

The Perpetuation of Legal Nihilism and the Assertion of Personal Freedoms in a Post-Soviet World

by Shara Abraham*

Since the fall of the Soviet Union in 1991, the human rights movement in Russia has experienced some successes, but more often has faltered amid political turmoil, social unrest, and economic distress. On November 9, 1999, Professor Boris Topornin, a Russian legal scholar and human rights activist, spoke with students at the Washington College of Law about the human rights movement in Russia. Topornin is the president of the Institute of State and Law in Moscow, a non-governmental organization that conducts legal research. Among other topics, Topornin addressed the development of the Constitution of the Russian Federation, the accomplishments and failures of the Russian Constitutional Court, and the ongoing power struggles amongst the President, Parliament, and the courts. Specifically, Topornin discussed the role these struggles play in the realization of fundamental human rights and freedoms.

Topornin attributes the difficulty in realizing human rights in Russia to legal nihilism, or disregard for the law. For seven decades, the Soviet Union dominated Russian citizens' lives and little attention was paid to developing a rule of law. Accordingly, Russian citizens continue to lack faith in the judicial system and its institutions.

Development of the Human Rights Movement in Russia

In discussing the human rights movement in Russia, Topornin explained how the Russian approach to human rights differs from the American approach. In Russia, the approach has focused on social and economic rights, whereas in the United States, the human rights movement emphasized personal freedoms. Throughout the 70 years of Soviet rule, Russians were accustomed to following the direction of state institutions, and expected the state to guarantee the realization of rights and freedoms.

The protection and endorsement of individual freedoms has emerged as a corollary to the demise of the Soviet Union and its emphasis on collective rights. Specifically, the latest version of the Russian Constitution, passed in 1993, embodies the dramatic change in thinking about human rights that spurred the Soviet Union's collapse. The codification of individual rights departed from Soviet ideology and is evidenced in Article 17 of the 1993 Constitution, which states: "The basic rights and liberties of the human being shall be inalienable and shall belong to everyone from birth." The 1993 Constitution contains other important developments. For instance, Article 14(2) provides the right to freedom of religion and prohibits state-sponsored religion; Article 19(1) provides equality before the law; Article 21 prohibits torture; Article 27 provides the right to freedom of movement; and Article 29 provides the right to freedom of thought and speech. Earlier versions of the Constitution contained a few of these provisions, but the 1993 version was the first to contain all of these civil and political rights.

Legal Tradition

In order to appreciate Topornin's comments, it is important to understand the history of the Russian Constitutional Court. It was not until Mikhail Gorbachev became General Secretary

of the Communist Party in March 1985 that the Soviet Union truly attempted to develop a law-governed system. Although the 1977 and 1978 Constitutions guaranteed rights such as freedom of speech, press, and assembly, there did not exist a body to interpret these rights in accordance with the interests of the people and the Soviet system. Under Gorbachev's leadership, the first Constitutional Court was established in 1990.

This first Constitutional Court operated until 1993 amid political and social turmoil, consistently adjudicating politically volatile issues. Further, the Constitutional Court judges assumed that a new constitution would replace the 1978 Constitution, which was riddled with over 320 amendments. Despite these difficulties, the Court still issued decisions important to

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the protection and endorsement of human rights. In particular, the Court heard a number of cases involving economic and social rights such as housing, labor, and health care, born out of the volatile post-Soviet transition period and the ensuing economic upheaval. In adjudicating these cases, the Constitutional Court relied on the Russian Constitution, as well as various international laws and treaties.

For instance, in rendering judgment in favor of plaintiffs challenging their dismissal from their jobs pursuant to a provision in the Russian Labor Code, the Court found the Labor Code provision contrary to Article 32 (guaranteeing equal access to state service) and Articles 14 and 38 (guaranteeing the right to work) of the 1978 Constitution. Additionally, the Court held the Labor Code violated the Universal Declaration of Human Rights, the Covenant on Economic, Social and Cultural Rights, and International Labor Organization conventions.

Throughout its tenure, the first Constitutional Court's mandate grew to include resolving power struggles between former president Boris Yeltsin, the legislature, and other powerful political leaders. The most politically charged issue presented to the Court was the Communist Party's challenge of Yeltsin's decree suspending the party and called for an inquiry into the Communist Party's past atrocities. The Court's consideration of the matter led to one of many confrontations between Yeltsin and the Court, eventually culminating in Yeltsin's suspension of the Court in 1993.

Following Yeltsin's suspension of the first Court, the second Constitutional Court emerged 18 months later, in March 1995. Once again, at the outset the Court faced a near insurmountable challenge—determining the constitutionality of the government-authorized military action against the breakaway Chechen Republic. Members of the Federation Council, the upper house of Parliament, and the Duma (the lower house of Parliament), challenged Yeltsin's three decrees and the government resolution authorizing military action against Chechnya, citing violation of the 1993 Constitution, the Law on Emergencies and Defense, and human rights law. The Court heard the case and determined to disallow actions threatening the territorial integrity and unity of Russia, effectively rejecting Chechnya's claim to independence. Further, the Court dismissed the

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various human rights claims brought before it, holding that the regular court system would handle such claims.

The Chechnya case exemplifies how politics has consistently impeded the Constitutional Court's adjudication of constitutional and human rights issues. Presidential elections were less than one year away and the Court was reluctant to find Yeltsin guilty of violating the Constitution because it feared such a ruling would undermine his prospects of re-election and perhaps serve as an impetus for his impeachment. Thus, the Court was unable to uphold its duty of impartiality. The Court's resolution of a contentious issue like the Chechnya conflict can best be understood by recognizing the volatile political environment in which the Court operated.

The Struggles of the Russian Court System

The Constitutional Court has consistently endeavored to give maximum review to human rights cases, but it has not been consistent in affirming the rights claimed. Along with this inconsistency, the concept of bringing personal grievances to court is foreign to the average Russian. For these reasons, many citizens whose rights have been violated remain uncompensated.

Today, Russia's entire court system continues to struggle under the weight of divisive partisan politics and financial depravity. Topornin discussed some of the problems that threaten the efficacy and autonomy of Russia's court system. Of primary importance is the divisiveness within the legal community that, as Topornin noted, has led conservative judges to oust more progressive judges. To remedy this problem, Topornin emphasized the need to establish a committee to monitor judges' behavior. He also noted the need to develop the professional skills of judges.

While in power, Yeltsin formed a special commission, of which Topornin is a member, to reform the judicial system. This commission, however, lacks the financial means to adequately support its work. Topornin emphasized that the gravity of Russia's financial situation affects not only the commission's work, but also the work of the entire court system. For instance, to date only 9 of Russia's 89 regions have a functioning jury system.

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There simply is not enough money to implement a jury system throughout the country. Additionally, Topornin noted that jurors often are susceptible to the influences of local interests, bribery, and organized crime. Russia's financial situation, Topornin commented, makes it almost impossible to stop the influence such external powers wield over jurors. The inevitable result is biased verdicts.

The dire financial situation also deleteriously affects the impartiality of judges. Topornin highlighted the need to prohibit the growing influence local politicians, party leaders, and factory owners have on the courts. The federal budget is meant to completely fund the courts' activities. Yet the insufficiency of federal funding precludes the courts from asserting financial independence and renders judges increasingly vulnerable to bribery and outside influence.

The Perpetuation of Legal Nihilism

As Topornin noted, the Russian Constitution provides for the protection and endorsement of fundamental human rights and freedoms. The chaos of the political, social, and economic situation in Russia, however, is not conducive to effective change, namely the assertion of human rights and a clean break from Soviet collectivism. The Constitution does not function as expected because, as Topornin asserted, the rights proclaimed therein are not realized. Topornin attributes this failure to a multitude of factors, including the lack of a legal and constitutional tradition, the dire economic situation, and the power of

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external influences. Accordingly, Topornin noted, Russia must develop an infrastructure surrounding the Constitution to ensure that it functions effectively, namely adequate funding for the court system, a comprehensive jury system, and proper training to ensure judges' impartiality.

In the meantime, legal nihilism continues unabated. Citizens' lack of faith in the law and legal institutions is a symptom of a historical national disregard for the rule of law. Although courts are playing a more significant role in citizens' lives, the court system remains seriously flawed. Of paramount importance is the popular notion that legal rules are not relevant for the resolution of private needs. Rather, Russians continue to resolve disputes outside the court system by turning to avenues such as bribery, political organizations, and the media.

The popular sentiment is not unwarranted. Though purporting to serve citizens' interests, courts subject citizens to a long waiting period for hearing cases and rendering decisions and, as Topornin noted, the government uses legal rules against citizens and not for citizens' needs. Further, there has been a narrowing of citizens' rights to complain about official misconduct.

Even the highest echelons of the government exhibit a disregard for the rule of law. Epitomizing such disregard, in July 1992 then-chairman of the Supreme Soviet, Ruslan Khasbulatov, sought retaliation against *Izvestiia*, an independent newspaper, after the newspaper published critical statements about him. Specifically, Khasbulatov tried to retake control of the newspaper and force it to assume its former status as an official organ of the Duma. Denouncing this attack on freedom of the press, Yeltsin supported *Izvestiia's* independence. Eventually, the Constitutional Court heard the case and determined that Khasbulatov's resolution against *Izvestiia* contained ten constitutional violations. The Court's decision affirming freedom of press is commendable. The personal intervention of Yeltsin and Khasbulatov, however, demonstrates that political influence rather than legal channels continue to determine the outcome of cases concerning constitutionally protected rights. Although this Constitutional Court decision is commendable for its support of freedom of the press, the means by which the court reached its decision illustrates the general disregard for the rule of law. ☉

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