REMAKING THE ROLE OF LAW: COMMERCIAL LAW IN RUSSIA AND THE CIS

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INTRODUCTION

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The role of law in the republics of the former Soviet Union has undergone a remarkable set of changes over the past two decades. For much of the Soviet era, law was marginalized. Though it existed on a formal level in the form of legislation, administrative regulations, and institutions dedicated to implementation, citizens did not feel that law served their interests. Rather, the sense was that law was a tool available primarily to the elite, whether acting through the Communist Party or the state apparatus. This sentiment was echoed among economic actors. Indeed, the administrative-command system gave short shrift to law. Fulfilling the production targets set by the economic plan was the overarching goal. If doing so required managers to skirt the law or even to ignore it, such violations were typically overlooked. This instrumental view of law began to be questioned officially in the early years of the Gorbachev regime, when he put forward the idea of transitioning toward a “socialist law-based state” (sotsialisticheskoe pravo v soyuz st Post-Soviet Ukraine with Todd S. Foglesong (2001); and Soviet Criminal Justice under Stalin (1996). He is also the Editor of the Bulletin on Current Research in Soviet and East European Law and author of many articles on legal reform in Russia. He is also an active participant in judicial reform projects, including the Canada-Russia Judicial Partnership funded by CIDA.

Alexei Zhiltsov is Head of the Comparative and Private International Law Department at the Private Law Research Center under the President of the Russian Federation (Moscow) and Associate Partner at the law firm “Intra” in Moscow. Born in Washington, DC, in 1963, he received his diploma in law in 1989 and his PhD in 1998 from Moscow State Institute for International Relations (MGIMO). From 1990-1994, he worked as a researcher in the Law Department of the European University Institute in Florence, Italy. From 1992-1993, he worked as a researcher in the Arbitration Department of the TMC Asser Institute for Public and Private International Law, The Hague, the Netherlands. Since 1994, he has been with the Private Law Research Center as Head of Department. In the 90s, he participated as a member of the working groups in the drafting of Part III of the Russian Civil Code, Division VII “Private International Law” of the Model Civil Code of the Commonwealth of Independent States and Draft Law “On Jurisdiction Immunity of a Foreign State.” He is author and co-author of numerous publications in the area of private international law and international commercial arbitration.

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organized by the Russia, East European, and Eurasian Center at the University of Illinois at Urbana-Champaign in honor of Professor Peter B. Maggs. The conference allowed the contributors to reflect on the state of affairs almost twenty years after Gorbachev called for a reinvigoration of law and more than ten years after the breakup of the Soviet Union and the creation of the Commonwealth of Independent States (CIS). As close observers of the region know well, the transition process remains ongoing and, consequently, the assessments of the various aspects of the transition should be regarded as snapshots taken at a critical moment in time. The essays provide valuable insight for practitioners, explaining how key portions of many fundamental codes took shape, documenting how courts and other important legal institutions function, and analyzing the consequences (both intended and unintended) of critical reform efforts. For scholars, the essays function as a benchmark by sketching out the CIS's legal landscape in the early years of the twenty-first century.

The participants in this volume represent the finest scholars currently researching the changing role of law in the CIS. Included are scholars based in the CIS (Didenko, Dogvert, Kozyr, Makovskii, Zhiltsov), Europe (Oda), and North America (Butler, Huskey, Hendley, Krug, Reynolds, Shelley, Solomon). All of the authors have studied law in one or more of the CIS countries since the Soviet era. They bring their deep understanding of the role of law in the transitional post-Soviet market setting to bear on the issues at hand. The articles represent a wide variety of methodological approaches, ranging from doctrinal to sociological. This diversity in research has the welcome effect of providing readers with different vantage points on the state of commercial law reform in the CIS.

The volume is divided into four thematic sections. The first part delves into the political challenges of reforming commercial law. A series of high profile trials for which the Kremlin appeared to be manipulating the results has brought the independence of the courts into question. Along similar lines, the murky but unquestionably powerful role of organized crime has left many wondering about the relevance of law in Russia and other CIS countries. The mass media, both in the CIS and elsewhere, has fueled these flames by paying more attention to cases that are sensational rather than mundane. The essays by Solomon and Shelley help sort the wheat from the chaff. Solomon explores the Putin regime’s recent efforts to undermine the independence of the courts, which he characterizes as an attempt at “judicial counterreform.” In particular, he investigates the plan to reshape the selection process of judges and the Kremlin’s shifting attitude toward jury trials. He is ultimately unable to uncover the reasons why the effort to give the Kremlin more power over the judicial selection process stalled. Yet he argues that the failure of these efforts is not the whole story. In his view, the accompanying rhetoric has had the effect of teaching judges to second-guess and censor themselves to rule in ways that would not challenge the Kremlin. Such behavior harkens back to the self-protective behavior of judges in the Soviet era. Shelley tackles the thorny question of organized crime. She argues that the intimate connection between organized crime and state institutions render these institutions opaque and unaccountable to citizens. When firms prefer to turn to the “roofs” (kryshi) provided by organized crime for protection and assistance with problems rather than the police or courts, then there can be no question that the “law-based state” remains a distant goal.

The second section of the volume addresses the legislative base for commercial transactions in the CIS. Makovskii provides a comprehensive and authoritative overview of the evolution of the civil code. His emphasis on the civil code is warranted, given that it is seen as the constitutional foundation for any market economy. He clearly places Russia in the family of civil law countries, documenting efforts dating back to the tsarist era, to harmonize commercial legislation with that of its European neighbors. Though he acknowledges that the 1917 Revolution brought an end
to the market economy, he reminds the reader that the Bolsheviks restored trade after the Civil War and reintroduced a civil code. This code, passed in 1922, kept many of the central features of the tsarist code, though the drafters downplayed these Western elements and gave all credit to Lenin. Makovskii exposes the folly of such claims, arguing that the non-politicized nature of the 1922 Civil Code and its successors allowed for a relatively rapid pain-free legislative transition in the post-Soviet era. Dovgert’s essay is a valuable companion piece, in that it focuses on the Ukrainian Civil Code. His emphasis is on more recent history; he details the process by which the 2003 code was drafted and adopted. Like Makovskii, Dovgert argues that Ukraine has a firm civil law legal heritage and sees the code as being in line with those of its neighbors in the European Union.

The essays by Kozyr and Zhiltsov examine elements of the civil system, namely the law governing transactions in commercial real estate and private international law. Both are critical components in any modern market economy. Legalizing the buying and selling of land was one of the toughest ideological hurdles for CIS countries. Kozyr’s emphasis is on commercial real estate or, as it is known in Russia, “immovable property.” She explains how the underlying norms have evolved and documents the ways in which businessmen have taken advantage of loopholes, thereby generating new rounds of reforms. She views the latest institutional reform, which created a national property registration system, as a step in the right direction. It would seem to assist in protecting potential investors by allowing them to secure their rights, both as buyers and sellers. Zhiltsov masterfully analyzes the recent reforms to Russian legislation on private international law. He pays particular attention to conflict of law rules, which should be of interest to practitioners. He documents how the Russian norms have edged ever closer to international standards by ceding jurisdiction in transactions in which no forum is selected by the parties to the site with the “closest connections” to the transaction.

The third part of the volume takes the analysis further by assessing the impact of specific reforms likely to be of interest to practitioners. The bureaucratic roadblocks and delays associated with start-up businesses is one of the issues long identified as problematic in transition economies. Huskey reports on the situation in Russia. A 2001 law set up a single step process for registering small businesses. It forces officials to be accountable by making them liable for damages if they fail to follow through on the paperwork in a timely manner. Although the law has been in operation for only a few years, Huskey’s optimism about its likelihood for success provides hope for investors that the registration process is being regularized. Hendley looks into the impact of the introduction of preliminary hearings in the Russian arbitrazh courts. Disputants are encouraged (but not required) to lay out the relevant evidence at this early stage in order to prevent unpleasant surprises at trial. This innovation has proven extraordinarily helpful in complex cases, but has had the perverse effect of making simpler cases take much longer than before. Reynolds focuses on the Federal Antimonopoly Service (FAS) in Russia. She is uniquely positioned to report on the FAS, given that she has been a close observer of its operations since its inception in the 1990s. She provides a compelling set of reasons why the FAS has been largely ineffective in combating monopolistic behavior. Krug explores the post-Soviet phenomenon of “reputational harm,” a cause of action that allows firms to seek damages for harm to their business reputation. Though the civil code seems to provide a legislative foundation for such cases, Krug’s analysis of the key decisions shows that judges are not relying on the code. Instead, this concept has evolved through caselaw, which has left its parameters unclear and subject to judicial discretion. A theme common to all of these contributions is institutional reform. All of the institutions are in flux, thanks to efforts by policymakers to remedy shortcomings. Not surprisingly, some reforms pan out, while others are stillborn. What is striking
and somewhat surprising is the willingness to keep experimenting in an effort to find the best possible result.

The final section of the volume examines the impact of reform on foreign investment. Butler's analysis of the 1972 Moscow Convention demonstrates its continued relevance. Even though this convention was initially established to allow arbitration of disputes between firms in Soviet bloc countries, it remains in force and widely used by the five remaining signatories. Didenko focuses on the norms governing foreign investments in his native Kazakhstan. His doctrinal analysis shows the efforts of the government to attract investment by guaranteeing that new laws will not alter existing contracts to the detriment of the investor. Oda takes on one of the most vexing problems for foreign investors, namely the ability to enforce decisions made by foreign or international arbitrators in the Russian courts. After explaining why the relationship between these outside arbitrators and judges has been so tortured, he argues that it is likely to improve as the courts accumulate greater experience. The careful research into the governing law contained in these three articles provides valuable insights for those interested in investing in the CIS.

The contributors to this volume share a commitment to understanding the changing role of law in the countries of the CIS. The variation among the essays in terms of method and topic provides readers with a good sense of the intentions that underlie the reforms and how they play out in practice.

The volume is dedicated to Professor Peter Maggs and arises out of a conference in his honor. The contributors are united by their respect for the body of work Maggs has compiled over a lifetime of studying law in Russia and the other countries of the former Soviet Union. After graduating from Harvard College and Harvard Law School, Maggs went on to a distinguished career at the University of Illinois College of Law, where he currently holds the Clifford M. and Bette A. Carney Chair. During the Soviet era, his scholarship ranged over a wide variety of topics, though his core interest in commercial law remained. The collapse of the Soviet Union and the transition toward market democracy took his career in new directions. Over the past decade, he has served as a consultant to many governmental and multilateral organizations engaged in legal reform, providing valuable assistance in a series of legislative drafting projects across the CIS that were related to the development of commercial law. He continues to be active in scholarship and consulting and, in 2006, received the Distinguished Faculty Award for International Achievement, the highest award bestowed upon a University of Illinois faculty member for scholarship and service within the international community.