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How the Law Really Works: The New Sociology of Law in Russia

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Introductory remarks

The sociology of law in Russia gradually changes its self-identity. Being a synthetic discipline that studies the domain where law and society meet, it naturally depends upon the epistemological traditions of legal scholarship and sociology. Previously, the law and society tradition in Russia was an integral part of legal studies bearing the stamp of its predominantly theoretical approach. Now it acquires a new empirical dimension grounded in the sociological approach and research methods, thus becoming a sub-discipline of sociology rather than a domain of legal scholarship.

The sociologically oriented field of legal studies is composed of scholars who work in the framework of the theory of state and law, which is most commonly found in the Russian law departments and an equivalent of which could hardly be found in any Western university. The theory of state and law mostly develops philosophical foundations of law with reference to state legal institutions. To some extent textbook and other writings on this discipline reflect ideas of the first generation of law and society scholars, such as Emile Durkheim and Max Weber, as well as of the representatives of the sociological jurisprudence movement – Eugene Ehrlich, Oliver Holmes, Roscoe Pound and Leon Petrazycki. Nevertheless, the influence of Russian legal scholars on the understanding of how law operates in a real society is very limited because they mostly build theoretical concepts which are barely connected to law in action.

During Soviet times the theory of the state and the law was a highly ideologically loaded discipline and did not give much attention to facts which required sociological methods. Being restricted in the freedom to pose awkward questions, Soviet sociologists virtually did not develop the sociology of law. For this reason one of the leading Russian sociologists Vladimir Yadov refused to include a chapter on

sociology of law in the thorough volume on Russian sociology (Yadov 1998, p.17).

In contrast to legal researchers who treat law as a self-contained system with its internal logic and evolution, sociologists challenge this autonomy of law and study external social influences. Their research is focused upon the social development of legal institutions, legal behaviour, legal cultures, the legal profession, the application of law, law in action and the like. The sociology of law extends sociological concepts to legal sphere and employs social science methods. The empirical social studies of law do not speculate on the nature of law and its connection to society. Instead, scholars raise specific questions with regard to the structure of legal institutions, their functioning, the conflicts of different social groups with the law, the social determinants of judicial behaviour and so forth (Banakar 2009). Such questions make it possible to develop a number of empirical hypotheses which can be tested with the help of sociological models.

When one talks about formal and informal institutions, it is supposed that formal institutions embrace written rules, laws among others (North 1990), that are assumingly explicit authoritative and coercive exogenous constraints (Suchman/Edelman 1997). Law and society tradition try to overcome this simplified view and seek to describe how exactly legal system operates and show “law in action” (as opposed to “law in the books”). For even though laws are explicit (formal) rules, their application is never straightforward.

The sociology of law in its modern understanding is a new concept for the Russian sociology and is not widely recognized as a discipline with its own developed theoretical background and apparatus of empirical studies. Yet, there are achievements of Russian sociologists in the related fields of criminological studies or the sociology of deviant behaviour (Gilinskiy 2000).

One of the recent developments that gave rise to the new sociology of law in Russia was the creation in 2009 of the Institute for the Rule of Law (IRL) in the European University at Saint-Petersburg. The mission of the Institute is to facilitate judicial and law enforcement reforms and to

uphold the principle of the rule of law in Russia. This goal is pursued by means of academic research, policy-oriented research and the dissemination of its results across the wider community in order to initiate public debates.

The IRL mostly works within the research tradition known as Law and Society, which is wider than pure sociology of law and also takes advantage of related disciplines, such as economic sociology, new institutional economics, law and economics, political science and others. Being one of the most important applications of sociology in the West, the tradition of law and society was previously non-existent in Russia. By conducting and disseminating its research the IRL institutes this tradition in Russia and enriches it by new case studies and data. On the basis of the ongoing research the Institute publishes policy memos containing strategic recommendations on different aspects of judicial and police reforms as well as other regulation issues¹. IRL also communicates the results of its research on weekly basis in leading newspapers and professional web-portals. Every year it organizes an international conference on the interdisciplinary studies of law and law enforcement in Russia that features major scholars working in the law and society tradition, such as Kathryn Hendley, Peter Solomon, Hazel Genn, Daniela Piana, and others.

In this brief overview we refer to four most interesting areas of studies combining public relevance, availability of empirical data, and sociological relevance.

How courts make decisions: the study of extra-legal influences on Russian courts

The study of judicial biases has a long history in Anglo-American social science dating back to the 1860s. The scholars who practice the study of judicial biases seek to look beyond the pure legal explanations of judicial events and processes. Judging implies a fair and impartial application of a law to a case. However the desire to make a "fair" decision is often met with subconscious deviations. In western literature there are dozens of studies examining different biases in court, such as gender, racial etc. (Ewick/Silbey 1998; Rose/Diamond 2008; Schafran 1989), but until now Russia has been lacking academic studies in this field. We can only rely on expert evaluation and speculative claims that judges treat representatives of diverse social groups differently.

The IRL's study of court decisions aims at gaining the verifiable knowledge of major regularities implicit in the decision making process in arbitration and civic courts in Russia. It seeks to explain these regularities with a help of a range of factors that determine outcomes of judicial proceedings based on different types of courts, cases, behaviour and status of parties involved, decision-making bias for various categories of offences and so forth.

The study uses mixed methods. The quantitative statistical analysis of courts' decisions goes hand in hand with expert interviews where all the findings are checked and explained. The project is divided into two sub-projects. One studies the verdicts of courts of general jurisdiction and the other deals with decisions of Arbitrazh courts that solve commercial cases.

The quantitative analysis is based on a representative sample of 10000 verdicts on administrative and criminal cases available online and approximately the same amount of commercial cases. Each decision was manually coded in approximately 60 explanatory variables, which were selected to check our research hypotheses on court proceedings and their outcomes. Whereas collecting the sample of arbitration court decisions did not pose any difficulties and over the reporting time from 2006 to the first half of 2011 10500 cases were collected, collecting the corresponding sample of general jurisdiction courts decisions has met with many problems. Despite the fact that the publication of all court sentences is required by law, courts of general jurisdiction comply with it poorly (Pozdnyakov 2011).

Currently, the analysis of the pilot data set for 2009 on the Arbitrazh courts is completed. The particular attention of this research to arbitration court followed its major role in the creation of proper and effective institutional setting for business, especially the improvement of contract discipline. In order for contract enforcement mechanisms to work effectively, proper formal institutional setting should be installed. By standing behind contract agreements, the law makes it easier for contracting parties to choose between different ways of the protection of their agreements. In 1990s the important role of contract enforcement belonged to private coercion executed by criminal groups. These groups provided mechanisms of contract enforcement that could be counted as a substitute for the arbitration court (Volkov 2002) and allowed people to enter into contracts that would be otherwise too risky (Leitzel/Gaddy/Alexeev 1995). The situation had changed significantly in the 2000s, when violence gradually lost its role

as a contract enforcement mechanism and the arbitration court received the relevant priority over alternative private contract enforcement mechanisms (Hendley/ Murrell/ Ryterman 2001; Johnson/ McMillan/ Woodruff 2002).

The analysis of Arbitrazh court statistics shows that about 15% of Arbitrage Courts caseload is generated by state agencies bringing to the courts standard micro-cases requesting a court order to fine or charge some individuals at a level below the cost of filing such cases. Only minor changes in regulation would dismiss the very reason for those complaints, or allow the state authorities to drop the charges that are not worth arguing over, just as a private firm would do (Volkov et al. 2010). It will also allow the arbitration court addressing the cases of its primary responsibility.

The research also investigates the causes and consequences of plaintiff bias in the Arbitrazh courts that has been shown to be statistically significant (Titaev 2011). On average the plaintiffs won in 82 % of the cases, however the status of a plaintiff might increase or decrease its chances in case sentencing. This bias contradicts the tendency in American federal appellate courts where anti-plaintiff bias has been shown to exist (Clermont/Eisenberg 2000). The author considers some possible explanation of this plaintiff bias. Firstly, a deficiency of mediation procedures, followed by the lack of credible commitment, creates a necessity to bring even simple cases to jury, whereas in systems with higher level of reciprocal trust parties could rely on out-of-court dispute resolution. Secondly, judges might treat a plaintiff as an infringed subject whose rights were violated by the defendant. Thirdly, the plaintiff might have put more efforts in defending his or her interests. This explanation however does not find statistical support. Further work on the project includes continuing the analysis of the arbitration court cases database in order to explain how different parties protect their interests and how the court reacts to particular traits of plaintiffs, defendants and a case itself.

After the project is finished we expect to draw the first ever multi-dimensional picture of the work of Russian courts and to establish its functions and uses in Russia today. It will allow us to isolate extra-legal factors that affect the functioning of courts and formulate the ways of improving the system in accordance with the imperative of the rule of law.

Judges as a professional community: A sociological study

The judicial system has long been in the focus of academic research. Even during the Soviet time the legal researchers understood that the functioning of the court system could not be properly explained by means of law studies alone and required the involvement of other methods. We can find some application of sociological methods to the study of judges' everyday routine and their socio-economic status in the researches of the Institute of State and Law conducted in the 1970s (Kudriavtsev 1975; Baturov 1979). But these volumes were not available to the general public. Most recent analysis of the Russian judicial system was made by the INDEM foundation in the framework of corruption studies (Gorbuz/ Krasnov/ Mishina/ Satarov 2010; Satarov/ Rimskii/ Blagoveshchenskii 2010). The study provides a profound analysis of Russian judicial system based on the thorough investigation of legislation, comparative study of court reform in transitive countries and surveys of population and business on the legal consciousness and attitudes towards courts. However the research of INDEM foundation provides outside perspective of the judicial system whereas the IRL research of the judicial profession aims to describe the internal mechanisms that influence judicial decisions and to create a multi-dimensional picture of the Russian judiciary: demographic data, professional trajectories and recruitment patterns, normative culture, workload, time budgets, decision-making.

This project (directed by Vadim Volkov) is based on the hypothesis that the normative culture of judges (values and norms) directly influences the nature of the judicial process and its results. Without such a research, it is impossible to understand to what extent judges in Russia are inclined to protect the rights of citizens, instead of, for example, advocating the interests of the state or to what extent they share the system of values, traditionally associated with justice.

The legal profession, which embraces lawyers, judges, attorneys and other experts, has long been a subject of a particular interest in the sociology of law and related disciplines, especially law and economics, economic sociology and political science (e.g. Abel 1991; Posner 2008; Baum 1998). Although many studies of the legal profession have originated from the legal scholarship or a more widely understood law and society perspective, this study builds on the theoretical concepts coming from the traditions of

the sociology of professions and focuses on the norms and values of judges as a professional community.

As a starting point this research employs a model which is based on a range of assumptions. Norms and values can be found in any stable professional group. Judges as legal professionals provide specialized service on the basis of their expertise. All community judges acquire patterns of normative culture through professional socialisation. Norms and values regulate the conduct of members of a professional group in a way that serves interests of a society but not their individual interests. Judges' social function lies in resolving conflicts, tension-management, and in protecting human rights, or in a broader sense, they make it possible to utilise the law as a mechanism of social control. The social patterns of judges' normative culture could be described as a set of norms that include affective neutrality, independency, accountability, openness and professional specialisation. Values that legitimate acting upon these norms are justice and legality.

The project also looks at the distinctive characteristics of judges as a professional group and focuses on the set of basic variables such as personal ascribed characteristics (gender, age, family status, geographical mobility), professional socialization (formal education, professional background and experience) and daily professional routines (time devoted to sitting of the court, examination of case detail, preparation of court decision and study of new legislation).

The data collection for this project has been a challenging task, as the courts in Russia tend to be very closed establishments and getting them to share internal information has taken time and some lobbying. The IRL researchers conducted 23 focused interviews with judges. A survey of 759 judges from 5 Russian regions was conducted using a specially designed questionnaire.

While the survey data is currently being processed, some initial results are already available. Judges who have entered the profession in post-Soviet time prevail over the old generation – the majority of judges were appointed after 2002 the year when new law on judicial system had come into force. The majority of Russian judges are women (66%) aged 35-50. This professional group is characterized by low geographical mobility compared to the population in general. The main source of judicial recruitment is the court apparatus (29%) through which mostly young female judges are recruited. Prosecutor's office and police

are also significant sources of newly appointed judges. Other legal professions, especially advocates, are represented much less in the judicial community.

The core values of the community are a composite of legality, the protection of rights, and justice, with legality occupying the core of the value structure. One can distinguish two subcultures within the profession that differ in terms of professional norms. The first group is mostly driven by bureaucratic norms, such as discipline, accuracy, attentiveness and following closely the letter of the law. This group mostly consists of female judges who gained their professional experience as court secretaries or judges' assistants. The second subculture ranks higher such norms as independency, justice, and non-pecuniary interest. Among this subculture we find more male judges of older age who came into the profession from prosecution and the law enforcement agencies.

The study indicates that Russian judges are overloaded and that they have a very limited time for studying and processing cases.

Institutional analysis of the criminal process and judicial decisions

Sentencing involves a series of decisions that reflect the complicated process practiced by judges, prosecutors, defenders, policemen and others involved in enforcing the criminal law. The criminal process and sentencing practices are studied in the framework of punishment theories in criminology, sociology and organizational studies (Gottfredson/Hirschi 1990; Dixon 1995). Russian courts practically never acquit defendants; their decisions are overwhelmingly biased towards prosecution. This research aims to describe the sentencing process, its social determinants and institutional framework from the moment the law enforcement opens a criminal case, and to the moment when the court brings in a verdict.

The study shows that the prosecutor's position in court (namely, the consequences a certain verdict would have on the prosecutor's job evaluation by his superiors) affects the final verdict overwhelmingly. The study discovered significant differences between outcomes in cases where two private parties compete and cases that involve the State Prosecutor. In cases initiated by the authorities the conviction rate is between 74% and 84,7% depending on the case type whereas in disputes between private parties the

conviction rate is 26% (Paneyakh/Volkov/Titaev/Primakov 2010). These data prove the lack of independence of judges vis-à-vis the state.

Institutional approach is applied to explain how coordination effects of legal institutions correlate with transaction costs that come from the application of legal rules (Paneyakh 2011). This study takes the internal bureaucracy of the enforcement system as a starting point in the attempt to explain the sentencing process in Russia. By analysing the structural conjugation of criminal ground-level police, investigation office and prosecution, it is demonstrated how the interplay of bureaucratic practices and conflicting interests of state officials affects the final outcome for the defendant. Each actor of a criminal case processing is bounded by rigid structural constraints that exist in their institutions. For instance, the report and evaluation system that rules the activity of criminal policemen creates ill stimuli for them and results in excessive transaction costs. As a result the criminal police seek to work with investigable cases only and discard most of the others. On the other hand, the structural constraints on the capacity of Russian judges for independent decision-making are built into the judicial system. Any verdict that has displeased the prosecutor constitutes significant risks for the judge in a long run, often undermining their work or career advancement. Prosecution tends to automatically appeal any such decision all the way to the top (as it delays the consequences for the prosecutor himself); and any verdict overturned creates trouble for a judge and his superiors (the chairman of the court at the first place). This means that ruling against prosecution the judge takes risks that may last for years – until all appeal options are exhausted.

The copyright law in the Internet: The international practice and implications for Russia

Internet technologies in Russia develop faster than the legislation and the regulation of this realm, which causes tensions and conflicts amongst stakeholders (copyright owners, platforms, providers, authors, users, regulators, associations and the like) over intellectual property rights. Russia was often blamed for being one of the largest infringers of copyrighted music in the world (Mertens 2005). According to some estimation the illegal downloading of movies and music is three-times more widespread in Russia than in western countries (Karaganis 2011). In the context of the growing commercial potential of the Internet, such

conflicts as well as the Internet regulation in Russia carry increasing gains and losses for particular players as well as for the society in general. The main stakeholders are aware of the necessity to adopt legislative acts regulating copyright in the Internet. But the specific acts and their contents depend upon the understanding of the general policy of copyright regulation on the Internet as well as on a broader idea about the impact of the Internet upon the society.

The IRL has concluded the analysis of the current situation in copyright regulation in Russia based on the series of in-depth interviews with the representatives of all stakeholder groups (Dzmitryieva/Saveliev 2011). The IRL has also studied the present legislation on intellectual property rights in the Internet and its enforcement. The focus of the attention was copyright law, as well as those technological advancements that have rendered some of the old-fashioned legal mechanisms obsolete.

The researchers analyzed the main problems in the field of copyright regulation that resulted from the development of the Internet and Web 2.0 technology. The study of the conflicts about copyright infringement between the right holders and the end users in Russia proves that these conflicts have been largely fuelled by a significant decrease in the costs of producing copies which in turn has led to a widespread file sharing via social and p2p networks. The development of Internet technology has transformed the notion of intellectual products and intellectual property and has led to a deficiency in international and Russian legislation which is based on the legal concepts of pre-digital era. Existence of media piracy illuminates more complicated problem of the current global system when the world as a whole but not a specific country needs to develop new regulation (Boyle 2003; Lessig 2004). Whereas the copyright of analog era provided right holders with the opportunity to gain sufficient revenue from creating and selling the hard copies of their products, and the law has been aimed mainly at protecting the interests of one businessman from the infringement of his/her rights by another actor, in the digital age, the Internet users have received an opportunity to copy and share information over large distances and in large volumes. The intellectual property right holders are now looking for ways to limit the information sharing by users.

The study identifies reasons of the widespread of illegal file-sharing on the Internet in Russia. Some of them are specific to the Russian segment of the Internet; whereas others reflect the general trends in transformation of social

relations caused by the development of the Internet. Specific Russian reasons of widespread illegal content-sharing have an economic basis and are associated with the high price of legal products, their low quality to price ratio and bad logistics that limits the access to legal products. Along with these, there are also infrastructure constraints caused by insufficient development of high-speed Internet access and immaturity of electronic payment systems. The third group of reasons is related to the social organization of the Internet that is based more on a reciprocal and voluntary exchange of information rather than a market exchange.

In this conflict the important role belongs to the Internet service providers (ISPs) due to the inability of the right-holders to sue the actual copyright infringers, namely the end-users, who are anonymous and widespread. Since the ISPs can be easily identified, the copyright holders aim to sue them instead for the compensation damages ensuing from the Internet users' copyright infringement. The copyright holders claim that the file sharing activities by the end users cause huge losses to the audio-, video-, and book industries, which was proved not fully true by different researches (Waldfoegel 2011).

The proposed remedies that could mitigate the conflicts can be analyzed by the means of Law and Economics tradition which can be efficiently applied to the discussion of regulation changes (Calabresi/Melamed 1972; Lemley 2005; Cohen 1999). The first remedy, which is often proposed by the copyright holders, is to enforce severe criminal and administrative liability sanctions on the end-users. There are already several criminal cases against Internet users for copyright infringement. However the application of these legal norms is unlikely to lead to the desired effect. Due to a wide extent of file sharing the law enforcement will be random and will involve significant social and economic costs outweighing possible benefits, and it will not be accepted by the Internet users as a legitimate norm and, therefore, will not change their behaviour. Thus the deterrence power of criminal liability for copyright infringement will be very limited. There exists an alternative, namely a development of a new business model that can minimize the damages to the intellectual property right holders. Several successful start-ups that have emerged in Russia in 2010 have proven that with the help of innovative business models it is possible to achieve a balance of interests of the intellectual property rights holders and the consumers. The second option, which is also often promoted by the copyright holders and by some lawyers, requires an introduction of a strict liability of the Internet

service providers for copyright infringement by their users and for corresponding damages compensation. This is highly ineffective as such measures would pull a large share of financial and human resources into preliminary content monitoring at the expense of developing new innovative projects (Hamdani 2002).

In the end of 2011 the global conflict around copyrighted products has reached a new level as the US Congress and Senate received new bills under consideration – the Protect IP Act and Stop Online Piracy Act. The whole story illustrates how the process of social changes becomes the cause of legal changes and that the process could be painful and sometimes involuntary.

Conclusion

Russia presents a vast fertile ground for empirical studies in the sociology of law. The condition whereby laws and courts, law enforcement organizations do exist, while the rule of law does not obtain, or when practical, informal laws prevail over formal laws, or, equally, laws are used instrumentally by powerful interest groups requires sociological approach. Legal research can tell us important things about the legal doctrine, reveal inconsistencies in statutes, and identify loopholes that enable the abuse of law. But legal research can give us little knowledge of what happens when law meets real life, when it actually affects or fails to affect human behaviour or produces effects unintended by legislators. The Russian legal realm is much more law in action than law on paper – a condition that invites sociological inquiry of social practice rather than normative analysis of legal texts. The sociological turn in legal studies in Russia is long overdue, and international scholarship can both help to make this turn and benefit from it.

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Endnotes

¹All memos and articles are available at the IRL web site: www.enforce.spb.ru.

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