Authoritarian legality and informal practices: Judges, lawyers and the state in Russia and China

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ABSTRACT
To participate in the global economy authoritarian states are pressed to offer international business a legal order that protects the interests of investors, customers, and sellers, but the creation of a modern legal order threatens to undermine the leaders’ control of public life. An increasingly common way to resolve this dilemma, I argue, is developing formal legal institutions that appear to meet world standards, while using informal practices to maintain control over the administration of justice when needed. In this paper I show how the governments of post-Soviet Russia (with its hybrid or competitive authoritarian regime) and the fully authoritarian People’s Republic of China as well, have used this approach in their relations with judges and defense lawyers in their respective countries. The analysis underscores the utility of investigating informal practices along with the reform of formal legal institutions, especially in the context of transition.

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For centuries the leaders of authoritarian regimes have faced a dilemma in dealing with judges and lawyers alike. Authoritarianism implies the concentration of power and the capacity of leaders to achieve their goals without opposition, but the effective and legitimate operation of courts in the criminal realm and beyond requires the appearance, if not also reality, of independent courts, where accused persons and respondents to claims are treated fairly. Even if those courts are not given the right to deal with the most important matters, what autonomy they possess entails yielding power on the part of the leaders, and for authoritarian leaders, this is not always easy to do. As I have explained elsewhere, their responses include courts where judges and the lawyers who appear before them, are openly dependent on political authorities and, alternatively, courts with considerable autonomy but little power, placing important matters in other sorts of tribunals that the regime can control. Authoritarian leaders may grant autonomy and power to courts and lawyers, either on a contingent basis, open to curtailment should either misbehave, or compromised in practice by the actual behaviour of leaders and subordinate officials (Solomon, 2007).

This last variant, that is the creation of legal or institutional autonomy accompanied by informal and opaque checks on what it means in practice, may well prove increasingly common as the 21st century progresses. The post Cold War era has given democratic forms of legitimacy increased prominence, while at the same time networks of public officials outside of leadership circles convey new, even liberal values into authoritarian states (Slaughter, 2004). Moreover, in the context of a global economy, where international business players, including the World Bank, hold expectations about the nature and quality of the administration of justice, themselves embodied in international norms and treaties, many authoritarian leaders face pressure to meet these expectations. In fact, comparative analysis reveals that the closer the linkages, economic and otherwise, between authoritarian states and the Western democratic world, the greater the costs of autocracy (Levitsky and Way, 2006). I would extrapolate further.

Unless a country has an economy that is self-contained and minimally connected to the world economy sooner or later its leaders will need to confront expectations about legal institutions. Yet filling these expectations may involve sacrifices in the
realm of political power that the leaders and their subordinates are unwilling to make. Meeting international standards and the expectations of onlookers from abroad through changes in formal institutions, while condoning and even participating in diluting their effect and maintaining control through informal practices, may prove a satisfactory response to the problem for the leaders of many countries.

I argue here that this is precisely what has happened in the Russian Federation during the post-Soviet era, and that there are indications that similar developments have begun as well in the People’s Republic of China.1 These countries represent different places on the spectrum of authoritarian regimes. China continues to have a system of partocratic rule, with little or no political competition and an invasive state whose power is checked mainly by the size of the country and difficulty managing subordinate officials. The post-Soviet Russian Federation lives with a hybrid regime that pretends to democracy, but has limited political competition and managed civil society to the point where it is really authoritarian (Kryshтановskaya and White, 2009). Yet in recent years both countries have developed forms of capitalism and private business, and both are sufficiently connected to the world economy to value outside approval of their laws and legal institutions. In short, in both Russia and China the appearance of a modern legal order is important for economic policy reasons, as well as to add to the legitimacy of the regimes.2

In examining legal institutions in Russia and China, I focus on judges and advocates, lawyers serving as defense counsel in criminal cases. While judges need considerable autonomy from political leaders, they remain employees of the state, and in democracies as well as authoritarian states, are subject to a variety of constraints, including in civil law countries the influence of judicial bureaucracies. Lawyers are often understood to be social actors, collectively a part of civil society, yet they perform functions that are public in nature and in the modern world require some form of state regulation. As we shall see, the Anglo-American image of lawyers as an autonomous “free” profession is an outlier even in the democratic world. The dominant pattern has been the German one of lawyers as a state-centered and well regulated group, whose members serve the courts as well as their clients. Modern authoritarian states also tend to follow a German model, especially the more extreme version of state control that obtained in Prussia before 1878.

This article begins with a brief examination of the civil law and European patterns in the relationships between judges and the state, and lawyers and the state, which constitute the relevant baseline against which to assess recent Russian and Chinese experience. It goes on to analyze the actual situation of judges and lawyers in the Russian Federation; and to provide a similar portrait of how state officials manage judges and lawyers in China. I try especially to bring out contrasts between reforms in law and formal institutions and informal practices that limit their influence, and raise questions about the sources of these practices. I also look for parallels in the situations of judges and lawyers, and consider the extent to which their relationships with the state reinforce one another.

Civil law baselines

The relationships between judges and the state and between lawyers and the state in the European civil law tradition differ significantly from what is found in the common law world. But it is these relationships that constitute the most appropriate baselines against which to examine the Russian and Chinese cases.

In Europe, and in states throughout the world that have drawn from the European tradition (including most of South America and Japan), judges pursue a career in the judiciary, and are organized in a bureaucratic hierarchy that in turn plays a major role in recruitment, assessment, discipline, and promotion. Countries vary in the extent to which the judiciary is allowed to manage its affairs without intervention or monitoring by politicians. Thus, the judicial councils that handle many key functions may be dominated by judges or by individuals outside the judiciary. As a rule, while at least in democratic countries there is respect for the judiciary as a whole, and judges have the protections of security of tenure and reasonable salaries and pensions, individual judges, especially at the lower levels, are severely constrained in their scope of action. On the one hand, the tradition discourages spontaneous and divergent interpretation of laws by judges. On the other hand, in using their discretion, judges are expected to be guided by the authoritative interpretative positions, expressed or confirmed by higher courts. In short, in contrast to the common law world, where individual judges have the right to interpret laws and to use judicial precedent to develop new lines of thinking about law, judges in civil law countries are encouraged to be circumspect and deferential. This tendency is justified with reference to the values of equity and certainty, which civil law scholars tend to privilege over creativity (Merryman, 1985; Guarnieri, 2002; Bell, 2006).

How great the pressure to conform for individual judges at lower courts varies with the particular country and political system. Judges in Chile, Japan, and the USSR (across regime types and phases) have encountered serious constraints on their discretion, and routinely experienced punishment in the form of transfers to less desirable positions and even removal from the bench for serious or persistent non-conformist behaviour. The articulation by young judges of political positions and their

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1 Sida Liu describes this phenomenon as the adaptation of global institutions through a process of “localization”. In the story he tells informal practices take Chinese judges far from the formal demands of their institutions, so that their day to day work “is only loosely coupled with their formal roles” (Liu, 2006).

2 On the reasons why authoritarian leaders may empower courts see Moustafa (2007), especially chapter 2. This is not to say that economic development and the attraction of investment represent the only reasons for the pursuit of legal and judicial reform in a given country, but they often help to convince authoritarian leaders of its wisdom.
The relationship of lawyers to the state also had a distinctive flavour in continental Europe. Especially in Germany, which became the model for countries further east, “legal professions were defined or defined themselves... in relation to the state” (Halliday and Karpik, 1997, at 5; Rueschemeyer, 1989). In most German states, like autocratic Prussia, the legal profession was created and controlled by the state, and initially lawyers constituted civil servants. This was only natural, since the bureaucratic state existed before the market for lawyers and there was no tradition of guilds (Rueschemeyer, 1997, 1973). Moreover, state officials saw lawyers as potential threats to the autocracy and its interests. On the one hand, they could and often did serve as a collective force on behalf of liberalization; on the other hand, for law enforcement individual lawyers represented a source of trouble (Halliday and Karpik, 1997; Feeley et al., 2008). As one contemporary writer put it, “an active defense is and should normally be interfering with the activities of police and prosecutor”, and this is how defense counsel were often perceived at least when they were still a novelty (Ramberg, 2007, at 89). In Prussia, lawyers were not only creatures of the state, they were in the context of criminal trials also officers of the court, who were meant to avoid total identification with the interests of their client accused. While this view of the lawyer made sense in the context of a neo-inquisitorial criminal procedure, it could and did lead to restrictions on what counsel could do ethically and legally (including a ban on political activity).

In 1878 Germany experienced a major reform of the legal profession, celebrated as the “emancipation” of the Bar from the grip of the absolutist state. Through the reform most lawyers involved in criminal defense work became private business people and the restrictions on their number and class origins were removed. Their fees were now set by statute (as opposed to orders of the Ministry of Justice), Bar associations and chambers were allowed a degree of self-government, and the application of discipline was placed in the hands of “honour courts” consisting of four judges and three lawyers from their own ranks. The attachment of lawyers to local courts and chambers of lawyers and the accompanying restrictions on the geographic scope of practice in some areas of law have lasted from 1878 to the present (Rueschemeyer, 1997; Siegrist, 1990; Ledford, 1997; Gromek-Broc, 2002). Analogous decentralization of key affiliations was found also in France and Italy, but lawyers in those countries achieved higher prestige than they did in Germany.

At the same time, the view of the defense counsel as an officer of the court, who owed allegiance to the larger goals of the administration of justice as well as the needs of his/her client, continued unabated in 20th century Germany. Students of the “emancipation” and later history of the German Bar have wondered at the continuing ambivalence toward lawyers and the influence of old attitudes and approaches. What constituted “old” attitudes and approaches in Germany, however, stayed alive and well in Russia and China, to varying degrees.

Judges in Russia: formal protections and informal realities

For most of Soviet history, judges were openly dependent upon both party leaders in their districts and judges and justice officials further up the hierarchy. Judges faced reappointment every five years, received modest salaries supplemented with discretionary benefits, and faced constant evaluation and monitoring. Moreover, they were obliged, at least as members of the Communist Party of the Soviet Union, to help their law enforcement colleagues confront crime.

Eighteen years of judicial reform in Russia starting in 1989 put in place the institutional bases of judicial independence familiar in the European civil law world. From 1993 security of tenure has been guaranteed by appointments for life until age of retirement after an initial appointment of three years, with firing only for cause and by decision of other judges on judicial qualification commissions established in 1989. In the Putin years judges received decent salaries, mainly in money rather than perks, and courts themselves received adequate support in most places. The judiciary gained control of the administration of the courts, and the jurisdiction of regular courts expanded to include such sensitive matters as judicial review of administrative acts. At the same time, judges remain part of a judicial bureaucracy, facing regular evaluations and discouragement of any deviation from collective norms, but as we have seen limits on personal discretion were normal in European justice (Solomon and Foglesong, 2000; Solomon, 2008).

These changes in law and institutions reflected the efforts of reformers seeking to normalize Russian justice and the recognition by political leaders of the value of well-functioning courts. While members of the Yeltsin administration may have seen autonomous courts as part of democratization, for the Putin leadership a central motivation was making Russia attractive for investment from business at home and abroad (although all courts, not just the commercial courts, were beneficiaries) (Solomon, 2002) At the start of his rule, Putin assigned the Ministry of Economic Development and Trade with providing fresh ideas about judicial reform and then assessing the impact of special investments in the courts. At the same time, the Russian government cooperated closely with the World Bank in the introduction of particular reforms, including the modernization of the arbitrazh courts and the publication of the decisions of most judges.

However impressive the changes in law or institutions may have been, the reality is that throughout the post-Soviet era the actual implementation of the laws relating to the courts, and their crystallization in informal practices, assured that authorities or powerful persons could influence the work of courts and that individual judges were not free agents subordinated only to the law and its interpretation by higher courts, but faced strong incentives to respond to external pressures of various kinds.
The informal practices that undermine the protections provided to judges in law stem from the excessive power of the chairmen (chairs) of courts and a set of expectations about judicial behavior of long standing. Chairs still control some discretionary perks (vacation packages, help in obtaining apartments or getting children into schools or nurseries); chairs handle the evaluations of judges and interpret data in letters of reference for potential advancement; chairs decide when judges should be disciplined and whether to do this informally or proceed with formal proceedings at the Judicial Qualification Commissions, including about possible firing for cause. Moreover, for the most part gaining the support of chairs requires meeting expectations that qualify a judge as a good team player. These expectations include: handling one’s case load efficiently and with dispatch; avoiding controversial decisions that might be challenged on appeal or displease powerful figures outside the courts; satisfying the law enforcement personnel, especially the procuracy, by avoiding acquittals and helping procurators themselves avoid embarrassment through informal pretrial meetings to check the quality of case preparation; and responding to the occasional request from the chair about the handling of a sensitive case that the Chair has assigned to the judge in question (Solomon, 2007a).

In law, rank and file judges have the Judicial Qualification Commissions to protect them from the wrath of their Chairs, since only the JQCs can impose formal disciplinary measures including firing. But in reality, the voices of chairs (who are not allowed to be members of the commissions) carry major weight when they choose to pursue a matter, and usually chairs of district courts discuss their initiatives in advance with the chair of the regional court, whose authority informally extends to the commission, which is headed by one of his judges. A contributing problem is that the list of grounds for the firing of judges includes vague and trivial ones, and chairs of courts have little difficulty finding pretexts that they can use against judges who displease them (Solomon, 2007b).

The chair of the court in Russia is and remains a “boss”, a super authority who manages his domain and represents the court in the outside world, including in informal dealings with local authorities, whose support still matters for the well-being of the court. Reformers in Russia have questioned the Chair’s role, and succeeded in 2002 in eliminating the permanent or lifetime tenure of chairs, replacing it with two six year terms. This fell far short of the proposal that chairs serve for three year terms on a rotational basis, elected by their fellow judges on the court. In fact, the selection of chairs lies de facto in the hands of the President and his staff, with some voice given to regional leaders. To be sure, the formal selection process features many stages, starting with a review of credentials by a Judicial Qualification Commission; communication of the views of regional authorities by the presidential representative in the federal district; vetting by the relevant high court (Supreme or High Arbitrazh), and review in the presidential administration that includes a security check (Trochev, 2006). Such a procedure is used for not only chairs but the appointment of all judges, and especially on higher and arbitrazh ones, and one that often takes a year to accomplish.

So, how well does the system of organizing judicial careers suit rulers in Russia? Formally, there is a system of independent courts, with judges subject to the normal constraints of judicial bureaucracy, but protected from outside pressures. De facto, those judges may act on their own in the bulk of cases, while avoiding actions that are unusual. But what about the occasional case that matters to a powerful person? The normal pattern for a government official or business person is to approach the Chair with a request, and for the Chair in turn to assign the case to a cooperative judge (a few judges are known as pocket judges), or at least to give the word to the judge who happens to hear the case. In response to foreign funded reform projects some courts have introduced random case assignment.

The introduction of trial by jury in 2002 throughout most of the RF as an option for serious criminal cases heard in regional courts undercut the traditional deference of judges to the needs of the prosecution, when juries started acquitting at a 15% rate instead of the usual fraction of one percent. Even with one third of those acquittals overturned by the Supreme Court and sent for new trials, the majority of jury acquittals lasted. The problem was that the use of jury trials meant shifting power from judges inclined to convict to juries prepared to act against the interests of the regime, presenting a problem for authoritarian leaders. What followed in Russia were attempts to manipulate juries behind the scenes, or to find informal means of influencing their activities; and finally in December 2008 a political decision to narrow the jurisdiction for trial by jury, similar to what happened in Tsarist Russia (Thaman, 2008; Solomon, 2007b; Kovalev, 2007).

A consequence of the need for judges to observe informal norms and on occasion take guidance from their chairs was the readiness of some judges to bend the rules for their own benefit. While corruption in Russian courts is not as common as the public thinks, some judges do accept and even require payments, especially in commercial cases, for example to get cases heard more quickly (Eniutina, 2001).

Informal practices (norms, institutions) play a prominent part in law enforcement and courts everywhere, including in democratic countries. What was different about post-Soviet Russia is the extent to which informal practices contradicted and undermined formal rules and institutions. This gap may even have increased with the greater authoritarianism of the Putin years. Public opinion surveys suggest that much of the public in Russia believes this (Rimskii, 2008).

Lawyers in Russia: pressures to conform

Lawyers in late and post-Soviet Russia faced many of the challenges embraced by their counterparts in Germany (Prussia) in the 1870s. For decades (since the late 1930s) they had worked in a state centered world, in which authorities determined and supervised, if not also managed, the conditions of their work; and their role in the criminal process was restricted. Emancipation from external control and the acquisition of new rights and powers were goals embraced by most advocates, and the flux of the Gorbachev and Yeltsin periods provided opportunities for gains on both counts. At the same time,
unregulated expansion of their numbers and spontaneous emergence of new forms of practice and management produced dysfunctions as well as a power vacuum, and state authorities under Putin seized the initiative to establish new guidelines. While a compromise with aspirations for full professional autonomy, the 2002 reorganization of the Bar and increased powers of advocates went further than traditionalists had endorsed, and laid the grounds for future conflicts.

The Bolsheviks, including Lenin himself, were ambivalent about lawyers, for whom they did not see a major role in the Soviet future. For the first two decades of Soviet power, the education of lawyers dwindled, and the management of the Bar had low priority. The decision in the mid-1930s to revive traditional legal order and with it the education of jurists changed that situation, and within a few years an approach to managing lawyers was put into place (Huskey, 1986b; Pomeranz, 1999).

The Ministry of Justice became responsible for managing the legal profession, but much of its administration was delegated to regionally based Colleges of Advocates (or Bars). Laws or ministry regulations dictated educational requirements, forms of practice, fee scales (including obligations to serve the indigent), and ethical standards, but the actual decisions on the size of the colleges and admission to them, as well as the disciplining of wayward members were made by the Colleges themselves, especially their praesidia. The praesidium of a regional college of advocates was elected in secret ballot by the membership, so that sometimes candidates backed by the regional communist party leaders were unsuccessful, but the choice of executives for the colleges was made more reliably by the praesidium itself. While the Colleges and their leaders handled day to day management of advocates, they faced supervision and in the crunch control by the Ministry of Justice (through small groups of officials in Moscow and one representative on each regional government) and by a corresponding party staffer at the regional party committees. The regional colleges of advocates had more autonomy than almost any other quasi public institution in the USSR, but they remained part of a state centered approach to managing advocates (Huskey, 1982; Kruglov, 1968; Anashkin, 1971).

In like manner, the role of advocates in the criminal process was limited. In most criminal cases, they had little or no access to case or client during the preliminary investigation, and as the judge led trial their main task was to make the case for leniency. Advocates were not allowed to conduct a parallel investigation, and their proposals for formal interrogation of witness had to be approved by the investigator or judge. To be sure, within the inquisitorial and neo-inquisitorial traditions, the investigator (or examining magistrate) was supposed to search for the objective truth, and the defense counsel was often viewed as extraneous. In the USSR, procurators and judges expected that the defense would serve state interests and avoid strenuous defense of their clients. Like the Prussian lawyers who had served as “officers of the state”, Soviet lawyers were supposed to defer to state interests. Failure could lead to disciplinary proceedings, initiated by a complaint by either a procurator or judge. Procurators in the courtroom were responsible not only for prosecution but also for supervising the legality of the proceedings, a role that gave them a right to complain about lawyers who got out of line. Judges could use the instrument of a “supplementary ruling” (chastnoe opredelenie) to register an official complaint against lawyers who showed excessive zeal or whose tactics they disliked (Huskey, 1986a, 1982; Solomon, 2005).

Under Gorbachev and Yeltsin the role of and demand for legal services changed dramatically, as the privatization of the economy, first surreptitious, then spontaneous, and finally authorized, led to a rapid and weakly regulated growth in the number of lawyers. While advocates fought to establish for the first time in Russian history a national organization, the key development was the emergence of and grudging acceptance by authorities of parallel colleges of advocates, or bar associations, at the regional and even national levels. The most successful of the “parallels” was the Guild of Russian Advocates, the creation of Gasan Mirzoev,3 whose members dealt with wealthy business clients rather than indigent offenders and who included many former law enforcement officers attracted by the new opportunities. For its part the Ministry of Justice struggled to maintain a semblance of order, insisting on the right to license new lawyers and trying to force members of parallels to help with legal aid. With time, some of the advocates cooperated with the Ministry officials, whose help and protection they needed in fending off tax officials preying on legal practices and in keeping some control over the number and quality of new lawyers. The irony was that while lawyers sought help from the Ministry, its approach to them became “more invasive, patronizing and unilateral” as time went on (Jordan, 2005 chpt.3; Huskey, 1990). The decade of the 1990s also witnessed a series of attempts to draft a new law on the defense Bar (advokatura) that might bring order to the world of lawyers and establish ground rules for their organization and conduct. The divisions and competing interests among the advocates themselves, let alone government officials, produced a stalemate, which was broken only by decisive action on the part of the Putin administration. The result was the 2002 Law on the Advokatura, an effective compromise among the competing positions. At the same time the 1990s witnessed a long and similarly dysfunctional debate over a new Criminal Procedure Code. A key issue was how much adversarialism to introduce (and whether to even abandon neo-inquisitorialism), so that the resolution would affect the role and rights of the advocate in the criminal process (Jordan, 2005 chpt.3; Huskey, 2005).

The reorganized Bar in Russia downgraded the colleges, core and parallel alike, to mere forms of practice and placed the responsibility for corporate management in the hands of a national and regional “chambers” (palaty) of advocates, reviving a Tsarist institution. The Ministry of Justice handles the registration of jurists as advocates when they have satisfied the formal requirements (the chambers do the examinations), but the chambers manage training of advocates after registration, the
disciplining of advocates, and the crucial and controversial matter of legal aid coordinating assignments to state appointed criminal cases and provision of free legal assistance for some civil matters. The “bar” (or the system of chambers) is defined in law as “an independent, non-governmental organization anchored in civil society rather than the state”, and lawyers have the freedom to practice in a variety of institutional settings, as well as to form associations. The state retains supervisory power, but reduced from the Soviet era, and ministry officials can help lawyers in discretionary ways, for example in obtaining inexpensive office space. The membership of each chamber elects a council (sowet) of 15 that in turn elects a chair for a four year term. Disciplinary matters are handled in the first instance by a Qualification Commission that, like the Judicial Qualification Commissions that handle discipline for judges, contains outside members. The thirteen members of a regional QC include 7 advocates (a majority), 2 Ministry of Justice officials, 2 judges, and 2 representatives of the regional legislature (sometimes law professors). Seekers of full professional autonomy for advocates have objected to the presence of outsiders, but they may give the commissions add legitimacy and help them to make brave and controversial decisions. Decisions of the commissions are subject to review by the Council of the Chamber, and after that appeal to a court (Jordan, 2005; Huskey, 2005).

The formal acquisition by advocates in Russia of increased autonomy within the framework of a state sanctioned profession was matched by improvements in their rights as counsel. The 2001 Code of Criminal Procedure eliminated the neo-inquisitorial trial in favour of an adversarial one, so that all evidence had to be established orally at trial and the case dossier no longer admitted as evidence. All evidence was to be established through interrogation of witnesses by counsel, rather than a judge led exercise. The preliminary investigation was retained, but made adversarial. In addition to access to the client from shortly after arrest and the right to attend all interrogations established in 1990, the advocate gained the further right to conduct parallel investigations, as well as some access to the file during the preliminary investigation. However, investigators were no longer obliged to collect exculpatory evidence. Furthermore, the introduction of trial by jury gave some leading advocates new opportunities to develop and use their rhetorical skills and achieve better results (Solomon, 2005).

In short, the combination of reforms to the organization of the Bar and the rules of criminal procedure improved the formal situation of advocates, giving them more collective autonomy than they had had before the chaos of the 1990s and increased individual powers and responsibility. The question remains, to what extent did their situation improve in practice?

Some advocates in Russia today complain about the problems of legal aid, including the obligation to take cases for which adequate compensation is not provided (Advokat, 2006). Others continue to fight old battles over the organization and governance of legal practice. But the more serious problems related to the role and power of defense attorneys in criminal cases.

To begin, most lawyers in Russia would acknowledge the continuation of an accusatory bias in the criminal process and their concrete difficulties in conducting criminal defense. They might refer to the lower pay set out for work in the pretrial phase, to the fact that they still needed permission of either the investigator or the judge to introduce evidence that they had collected in a now legal parallel investigation. Or to the fact that many judges and procurators continued to expect them to “cooperate” with the needs of law enforcement in the trial setting. Some judges as well still expect defense counsel to be deferential. In short, the implications of the new adversarial procedure were not fully absorbed by many of the players, to the disadvantage of the defense and his client.

Things could get worse. In some parts of the country there were signs of continuing, and even increased hostility toward advocates on the part of police, procurators and judges alike. Incidents of harassment and attacks by police were on the rise and in like manner denunciations of advocates by judges, for example through supplementary judgments leading to disciplinary hearings. There were even instances of fabricated prosecutions against advocates, especially when they complained about mistreatment by other players. Press reports on such matters have been commonplace since the mid 1990s, but a 2005 meeting of the Council of the Guild of Russian Lawyers heard reports from two different lawyers on these matters, one referring to a “massive attack on advocates” (Jordan, 2005 at 131–135; 163–177; Stetskorskii, 2007 at 331–343, 358–366).

At least in major centres like Moscow and St. Petersburg the Qualification Commissions of the Chambers of Advocates acted impartially and resolutely and regularly defended their members from acts of revenge attempted by procurators and judges. In one vivid example from 2005 the Commission of the Moscow Bar Association (Chamber) cleared all charges against a lawyer who had angered a judge by trying to have her disqualified from a case for conflict of interest and had pursued this and other motions in a strong but correct way. As it happened the attorney had made a tape recording of the hearing, which supported her contentions about the unreasonableness of the judge and the legality of his actions. The opinion produced by the Commission was detailed and better reasoned than the sentences from most courts in Russia. The chairman of the Commission was the noted lawyer Genri Reznik, president of the Moscow Chamber, and among its members were Sergei Pashin, the famous judicial reformer and former judge of the Moscow city court, in this instance as a representative of the Moscow City Duma (Moscow Advocates’ Chamber, 2006; Moscow Bar Association, 2005).

Perhaps, the greatest pressure on the Moscow and Petersburg commissions in recent years came from the attempt by authorities to wreak vengeance on the lawyers who had defended the tycoon Mikhail Khodorkovsky in his first criminal trial. Through a series of separate complaints from the Federal Registration Service that licensed lawyers and the Procuracy, disciplinary proceedings were initiated between 2003 and 2005 against ten different lawyers, in most instances with calls for their disbarment. After careful reviews of the complaints, the appropriate Qualification Commissions turned down all of these applications (Tsentr sodeistviia mehdunarodnoi zashchite, 2006; Khodorkovsky website 2006). In this instance, formal
institutions (the qualification commissions of the regional Bars) exercised their prerogatives, and the persons acting on behalf of the President chose not to use other means to trump them.\textsuperscript{4}

The Moscow and Petersburg city chambers of advocates included many leading advocates, who were accustomed to the hard task of asserting and defending the autonomy of the profession, not to speak of having distinguished outsiders like Sergei Pashin. I do not know whether Bar associations in far flung regions do as well in defending their lawyers from reprisals and attacks coming from the police, procuracy and judges. Overall, the qualifications commissions for lawyers were active, hearing in 2006 some 4000 disciplinary cases based on 900 complaints. As a result more than 100 jurists lost their status as advocates and others receive warnings (St. Petersburg Advocates’ Chambers, 2006).\textsuperscript{5}

The failure of the Moscow and Petersburg commissions to discipline lawyers in the Khodorkovsky trial prompted President Putin in one of his last initiatives as President to propose a new procedure whereby the officials who register lawyers could seek their disbarment in a court without the approval of the appropriate advocates’ commission. However, after considerable protest the draft law incorporating this change did not receive approval in the State Duma. By early 2009 there were other new initiatives to inhibit lawyers, including a proposal of video recording meetings between defense and their clients in pretrial detention (Snezhkina, 2008; Nikitinskii, 2008; Katanian, 2009).

In short, the situation of advocates in Russia continues to have the potential for considerable stress, especially if they seek to defend their clients vigorously and act in a fully adversarial fashion. The new Criminal Procedure Code may call for such action, but law enforcement officials and judges alike do not welcome such conduct, which conflicts with their traditional view of the role of defense as well as their current interests. The relatively autonomous position of regional Bar associations, in particular relating to the discipline of lawyers, has led to the protection of some of them from one means of reprisal, but this may not be happening everywhere and other forms of reprisal may be harder to fend off, such as harassment by police and manufactured or ordered prosecutions.\textsuperscript{6} At the same time, the more authoritarian the political atmosphere (and the weaker the accountability of law enforcement personnel), the more likely reprisals become. In this way, advocates, like judges, while formally more autonomous than in Soviet times, face informal inducements to conform with expectations from the outside.

**Judges and lawyers in China: team players and outsiders**

China combines elements of a dynamic capitalist economy with an authoritarian and unreformed partocratic state. While its courts and judges remain even in formal terms far from independent and fully “embedded” in the political order (unlike Russia China has not adopted the formal bases of judicial independence), China’s growing involvement in the world economy (including entrance into the WTO in 2001) has encouraged both adjustments in particular areas of law (such as intellectual property, trade and customs) and, more relevant here, elements of legal and judicial reform, aimed in the words of one observer at making courts “display a rational and professional outlook in the Western sense” (Liu, 2006).\textsuperscript{7} Yet the persistence and further flowering of informal practices ensures that judges pay heed to the interests of political authorities and conform to the norms of their peers. The situation of defense counsel is no better, as, the law, notwithstanding, they are expected to give precedence to cooperation with law enforcement over conducting a meaningful defense.

To begin, the lines of dependency for judges are clear. The local communist party officials: “appoint, review, promote and discipline judges, especially those in management positions.” The procuracy supervises the work of the judiciary and the courts depend financially on local government. Political intervention is common in economic and political cases of any seriousness, and such influence is often decisive, but in most cases judges are allowed to decide for themselves (Peerenboom, 2002 at 280–343; Fu, 2003).

At the same time, it is hard for individual judges to go wrong. For one thing, all but the simplest cases in the criminal realm are handled by panels of three judges or two judges and a lay person. For another, in serious cases the panels themselves are expected to consult the managing judges of their court, either directly or through their court’s adjudicatory committee comprised of its top judges. It is also commonplace in hard cases or in the face of excessive local pressure for judges to seek the advice of their counterparts on higher courts, to ensure that trial level decisions do not get overturned. Not only are changes on appeal held against trial court judges in their evaluations, they may actually lead to decreases in their salaries! The dynamics of collective decision-making led one observer to conclude that in Chinese courts “legal procedure is only loosely coupled with the actual decision-making” (Liu, 2006; Peerenboom, 2002).

\textsuperscript{4} Harassment of one of the Khodorkovsky lawyers, Karina Moskalenko, has continued beyond disbarment attempts, including an incident of poisoning, but Moskalenko’s controversial activity (from the viewpoint of Russian authorities) has continued and included work on the Politkovskaya trial, as well as bringing multiple cases to the European Court of Human Rights in Strasbourg, including two relating to Khodorkovsky.

\textsuperscript{5} At 100 the annual number of lawyers in the RF disbarred for misconduct approximated the number of judges removed for cause, which in 2005 stood at 93 (Vysshiaia kvalifikatsionnaia komissia, 2006).

\textsuperscript{6} In fall 2008 lawyers were taken off a list of persons against whom a prosecution required a court ruling on the grounds for its pursuit, removing any protection against revenge from investigators who objected to a serious defense. Moreover, Duma members seemed convinced that requiring approval of a senior investigator would prove sufficient protection for advocates. The latter disagreed (Khmairev, 2009).

\textsuperscript{7} For observations on change in various areas of substantive law relating to the economy and the “selective adaptation” to international legal norms, see Potter (2007) and Ya Qin (2007). Benjamin Liebman questions the extent to which economic development and international relations are responsible for the modest advances in administrative justice and other innovations in the resolution of civil disputes that he documents (Liebman 2007).
In the handling of normal cases, judges at some courts do try to come up with fair and legally justifiable results. And with an increase in the share of judges with legal training, and move away from the recruitment of former civil servants and retired officers for the recruitment of judges, this trend is likely to increase (Hawes, 2006). Still, the policies of political leaders can distort and overwhelm nascent efforts at reliance on legal procedure. One example is the anti crime campaigns starting of recent years (starting in 2001), known as “yanda” (strike hard). These campaigns target particular types of crime and criminals, for example, economic, but lead to the unmitigated severe responses to large categories of offenders and to overly swift and superficial handling of the charges. Despite warnings to judges that they should not always give the maximum sentences allowed by law, this continues to be the norm, as judges try to avoid getting chastised for lack of political vigilance. The Yanda campaigns represent propaganda even more than law enforcement, and are aimed at defining public morality and social norms. Some trials have been accompanied by “sentencing rallies” at the local stadium, where the judges pronounced sentencing on criminals before thousands of persons, who clapped enthusiastically at each announcement of a death sentence (Trevaskes, 2007).

Nor do recent additions to the administration of justice tend to encourage the entrenchment of responsible and independent adjudication. To correct some of the defects in the work of trial courts China has developed in addition to normal appeals to higher courts a procedure known as individual case supervision, which using a form of adjudicative supervision, allows procurators and higher judges themselves to initiate protests and reviews. These mechanisms are believed by some to serve as counterparts to corruption and local protectionism, which can be pronounced in civil or business cases, but supervisory reviews are also subject to abuse in both their initiation and implementation (Peerenboom, 2006).

Like judges, lawyers in China, especially those who work at criminal defense, still face strong incentives to cooperate with law enforcement officials, this in spite of major reforms in 1996 of both the role of defense in criminal cases and the system of regulating the legal profession. Again, institutional changes designed to help China come closer to world standards have been undermined thus far by informal practices, including resistance by law enforcement officials unchecked by politicians.

The development of a legal profession in China was delayed even more than that in Russia. In the nationalist period, under Kuomintang rule, there were very few lawyers, and in the early communist years also; in 1957, China had only 2500 full time lawyers, enrolled in 19 regional bar associations. Only in 1980 did the process of training lawyers begin in earnest, and their licensing, practice, and discipline came under the direct management by the Ministry of Justice. Until 1996 the formal role of lawyers in criminal cases was extremely limited. Defense counsel had no access at all to the pretrial phase, for any categories of offenders and police in contrast could hold accused persons in detention indefinitely. Lawyers became involved in cases only at the trial phase, and as a rule were assigned to cases no more than seven days before the trial. They had neither the right nor the resources to investigate themselves, and their role at trial was usually limited to making a plea in mitigation, that is requesting a lenient punishment. Trials themselves were not public, and there were limited opportunities for appeal. Moreover, the members of “iron triangle” of law enforcement: police, prosecutors, and judges, regarded defense lawyers as outside troublemakers rather than colleagues, and instead of cooperating, tended to marginalize them (Peerenboom, 2002, 343–393; Halliday and Liu, 1997).

In 1996 China adopted both a new Lawyers’ Law and major changes in the Criminal Procedure Code, which together promised improvements in the situation of defense counsel. On the one hand, the Lawyers’ Law redefined the lawyer’s obligations and the organization of legal practice, called for improved standards of conduct, initiated legal aid, and authorized the establishment and empowerment of a national association of lawyers with regional chapters. On the other hand, the revisions to the Code of Criminal Procedure gave lawyers important new rights, including access to their clients from the start of the preliminary investigation, the right to do parallel investigations, the possibility of bringing their own witnesses to inquiries and trials, and also the opportunity to play a more active part in trials that were supposed to become adversarial. In practice, however, improvements came slowly, if at all (Peerenboom, 2002; Halliday and Liu, 1997).

The projected Lawyers’ Association and its regional branches were established, but most of the branches were too weak to take over key functions in running the profession. Such key matters as the handing out of licenses to practice and their annual renewals, the establishment of fee schedules and legal aid rules, and the disciplining of advocates remained in the hands of the Ministry of Justice (Peerenboom, 2002 at353ff.).

Moreover, police and prosecutors did not welcome truly active defense counsel and in practice did all they could to thwart them. A 1997 police report from one province urged its officers who handled defense requests to meet with their clients “if possible, to avoid, avoid; if possible to delay, delay”. Ethan Michelson reports that as of 2004, lawyers continued to face resistance to the performance of their duties, including “three difficulties”—in collecting evidence, in meeting with clients, and in reading and photocopying documents. At the same time, lawyers had to deal with judges who discounted their arguments and police who tampered with evidence and intimidated witnesses (Halliday and Liu, 1997; Michelson, 2007). But this was not all.

Lawyers’ who insisted on defending clients conscientiously also faced the possibility of persecution by police, including beatings and illegal detentions, and even the opening of criminal cases against them. Sometimes, these cases involved the use of “Big Stick 306”, that is Article 306 of a 1997 law that made lawyers subject to prosecution if they helped the accused tamper with evidence or encouraged him or her to commit perjury. Lawyer’s who told clients to retract forced confessions or who came up with new exculpatory evidence were especially vulnerable. In short, lawyers who continued in the traditional passive mode and remained “outside annoyances” to police and prosecutors were tolerated, but lawyers who tried to defend their clients faced the real prospect of harassment or persecution (Michelson 2007; Halliday and Liu 1997).
In a number of instances, persecuted lawyers and their friends have rallied support using internet resources provided by the Association of Lawyers, this an encouraging sign of an emerging sense of professional identify and solidarity. But overall the situation of defense counsel remains difficult, and the promise of the reforms of 1997 unrealized. New rights and powers acquired by defense mean less in practice than the careful use of networks of acquaintance (guanzhi), which gives an advantage to counsel with prior experience in law enforcement (Michelson, 2007).

There is no sign that political authorities care about having a proper defense at trials. To the contrary, the mounting of campaigns against particular kinds of crime in the form of the already discussed Yanda suggest the opposite. Needless to say, when Yanda is underway, defense attorneys lose any chance to help their clients. The simplification and acceleration of the criminal process and insistence of exemplary convictions and punishments leave little or no room for mitigation of punishment, let alone contesting charges (Trevaskes, 2007).

Further changes in China’s law of criminal procedure may be in the offing, but it is not clear how changes in law alone can counteract the force of traditional attitudes toward defense counsel and the retaliation of police and prosecutors against them. To make advocates into accepted players in the criminal process might well call for changes in the operational rules and system of assessing the work of police, prosecution and judges, but there is no sign that these groups or their political masters want to change the way the administration of criminal justice actually works.

Comparisons and the force of informal practices

Everywhere, the operation of formal institutions involves informal practices, which may to varying degrees support or hinder it. This is especially the case with law enforcement and the administration of justice, whose informal side in Western countries has attracted scholarly attention (Eisenstein and Jacob, 1977; McBarnet, 2004, part two; Ericson, 1982). In some contexts, though, informal practices are more developed than others or may depart from formal rules to a greater extent than elsewhere. The analysis of Alena Ledeneva suggests that a legacy or tradition of well developed informal practices and/or the low regard paid to laws and formal institutions makes it easier for such contradictions to develop in the present. At the same time, though, it is the conditions of the new amalgam and the current interests of key players that matter most. Furthermore, Ledeneva’s empirical analysis reveals that the use and manipulation of law plays an increasingly important part in the informal workings of the state and economy in post-Soviet Russia, a development that threatens attempts to insulate judges and empower advocates (Ledeneva, 2006).

In the USSR and Communist China alike, informal practices always played a major role in public life (for example blat and guanzhi), and both the public and elites alike were accustomed to a wide gap between formal rules and the realities of life (Ledeneva, 2008). At the same time, though, in the administration of justice informal practices supported formal institutions to a considerable degree, because the latter were so openly designed to serve the interests of the state. Judges and lawyers were meant in their own ways to serve state interests, and the formal design of their roles, careers, and incentives provided the structures to which informal practices contributed. To be sure, constitutions spoke of the independence of judiciary and the right to a defense at trial, but constitutions were not understood by most observers to represent either fundamental law or an accurate portrayal of real socialist institutions.

In post-Soviet Russia and in China’s communist led market state, formal institutions in the legal realm have started to change, Russia’s more than China’s, in the direction of supplying the legal framework for an independent judiciary and sufficiently autonomous and empowered corps of defense counsel to operate in an adversarial trial. In this new context, the informal practices of the past, designed to ensure that judges served the interests of the powerful and of their peers and that lawyers did not interfere with the work of police and prosecution, assumed new significance and meaning. To be sure, their continuation and even intensification reflected the immediate interests of actors close to the action, such as the leaders of the judiciary, police chiefs, procurators, and local politicians. At the same time, the toleration by the two country’s leaders of both opposition to reform and widespread manifestations of creative compliance with legal changes that undermined their purposes suggests at least passive complicity in the results.

To a considerable degree, the opposition to judicial reform and a more balanced and adversarial criminal process in Russia and China comes from the worlds of law enforcement and the judiciary themselves, that is from officials involved in the implementation of new policies, and reflects the normal resistance of public officials to innovations that involve new ways of thinking, not to speak of new understandings of their roles. But, as we have seen, the activity of officials was reinforced by the actions of government leaders.

In both Russia and China there were signs that the top leaders were ready to manipulate legal rules in pursuit of their interests notwithstanding any deleterious effects on legal reforms, which in turn encouraged politicians and officials below to do the same. Thus, the leaders of Russia directly or indirectly placed power above law in the pursuit of tycoon Mikhail Khodorkovsky, first in the actual prosecution and then in the initiation of disciplinary procedures against defense counsel who did their duty for the (in)famous defendants. For their part, Chinese leaders pursued Yanda type crime campaigns that made a mockery of the new rules of criminal procedure, in particular of the newly legislated protections for the accused. The Yukos oil company prosecutions and the Yanda campaigns alike demonstrated to observers that the commitment of the leaders of Russia and China to legal and judicial reform was hedged. Improved law and courts were fine, as long as they were reliably served the instrumental needs of the leaders. Moreover, the leaders’ actions suggested that they continued to regard the courts and judicial process as part of the “coercive capacity of the state” ready for use in the fight against crime and political enemies, notwithstanding proclamations about impartial adjudication (Levitsky and Way, 2006).
At the root of this conduct by the two countries’ leaders and of the informal practices that partially undermined judicial and legal reform lay the gap between the leaders’ desire to benefit from the appearance of a modern legal order and their urge to keep or develop control over public life. In both countries the appearance of legal order characterized by trustworthy laws and independent courts could aid the growth of regulated market economies. In Russia, there was the additional complication of a political system that was based in formal constitutional terms on democratic legitimacy, despite the fact that in reality it had for all intents and purposes returned to an authoritarian mould. As of 2009, the gap between formal institutions and informal practices in Russia’s law enforcement and justice system was greater than that in China, but mainly because Russia had taken legal and judicial reform further than China and had additional reasons for not reversing them.

It would be easy to exaggerate the manipulative intent of leaders and the extent of their hypocrisy. The available evidence suggests that Russia’s leaders do value courts that act impartially in situations where their own or state interests are not involved. Nor do the leaders in either country approve of policing and justice that is overly responsive to the desires of local power or the business world, that is to say alternative centres of power. (Recall that Stalin treated law as an instrument of centralization of power). But authoritarian leaders usually do value, and often insist upon having, a legal system that in the crunch serves their interests and to have this benefit inevitably requires compromises on other fronts.

We began with the proposition that authoritarian leaders seeking integration into the world economy often seek a legal order that, at least in outward appearance satisfies international standards, but whose informal practices might ensure continuing subservience of the interests of those leaders and their officials. The experiences of Russia and China in the 1990s and first decade of the new millennium illustrate this pattern, as do those of post-communist states that have avoided political change and the contagion of globalization, such as Belarus and some states of Central Asia. In Belarus the development of formally independent courts and an autonomous Bar has not progressed far, and as a result the gap between institutions and informal practices is small (Martinovich, 2002). In Georgia, a hybrid state lacking authority in part of its domain, the formal institutions of the justice system, including the defense Bar, are so weak that informal practices dominate the administration of justice (Waters, 2004). In this instance, informal practices supplanted rather than contradicted formal institutions. It would be useful to extend this argument beyond communist and post-communist states, and countries like Singapore may well fit the mould.

Finally, in Russia and China alike the fact that the reform of the defense Bar has moved in phase with judicial reform, but not ahead of it, suggests that these are not countries where the legal profession will soon become a force promoting liberalism in public life. To be sure, in the new market economies of these countries the bulk of lawyers are preoccupied with personal enrichment, a generalization that applies especially to younger lawyers, who do not share the commitment of some of their seniors to broader liberalization. But the more forceful reason lies in the reality of the new authoritarian environment, in which civil society initiatives are discouraged and societal organizations like the Bar increasingly supervised by the State. For lawyers to become a force for change will require change in the nature of the regime itself. In the case of Russia at least, lawyers are starting to occupy positions of power. The new President Dmitri Medvedev represents the first former practising lawyer to occupy the post and a leader who seems to care deeply about the administration of justice and has already supported a series of reform measures, including the expansion of legal aid (Solomon, 2009). Perhaps, in future generations lawyers will become more prominent in leadership circles and in turn bring a dose of liberalism to the policies of Russia’s authoritarian regime, if not also help it move it back onto a democratic track (Barenboim and Reznik, 2007).

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References