Chapter Five

Legal Institutions
One of the factors that impedes the transition to market economy in post-Soviet Russia and encourages a large role for criminal activities is the weakness of law and legal institutions. Market economies seem to require a sound legal order. The main characteristics of legal order are: the presence of legal rules that are uniform, effective and binding upon all persons or parties which in turn presupposes a clear hierarchy of legal rules, including laws and bureaucratic regulations that are well publicized, the enforcement of these rules by independent courts and legal services that are respected, trusted and used. While legal order need not imply only rule of law, it does mean that laws constraint governments and their leaders as well as citizens.

The USSR had a huge body of laws, decrees, regulations and courts that worked better than their reputation had it, but the standards of legal order required for a market economy were absent. A hierarchy of enforceable legal rules open to scrutiny did not exist. Countless decrees and regulations of administrative bodies took precedence over laws and often contradicted them. Courts were dependent upon the good graces of politicians, especially at the local level and open to the interventions in their work in civil as well as criminal cases. Courts failed to offer adequate protection to citizens from most wrongs imposed upon them by officials of the state.

In the first years of 'Glasnost' jurists and politicians recognized these problems as a result of which the struggle for legal and judicial reform was
born. Between 1989 and 1991 the laws of the USSR recorded significant changes and the laws in the post-Soviet Russia continued to undergo reform. Particular changes included:

1. new and better way of appointing judges;
2. expansion of the roles of defense counsel in criminal cases and provisions for a greater role of courts in the pretrial investigations;
3. new requirements for the publication of laws and regulations affecting the rights of individuals; and
4. expansion of the competence of courts to hear complaints by citizens against government officials and the establishment of a Constitutional Court.

Another dimension of legal reform was the rewriting of substantive law, especially in areas relating to changes in economic system. These included laws on property, banking, taxes and civil law in general. The scope of change was daunting. Ridden with political conflict, the efforts at legal and judicial reform have marked a new beginning of a lengthy transition towards legal order.

The present chapter assesses the struggle for legal order in Russia and the evolution of a new legal regime after the adoption of 1993 constitution. It examines the state of civil, criminal laws and judicial reforms, especially steps taken to make courts independent and to invest them with new power and authority, the impact of these developments on
regard for courts and law by the public, jurists and the politicians. The concluding section of this chapter deals with the emergence of the institution of Constitutional Court as the third branch of the governmental structure.

-- Emergence of Market Economy and the Changing Legal Order

The Soviet legal system proved to be ill-suited to the demands of capitalism, even in the nascent and arguably distorted form found in Russia today. The reality of post-Soviet Russia required new "rules of game". Laws and legal institutions have had to be reoriented so as to facilitate market transactions rather than plan fulfillment. During the adoption of the constitution of 1993, a consensus quickly emerged as to how to reconstruct the existing legal system. Echoing the shock therapy debate, Russian policy makers argued that laws and legal institutions had to be reshaped in a rapid and necessarily top down fashion. A number of assumptions were embedded in the above 'development' argument. The first is the existence or the emergence of a market, and a state capable of enforcing the law when necessary. Second and more fundamental was the assumption that if a western-style legal system were put into place in post-Soviet Russia, then

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1 New rules were needed to facilitate democracy. This chapter does not address such matters as electoral laws, delineation of power between national and regional authorities and the like. It concerns exclusively with the role of law and a stable legal order in a transitional society fast moving towards capitalist market.
Russian economic actors would rely on the laws and institutions in their relations with one another. A demand for yet more law would be stimulated by mutually reinforcing desires for predictability in economic relations and for the protection of newly found property interests. Finally, the concept of law embedded within the 'Development' argument is western: law is viewed as a set of rules developed through co-operation between state and society that are applied across the board by institutions that are politically neutral and are capable of being enforced, if necessary by the state. Boycko and Shleifer laid out one variant of their Development argument:

A genuine demand for such (legal) reforms now exists, primarily because privatised and newly private firms need legal protection and commercial law to restructure. Critiques of privatization, who argued that legal reform had to precede privatization, simply have missed the boat in their assessment of political capital. A year ago the political demand for legal reform did not exist in the Russian economic reform process, however, legal reform is both essential and politically feasible.²

This focus on privatization, market economy and attendant reforms of the legal system has become the basis for the emergence of a new legal order in post-Soviet Russia. The simplicity of the argument is appealing but as we move on to see the actual legal reforms we will see that the institutional changes have not prompted Russian economy actors to shift their reliance on networks of personal relationships to a reliance on law.

For Russians, shifting to a reliance on law requires not only departure from established patterns of behaviour, but also relinquishing control and power over economic transactions.

In the Soviet Union, there was an antipathy towards law shared by the citizens. This orientation towards law and legal institutions was part of the Russians' distrust towards institutions in general.* The lack of autonomy of law reflected in the capacity of the Communist Party to dictate the substance of the law and to reach into any legal dispute and dictate the result, contributed to a perception of law as a tool of the party. How law was applied depended very much on who was involved and his or her political connections. This highly particularistic legal culture was not conducive to the transition to market.

Law, understood as being universally enforceable and relatively autonomous, facilitates economic transitions and a market economy. It provides a common set of assumptions for negotiation and a default mechanism for resolving disagreements and disputes. Law constitutes a mechanism for preserving the priority interests and courts represent peaceful fora for the resolution of disputes. Law is also the most efficient mechanism by which economic transactions can be organized peacefully.

* See Appendix 1.1.
Thus, the movement of society from a socialist regime to a capitalist regime necessarily demands an efficient legal order. The institutionalization of legal regimes in the form of statutory law and state sponsored courts is taken to be necessary step towards formal legal rationality. This analysis of the role of law in the emergence and maintenance of capitalist order and market relations is grounded in the experience of Western Europe where the rise of law and capitalism paralleled the rise of the modern state.

In the post-Soviet Russia, the aim of the Russian policy-makers and their western advisors was to build a legal system that would facilitate market transactions domestically and allow Russia to become an active participant in the global economy. Several factors were identified that contributed to the creation of a developmental dynamic in the arena of law. Politically Russia emerged from a period of authoritarianism or neo-traditionalism in which the communist party held firm monopoly on political power. With the disintegration of CPSU during the Gorbachev period, a wide range of alternative voices emerged with competing visions of the Russian future. The confusion over the future order, the confusion relating to the constitution and other fields gave rise to constant

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manoeuvering for short-term gains. Political gridlock was the ultimate result. Under these circumstances law emerged as a common language of political discourse. The quest for a legal order in the post-Soviet period was felt more than it was in the Soviet period.

Economically, the disintegration of the Soviet era administrative command system acted to liberate economic actors. Economic freedom in the firm and other sectors led to a new set of legal challenges. The transition phase also witnessed the legalization of private property in Russia. The consequent privatization of state property included not only industrial enterprises but also much of the housing stock. Wealth accumulation which had not been a part of the official ideology of the Soviet Union, became acceptable.

Last but not the least, these changes in the political and economic system came at a time when the integration of the global economy was creating ever greater pressures for standardization among nations with regard to laws governing commercial transactions.4

Russia's precarious financial situation and its need for credits and loans required it to take seriously any outside "suggestion" about laws that

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ought to be promulgated. The desire of the Russian businessmen to participate in international business transactions and to secure capital investment demanded a renewed importance to legal institutions.

I LAW AND LEGAL INSTITUTIONS IN THE SOVIET PERIOD

The critical role that law and legal institutions play in establishing a successful democratic state has come to the forefront in post-Soviet Russia. The new constitution which was adopted in 1993 and the formal statements of top Russian leaders committed the country to respecting the rule of law. Specifically they promise to reform Soviet era institutions and practices so as to create a "law-governed state". Although the new constitution gave a clear expression to the importance of the legal institutions, the process of evolution of legal institutions started much before this time.

As the Gorbachev period unfolded it became clearer that the changes in the political, legal and social spheres are far outpacing the developments

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in the Soviet economy. Perhaps, in part, because of Gorbachev's legal training, the developments in the twilight of Soviet era, including those in the economic field were increasingly being expressed in the language of law. Great reliance was placed on law to institutionalize the policies of Perestroika.

As legal reform discussions proceeded after the mid-1980s, it gradually became clear that the spirit of Glasnost had pervaded the arena of law as it had in many other fields. The ground rules for discussion were relaxed and issues that were previously ignored or approached only cautiously begun to be debated openly and vigorously. What also emerged at this time (about 1987) was the increasing use of a new or more accurately a revived term to denote the general objectives of legal Perestroika in the USSR: the concept of a "Law-governed state" Pravovoe Gosudarstvo. 6

This 'bourgeois' concept which had previously been banned from use with regard to Soviet law, became the central theme under which a wide spectrum of legal reform initiatives had been subsumed. The term was used in official writings and speeches including party document and had become

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commonplace in legal and journalistic accounts as well as in that revived genre publicistic (publisticheski) commentary on law.\(^7\)

During the post-Stalin period several efforts at law reform had been undertaken in the Soviet Union. The codification activities begun as early as 1950s and continued for some years thereafter rewrote much of the substantive and procedural law of the country. The legislative initiatives growing out of the adoption of the USSR constitution in 1977 continued this process and resulted in further efforts at systematizing Soviet law, such as issuance beginning in 1980, of the *Svod Zakonov SSR*, an eleven volume collection of published law kept current by periodic updating.\(^8\) Neither of these periods saw much liberalization of substantive Soviet law, however, and a significant body of law, for internal use only continued to exist. But it was not a time completely devoid of positive developments. By the 1960s a highly trained legal profession had been created which was attempting to assert its professional autonomy. It was responsible in considerable part for the systematization and codification of law that was accomplished during these years.

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\(^7\) See ibid., p.136.

\(^8\) See ibid., p.137.
The early Gorbachev period was something of a transition phase. By that time the legal dialogue had become somewhat more open and the need for reforming the system, including legal reform was beginning to gain recognition. The centerpiece of this reform period was a plan adopted in August 1986 by the Presidium of the USSR Supreme Soviet and the USSR Council of Ministers for the promulgation during the period 1986-90, of thirty eight separate legislative acts. Each act scheduled for adoption at a designated time, was assigned to certain government agency for drafting. The overwhelming majority of the proposed acts - many of them involving economic legislation such as price reform could not be adopted. Other important parts of the plan, such as a law on state security and a law on the press and information also fell years behind the schedule. Thus the results of the reform plans have been meager but this phase marked the beginning of an era of revolution in the field of legal reforms.

The three periods described marked the major phases of legal development in a period of approximately thirty-five years. But the immediate next phase of reform of legal institutions can be seen as an effort to create a socialist law-governed state.
The Concept of Law-Governed State

The phrase 'law-governed state' itself had become the slogan of the reform movement and was widely used in Soviet legal and political discourse. The use of the phrase amounted to an acknowledgment, often explicitly stated in writings on the subject, of a debt both to pre-revolutionary Russian law and to western law. It suggested both a lowering of ideological barriers and a confidence in the changed political atmosphere in the USSR which allowed the pragmatic use of law from diverse sources of innovations that might prove useful to the Soviet system.

The idea of a law-governed state also implied a fundamental change in emphasis. At its most basic level, the advocates of a socialist law-governed state envisaged a fundamental transformation of the role of law in the Soviet Union. This involved a change in the traditional relationship between the state and the private parties (both individuals and groups) with the balance shifting more in favour of the rights of private parties. The fullest official endorsement of the socialist law-governed state was included in the Thesis of the Nineteenth Party Conference in 1988 and was reaffirmed in a resolution at the end of the Conference. As stated in the Theses:
In adding the concept "law-governed" to the description of our state of all the people, it should be emphasized once more that not only do citizens have a responsibility to its citizens. It must show constant constraint for strengthening guarantees of the rights and freedoms of Soviet People.9

Or, as a Soviet legal scholar put it even more concisely in 1989, "the defense of individual rights is the keystone of the law-governed state".10

To some Soviet jurists, the idea of law-governed state embraced a universal sense of justice that goes beyond the Soviet context. For them, the concept has philosophical implications that might be examined from a comparative law perspective. The emphasis on curbing the power of the state and enhancing personal liberties helps one to see the difference between the concept of law-governed state and the slogan that has traditionally been considered the hallmark of Soviet law and socialist legality. Socialist legality has typically been interpreted to invest great power in state organs, with the admonition that this power should be applied strictly and even-handedly.

The idea of the law-governed state is seen as a fresh start, a concept that symbolized a clean break with the previous practices. This was implicit in almost every general discussion of the law-governed state. It was contained in calls of a civilized system of law suggesting that by

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9 Izvestia, 27 May 1988 (2), quoted in Barry n.6, p.139.
10 V. Savitski, Izvestia, 5 January 1989 (6), quoted in ibid.
implication the prior system was uncivilized. And this perception was an occasion made explicit, as in this 1988 statement by an enthusiastic supporter of the law-governed state:

It is not an empty question: why in particular is it necessary for us to introduce a new term? Weren't these words having to do with strengthening legality, the development of democracy, etc.? There were all of these. But the main thing wasn't there - the recognition of the higher value of human freedom - specifically freedom and not only well being although this is also very important. There were no effective barriers against sliding back to a regime of personal power. Therefore, the formation of a law-governed state presupposes the introduction of fundamentally new principles of legal and state operation which possess the character of democratic guarantees.\(^\text{11}\)

The above discussion clearly indicates that the rhetoric of legal reform was in operation and that a mood had already been created for change. Four areas of activity seemed most appropriate for discussion to analyze the above phase of reform:

1. Constitutional changes;
2. Relevant Statutory Developments;
3. Reform of Economic Legislation; and
4. Reform of Criminal Law.

We may briefly explain here these phases of reform

\(^{11}\) M. Baglai in *Izvestia*, 1 September 1988, quoted in Barry, n.6, p.139.
(i) **Constitutional Changes**

Constitutional changes during this period related to the move to draft a new constitution and the changes which were proposed and adopted in the existing constitution. In his speech at the time of the adoption of the 1988 amendments to the constitution, Gorbachev acknowledged that much in the constitution of 1977 is already in need of replacement. But he indicated that in the short run, changes should be made only in certain parts of the document where proposals had been published and public discussion had taken place. At the end of its first session in June 1989, the Congress of People's Deputies created a 107-member constitutional commission to draft a new document. This constitutional commission played an important role in the drafting of a new constitution in the later period.

(ii) **Relevant Statutory Developments**

Under the Soviet practice, many constitutional provisions required further legislation in order to be implemented. Two examples of this are Article 125, providing for a Committee on Constitutional Supervisions, and the constitutional provisions on legislative elections. When rights began to be taken seriously the need for further legislation and enforcement of these through supplementary constitutional provisions manifested itself. Part two of Article 58 of the 1977 constitution provided that citizens can sue in court.
to overturn actions of officials that infringe their rights. But the provisions also stated that this right is to be exercised in the manner established by law. In other words, further legislation was needed to provide the framework for such suits. For ten years after the adoption of 1977 constitution there was no such law, even though numerous Soviet jurists urged that one should be adopted. Basically then this constitutional right remained unavailable for use by Soviet citizens during this period. Finally, with specific endorsements from Gorbachev in 1986, further amendments in 1989 eliminated most of the barriers to citizens seeking courts review of grievances against government. This law began to serve as a remedy for citizens who believed that they have been treated improperly by the authorities.

Article 50 of the 1977 constitution guaranteed freedom of speech, of the press, of assembly of meetings and of street marches and demonstrations. It also provided that these rights were to be exercised in accordance with the interests of the people and in order to strengthen and develop the socialist system. This article was not taken very seriously and was always considered meaningless. However, Glasnost unleashed a lot of desire for expression and this led to the adoption of a number of measures to define further the permissible limits on speech, press activities, demonstrations etc. A series of regulations relating to public gatherings and
requiring advance permission from local authorities was adopted in 1987 and 1988. Moreover, as civic consciousness in the USSR had become matured enough, the leadership was finding that it could no longer simply impose a regulation and expect quiet acquiescence. Some concessions to publics’ desire to assemble were granted. Another aspect of Article 50 involved the activity of the press. The delay in adopting long promised laws on the press and on glasnost suggested the difficulty that the leadership was having in deciding how to deal with this crucial matter.

A final development having to do with restrictions on various forms of expression was found in the April 1989 amendments to the law on state crimes and the controversy that accompanied its adoption. These amendments had the effect of eliminating the old anti-dissident laws penalizing anti-Soviet agitation and propaganda (Article 70 of the RSFSR criminal code) and the circulation of fabrications and social system (Article 190-1 of the RSFSR criminal code).

(iii) The Reform of Economic Legislation

The economic laws adopted within the reform (during Gorbachev period) contrasted strikingly within Marxist theoretical propositions, in particular with the basic principles of state ownership of the means of
production and its corollaries in the field of economic planning. Few of these laws are enumerated here.¹²

- the law on individual labour activity of 19 November 1986;
- the law on state enterprise of 30 June 1987;
- the law on co-operatives of 26 May 1988;
- the law on forms of ownership of 6 March 1990;
- the decrees on stock co-operations and limited liability companies of 19 June 1990; and
- the fundamental principles of legislation on capital investment in the USSR of December 1990.

(iv) The Reform of Criminal Law

In the Field of criminal law also substantive changes were introduced in the rules of the 1991 criminal law reform. The last Soviet legal reform before the coup was adopted on 2 July 1991 by the USSR Supreme Soviet and published in the official Gazette on 24 July 1991 concerned the new fundamentals of criminal legislation of the USSR and the Union Republics. The new fundamentals confirmed the validity both of the material concept of crime based on the social implications of the act, and of most kinds of punishments formally provided for including the death

¹² For details on these laws, see Ekonomicheskaya Gazeta (1987), no.28, pp.10-15 and Ekonomika i zhizn (1990), no.27, pp.12-14.
penalty. The 1991 Fundamentals of Criminal Legislation of the USSR provided the following punishments:

1. fine (Article 30)
2. deprivation of the right to occupy particular posts or engage in particular activities (Article 31)
3. correctional labour up to two years (Article 32);
4. restriction of freedom up to four years (Article 33);
5. arrest and detention up to three months (Article 34); and
6. deprivation of freedom up to ten years or up to fifteen years for particularly grave crimes and up to twenty years in case of replacement of death penalty with deprivation of freedom, after the granting of a pardon (Article 35). Further punishments included limitation of military service for military servicemen in Article 38 and confiscation of property in Article 39.¹³

The foregoing account of the significant changes made to the Soviet legal code during Gorbachev period from 1985-91 shows that the climate for change in the concept of law and in the legal institutions were fast emerging in the Soviet Union before it collapsed finally in 1991. Although inconsistencies and ambiguities were identified in many of the new laws adopted under Gorbachev leadership on constitutional reform, on the economy and in criminal law, the domain of legal institutions expanded and their importance increased. During this period policy formulation on so

important a matter as political expression was no longer considered the exclusive territory of the top political leadership. Lawyers, the press and the representative institutions joined the process which made a difference in the law formulation. Moreover, the possibility that the courts might play a larger role in further fashioning the legal universe was raised by some other reforms which took place during 1991-93. Important initiatives were undertaken in the field of jury trial, the strengthening of lower courts and the independence of the judges.

II LEGAL INSTITUTIONS IN 1991-1998

The old Bolshevik system of jurisprudence and the principles on which it was based were clearly inadequate for a democratic market based society; and thus a new system in its entirety had to be created. The old system, inherited by the new regime could not be reformed; it had to be rebuilt from the scratch. There was nevertheless, a large degree of continuity in the first period and the judicial system moved slowly. During Gorbachev period the system had moved beyond the nebulous concept of socialist legality towards a law-based state. The post-Soviet Russia under Yeltsin sought to combine the principles of a Rechtstaat with those of Democracy. Under the Soviet regime each republic had its own

legal code as well as their own constitutions but they varied very little from all union standards. The struggle for statehood from 1990 had naturally been accompanied by a legal conflict between republican and the union legislation. During the war of laws of late 1990, the Russian Supreme Soviet insisted that Russian laws took precedence over all union laws.

The establishment of a *Rechtsstaat* in the post-Soviet Russia meant a system of citizen's rights, structures for pluralistic interaction of groups and also the development of a market economy. It also meant judicial review of legislative and executive Acts. Thus, a comprehensive reorientation of the legal system based on a new set of values began to take place. The key issue was to create an independent judiciary. From the 1860s urban Russia had seen the development of a relatively free judiciary and the development of the jury system, but these achievements had been swept away by the Bolshevik regime. Under Gorbachev, the judiciary began to achieve a measure of political autonomy, but this process had been precarious. The problem remained of how much of the old system, now considered totalitarian and unlawful, should be retained.

After the August coup, Russia seriously embarked upon building a new legal system. The first task in this direction was to put an end to the question of political prisoners and to complete the process of rehabilitation
of the victims of the past. With the opening of the Communist Party Archives the scale of repression against dissent at least became known. According to Sergei Kovalev, Chairman of Parliament's Committee for Human Rights, the Soviet regime between 1976-86 had sentenced 2,186 persons under Article 20 (Anti-Soviet agitation and propaganda) and 667 under Article 190-91 (spreading known falsehoods defaming the Soviet state and civil order). Immediately after Russia emerged as an independent nation state, steps were taken to curb these.

In February 1992, Yeltsin decreed the release of Russia's last ten political prisoners from the Perm 33 prison. Thus a whole epoch in which people had been incarcerated for their political beliefs came to an end, an epoch that had lasted for over a century in Russia.

One of the most painful questions to be dealt with by the judicial reforms was the use of capital punishment running consistently between 62-67 percent.15 The number of offenses liable to the death penalty had traditionally been high, with some sixty capital offenses in the RSFSR criminal code. The Soviet Union till then led the international league for the use of death penalty even though it had declined during Perestroika. Between 1962 and 1989, 21,025 people, i.e., 750 a year were executed in

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the USSR though by 1990 the number had fallen to 195. During this period many wrongful verdicts were passed in the absence of juries and with no courts of appeal in the USSR. The Soviet judicial system was imbibed with a harsh and repressive ethos and the system was heavily biased towards guilt with few acquittals and with a high proportion of judicial errors. Not only the system of law had to be changed but a new generation of people too had to emerge who could defend the independence of the judiciary.

In Russia, the rebuilding of the legal system took place in the special conditions of the transition from a one party system to a multi-party parliamentary democracy accompanied by transition from the command to the market economy, the social function of law played as prominent part in all the post-communist societies. Not only law became a method of exercising and controlling state powers, establishing the rules for the conduct of power politics, but it bore a system of values as well enshrined in such principles as legal security, the freedom to own property and the protection of rights. The challenge facing the democratic system was to

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17 One such figure was Gennadi Ponomarev, Moscow's Procurator whose life of conflict with the authorities did not end with fall of the communist system but continued as he defended the rights of the local soviets against the mayor's office. He also came into conflict with A. Muzychkantskii, Perfect of Capitals Central District who accused the Russian Writers Union of supporting the coup and sealed their building, Izvestia (2 September 1991), p.3, quoted in Sakwa, n.14, p.87.
move from ruling by decree to governing by law in which the legislative acts of parliament take on much greater importance. Faced by what he perceived to be a conservative majority in parliament, the Russian President tended to rule by *Ukaz* (by decree). Thus, continuity remained in form, if not in content with the old system (at least till the new constitution was adopted in 1993).

The legislative activity of the Russian parliament concerning law and rule making operated within these constraints. There were numerous key areas of legislation; the jurisdiction and the legal status of administrative bodies as well as political officials; constitutional reform and the debates around the adoption of the new constitution, the establishment of the Constitutional Court, judicial reform, the rebuilding of Russian legal system, laws regulating public life, the registration of political parties, laws on assembly and association, electoral regulations, laws on local government, laws concerning transformation of economy, foreign trade and association laws, regulating the market economy, tax, privatization, land laws, laws concerning the social sphere and welfare politics, social security, unemployment benefits and labour laws etc.¹⁸

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¹⁸ See Sakwa, n. 14, p.86.
The sheer volume of new legislation threatened to overwhelm the institution of legislature as well as the judiciary, yet these were the first indicators of the evolution of a new legal order in the post-Soviet Russia. The first ever congress of the Russian judiciary was held in October 1991. They adopted a series of proposals which were to be put to the Russian Parliament including the return to the Jury system abolished by the Bolsheviks in October 1917.

One of the more solid achievements of the new judicial system was the establishment of the Constitutional Court of independent judges. The law was passed in July 1991 and thirteen of the fifteen judges were elected at the fifth congress in October. Under its Chairman Valerii Zorkin, the court sought to mark out the central ground that could establish civic peace and maintain the unity of the country. The court asserted its authority against the executive authorities when on 14 January 1992 it overturned a presidential decree merging the newly termed ministries of security and internal affairs. The court's attempt to modify the referendum held on 21 March in 1991 Tatarstan failed, though Zorkin was vigorous in condemning the perceived threat to the unity of the country. Its ruling on the constitutionality of Yeltsin's ban on the CPSU in November 1992 also found a compromise solution to the problem. Most important, in December 1992, during Russia's first genuine constitutional crisis when executive and

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19 The role of the Constitutional Court has been analysed in greater detail in subsequent pages.
legislative power were locked in conflict, the court acted as a mediator and once again found a compromise solution. The court tried to assert its authority as a worthy representative of judicial authority to achieve the separation of powers, but the titanic struggle between executive and legislature marginalized the judiciary and trampled on rule of law in its entirety. The Constitutional Court was placed in the invidious position of defending a discredited constitution. Yet at this point the evolution of this institution of Constitutional Court instilled a new legal consciousness among the Russians.

(i) Judicial System

a. The State of Civil Law

As Russia marched on the path of market economy, the number of civil laws especially as they related to economy, increased rapidly. New laws on property, monopolies, banking and taxation came up. However, these laws failed to confer full property rights. In the new situation, the meaning of ownership varies in complex ways depending upon the sphere of business and other variables. In the absence of full and clear ownership that includes the right to dispose of property, owners are willing to make short term investments rather than long term ones. Another weakness of the new law lies in their failure to specify crucial details, leaving this to the determination of administrative agencies. A case in point is the December
1992 law on bankruptcy; nowhere did this law address the issues of ownership and transfer of equity in an operation. Some of the new tax laws of the federal and regional governments established rates of taxation so high and confiscatory that evasion of the laws became the norm. Finally, there arose the universal problem of inconsistency of new laws with other laws (old and new). Drafted by different groups of jurists at different times, laws were reviewed and approved by politicians who themselves often lacked knowledge of existing laws. Not only the new laws and regulations on economy failed to meet the standards of good law, but many of them also received partial enforcement due to lack of resources, ambiguities in the laws and the willfulness of administrative and local officials. Thus, property rights and contract laws even as established in federal laws were often challenged by local governments, sometimes through their own ordinances (which contradicted the Russian law).20

Thus much of the problem in the field of civil law in the post-Soviet Russia lies in the implementation rather than the adoption of the law. Some of the economic rights and laws relating to privatization were spelt out in the constitution of 1993. One way to bring order to the legal landscape

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20 In St. Petersburg, the arbitration courts began to confront this problem. Between 1990 and 1993, the number of cases heard by the city Administration Court in St. Petersburg in which private firms sued state firms rose from 27 to 151 (and as a share of cases heard in that court from 8.5% to 54.1%), see Peter H. Solomon, Jr. "The Limits of Legal Order in Post-Soviet Russia, Post-Soviet Affairs, vol.11 (April-June 95), p.91.
governing the Russian economy was through the drafting of a new civil code, which would take precedence over other economic laws and whose principles the latter would have to adhere to. On 21 October 1994, a draft of the general part of the civil code gained approval from the state Duma and at the end of November it became law.\(^\text{21}\) However, agreement on a special part of the civil code appears to be years away. In recognition of the long term character of the development of laws regulating private economic relations, President Yeltsin issued a Decree in July 1994 launching a programme for the development of private law, establishing a research centre and calling for the opening of Russian school of private law to be based in Moscow and Yekaterinburg.\(^\text{22}\)

\(\text{b. Criminal Law}\)

Like the civil law, criminal law in the post-Soviet Russia experienced some flux due to frequent changes in the preexisting laws and the on-going drafting of a brand new criminal code that promised further modifications. Both processes reflected two conflicting tendencies: the unfulfilled agenda of legal reformers and the declared needs of law enforcement, especially in confronting organized crime. At the same time, 

\(^\text{21}\) See ibid, p.92.

knowledgeable observers agreed that the existing criminal law was adequate for fight against organized crime and corruption.\textsuperscript{23}

Between 1992 and 1994 Russian legislators had no difficulty amending the criminal code frequently and for a variety of reasons. To adjust the law to the needs of a market economy, they eliminated the distinction between theft of state and theft of private property. To address the activities of organized crime in Russia, law makers approved new provisions on extortion and on the export of information about Arms (1993).

By the end of 1994, a draft criminal code, produced by a commission representing both the state Legal Administration and the Ministry of Justice, reached the state Duma where despite objections it started to receive serious consideration. Reflecting a decade of work and insights of various drafting groups, the draft criminal code included new principles and ideas already widely accepted in legal circles. This included careful differentiation of offenses according to their seriousness, return to the short term imprisonment, etc. On the whole, the new code represented a

\textsuperscript{23} See Solomon Jr, n.20, p.92.
moderate consensus document that promised to desovietize and modernize Russian criminal law.\textsuperscript{24}

Two other draft laws relating to crime and in circulation at the end of 1994 were - draft law on corruption and a draft law on organized crime. The draft law on corruption followed a presidential decree on the subject by laying out a spectrum of responses to breaches of the rules and the main thrust of the draft law on corruption laid measures designed to increase detection of wrong-doing.

(ii) Judicial Independence and Judicial Power

The creation of legal order in Russia required the emergence of courts that are independent and have significant powers, especially vis-a-vis government officials. In the USSR, judges had depended upon party bosses in the localities for tenure in office and for a variety of services. In the late 1980s and early 90s, judicial reformers in Russia tried to address themselves these deficiencies by changing the selection and tenure of judges and by increasing their legal competency. At the end of 1994, the role, status and organization of courts has changed substantially. However,

\textsuperscript{24} See ibid, p.94.
the implementation of these laws are fraught with difficulties caused by the frequent changes in the laws themselves.

*a. Judicial Selection*

Breaking the dependence of judges upon politicians has also proved to be a difficult task. The reform of 1989 had increased the tenures of judges at the peoples courts from five years to ten, established judicial screening of potential candidates for judgoships and shifted their ultimate approval from the party bosses who confirmed candidates for election to oblast level Soviets. The results, however, was that Deputies to these Soviets themselves began bossing judges. By the fall of 1991, the authors of the radical planning document, *The Conception of Judicial Reform of the Russian Federation* approved by the Supreme Soviet of the Russian Federation, were calling for life-time appointment of judges to be made by the President.  

However, the practice of life time appointments did not begin.

The new constitution of the Russian Federation, approved by the referendum in December 1993, did not deal with the tenure of judges and consequently left in place the provisions for life-time tenure adopted in 1992 law on the status of judges. At the same time the constitution gave to

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25 See ibid, p.95.
the President the power to nominate judges for the Constitutional Courts, the Supreme Court, the Supreme Arbitration Court and to appoint judges on other federal courts. Which all bodies are qualified as 'other constitutional', was however not specified in the constitution.

The President and his advisers assumed that they had achieved control of appointments and began exercising that power. Already in May 1994 the President was appointing judges to regional courts and by November had reportedly appointed 600 judges to these courts.26

The President's assumption of broad power of judicial appointment did not go un-challenged. In July 1994 the state Duma approved amendments to the law on the status of judges that qualified this power granting the chairman the right to appoint the chairman of the peoples courts. President Yeltsin successfully vetoed these changes on the ground that they contradicted his constitutional right to appoint judges on all federal courts. Dissatisfaction with the President's assumption of an exclusive power of judicial selection extended to the leaders of judiciary as well. While the top judges accepted the constitutional provision of the President as the final authority, they did not want the officials in the administration of the presidency to assume effective power of choice.

26 See ibid.
Accordingly, in June 1994, the chiefs of the Supreme Constitutional and Supreme Arbitration Courts submitted to the law on the status of judges.\textsuperscript{27} While respecting the President’s role as the formal appointee of judges, the top judges called for the establishment of procedures for recruitment and screening of candidates. The draft amendments specified that the President make his appointments from a list of candidates supplied by Supreme Court and Supreme Administration Court.

These proposed amendments were designed to rescue the judicial selection from the presidential bureaucracy by preserving the existing system of recruitment and review and curbing it with the presidential power of appointment. The amendments affirmed the need for screening of qualifications by emphasizing the non-partial character of courts. These proposals on the procedures of judicial selection were eventually absorbed into the official draft law on the court system under consideration in the Duma in winter 1995.

\textit{b. Court Reorganization and Judicial Independence}

The new constitution also opened the way for a reorganization of the courts, especially in offering the subjects of the federation the right to establish and operate local courts separate from the federal court system.

\textsuperscript{27} See ibid., p.97.
But the authorities in Moscow proved unprepared to yield any existing courts to local control. All of the draft laws on court organization in circulation in late 1994 envisaged a complete court system under federal court.

The main goal of reformers of court organization was to rearrange judicial districts and building of federal inter-regional courts which would assume part of the case load of the excessively large Supreme Court. In fact, one plan put the basic level courts named judicial districts under the authority of newly created judicial districts. In the meantime, the real situation of courts and judges in 1994 was precarious. Working as a judge conferred low status and gave low payment compared to legal work in new private sector, where demand was growing. Worst of all, there was the sheer physical danger of working as a judge. Physical security emerged as a top priority for a new congress of judges and by the end of 1994 a draft law on the protection of judges and employees of law enforcement agencies had received first reading in the Duma.

One promising development for judges was the creation of their own organization, a congress of judges and a permanent council of judges, both elected bodies that served the interests of the judicial corps. Amendments to the law on the status of judges called for significant increases in salaries
and a variety of benefits for judges like free apartment and medical services and long vacation. Still, it remained the case that while some of the bases of more independent judiciary has been laid, the process of creating it had only begun. Increasing the power of the courts, especially in comparison to that of the procuracy was another major goal of judicial reformers. At the end of 1989, the courts had been empowered to hear a wide variety of such complaints and a new law in 1993 strengthened this right.²⁹

Two other particular judicial reforms symbolized the commitment to the independence and increased power of the courts. These were the revival of the jury system, whose role in deciding verdicts could shield the court from political pressures and the establishment of constitutional courts with authority to keep other branches of government operating according to fundamental law. In promising these measures reformers sought to raise the prestige of the law and its practitioners as well as to strengthen the 'third branch of government'. A detailed discussion on the Constitutional Court has been given in the last section of this chapter. The revival of 'jury system' is being touched here briefly.

²⁸ See ibid., p.98.
²⁹ In the interim, citizens did bring steadily increasing number of complaints to the courts. For example in 1991, the number of cases was 3,941, in 1992, 6,366 and in 1993, it was more than 8,300 cases.
c. Revival of Jury System

Reviving trial by jury, once a feature of late Tsarist criminal procedure for important cases became, in 1992-93, the chief goal of radical reformers of Russian criminal justice. They assumed that only the transfer of decisions about verdicts from the judges assisted by two laymen to twelve citizens acting on their own could convince the Russian public that the administration of justice had become insulated from political power. The obstacles to instituting the jury were massive - high costs; inadequate court rooms, distrust and opposition on the part of prosecutors and police, etc. But Russian legislature ultimately approved the trials for serious cases heard at the regional courts (such as murder, rape, threats) and provided for organization of the trials with an alternative criminal procedure in nine regions.\(^\text{30}\)

The initial experience with the trials in post-Soviet Russia was positive. As of mid - October 1994, ten months after the first trial in Saratov, the 9 regional courts had completed 108 trials and dealt with 145 accused persons. Four out of five trials addressed charges of aggravated murder or rape.

The foregoing account of the emerging legal institutions shows that legal institutions in Russia have changed drastically since the adoption of

\(^{30}\) In these nine regions, persons accused of serious charges had the right to elect. Trial by jury and jury trials actually began in December 1993 in the city of Saratov.
1993 constitution and law is playing an active role in society. However, attitude towards law has remained unchanged. The incentives necessary to change attitude towards law will come neither from the introduction of new laws and legal institutions nor from the improvement on paper of the existing laws and legal institutions. Instead change will come only when economic actors become convinced of the usefulness of law. During the Soviet past, law was seen as an instrument used by the state to achieve policy goals. Persistently absent from the Soviet concept of law was an understanding of law as a mechanism available to ordinary citizens to protect their interest from arbitrary actions by the state or other private actors. This state centered view of law persists in the post-Soviet Russia too.

Although the changes made to the Russian legal system during the past decade have been both fundamental and far-reaching and a legal order is fast emerging in Russia, yet for many Russians, law continues to be an instrument of the state. Economic actors do not view law as being useful to them as a mechanism either to advance their interest or to defend themselves from the arbitrary acts by the state. Equally important is that law has always been perceived in a top down fashion. Because of the Soviet legacy, Russians’ faith towards law has been very weak (see Table 1.2). President Yeltsin in his State of the Federation Speech to the legislature in February 1995 argued that:
Table 1.2
Russian Legal Views and Behaviour

<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td><strong>Over the Past Year, Has Law and Order:</strong></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Grown Stronger</td>
<td>4.2</td>
<td>1.4</td>
<td>0.8</td>
<td>4.4</td>
</tr>
<tr>
<td>Stayed the Same</td>
<td>17.1</td>
<td>17.9</td>
<td>12.8</td>
<td>20.0</td>
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<tr>
<td>Grown Worse</td>
<td>78.7</td>
<td>80.7</td>
<td>86.4</td>
<td>75.6</td>
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<tr>
<td><strong>Must Stop Crime Even if it Means Violating Suspects' Rights:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fully Agree</td>
<td>25.3</td>
<td>27.2</td>
<td>13.9</td>
<td></td>
</tr>
<tr>
<td>Agree</td>
<td>24.0</td>
<td>29.8</td>
<td>45.2</td>
<td></td>
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<tr>
<td>Can't Say</td>
<td>16.4</td>
<td>11.8</td>
<td>10.3</td>
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<tr>
<td>Disagree</td>
<td>23.1</td>
<td>23.4</td>
<td>27.8</td>
<td></td>
</tr>
<tr>
<td>Fully Disagree</td>
<td>11.3</td>
<td>7.8</td>
<td>2.9</td>
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<tr>
<td><strong>Sometimes Better to Disregard the Law and Solve Problem Quickly:</strong></td>
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<tr>
<td>Fully Agree</td>
<td></td>
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<td>3.4</td>
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<tr>
<td>Agree</td>
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<td>25.9</td>
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<tr>
<td>Can't Say</td>
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<td>16.5</td>
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<tr>
<td>Disagree</td>
<td></td>
<td></td>
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<td>43.4</td>
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<tr>
<td>Fully Disagree</td>
<td></td>
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<td>10.8</td>
</tr>
<tr>
<td><strong>Judicial Authorities Make Just and Fair Decisions:</strong></td>
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<tr>
<td>Very Often</td>
<td></td>
<td>12.8</td>
<td>9.2</td>
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</tr>
<tr>
<td>Sometimes</td>
<td></td>
<td>48.1</td>
<td>42.1</td>
<td></td>
</tr>
<tr>
<td>Rarely</td>
<td></td>
<td>33.8</td>
<td>38.9</td>
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<tr>
<td>Never</td>
<td></td>
<td>5.3</td>
<td>9.7</td>
<td></td>
</tr>
<tr>
<td><strong>Best Way to Get Things Done is Through Personal Contacts:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fully Agree</td>
<td>39.6</td>
<td>32.9</td>
<td>26.8</td>
<td></td>
</tr>
<tr>
<td>Agree</td>
<td>38.8</td>
<td>50.6</td>
<td>52.8</td>
<td></td>
</tr>
<tr>
<td>Can't Say</td>
<td>12.7</td>
<td>6.9</td>
<td>7.7</td>
<td></td>
</tr>
<tr>
<td>Disagree</td>
<td>6.4</td>
<td>7.6</td>
<td>11.4</td>
<td></td>
</tr>
<tr>
<td>Fully Disagree</td>
<td>2.4</td>
<td>2.0</td>
<td>1.3</td>
<td></td>
</tr>
<tr>
<td><strong>Rating of Lawyers:</strong></td>
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<tr>
<td>1 (Lowest)</td>
<td></td>
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<td>3.0</td>
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<tr>
<td>2</td>
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<td>5.6</td>
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<td>3</td>
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<td>9.4</td>
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<td>49.9</td>
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<td>6</td>
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<td></td>
<td>12.4</td>
<td></td>
</tr>
<tr>
<td>7 (Highest)</td>
<td></td>
<td></td>
<td>8.3</td>
<td></td>
</tr>
<tr>
<td><strong>Those Who Have Ever Contacted:</strong></td>
<td></td>
<td></td>
<td></td>
<td>(of those, percentage finding it somewhat or very helpful)</td>
</tr>
<tr>
<td>A Lawyer</td>
<td></td>
<td></td>
<td>14.8 (62.2)</td>
<td></td>
</tr>
<tr>
<td>A Cleric</td>
<td></td>
<td></td>
<td>6.6 (91.7)</td>
<td></td>
</tr>
<tr>
<td>A Patron</td>
<td></td>
<td></td>
<td>22.7 (89.8)</td>
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</tr>
</tbody>
</table>

The old technology power based on ideological and political coercion is giving way with difficulty to modern methods and approaches. Rule by directive rather than the rule of law still prevails. The cadre renewal of the state apparatus with competent people with modern ideas is meeting with tremendous resistance. The authorities and their representatives have still not learned to be open and comprehensible........ Last year Russia continued to live in a rare field legal area. The number of laws which the country needs exceeds many times over the number that have been adopted. The legislative process is often overwhelmed by political struggle. New legal customs have not taken shape and legal culture is poor. It is important to realize that respect for the law in society will only take root once the authorities respect the law.31

Thus, even if Russians are persuaded of the usefulness of law, they resist inserting themselves into the legislative process. Law is an inherently interactive process and attitude towards the legal system has a decisive influence on the willingness to use it. Changes in legal rules and institutions has to go side by side with the change in legal orientation of the Russians. Without greater attention to state building and development of legal culture, Russia stands in grave danger of becoming a country with an excellent legal system on paper but one that remains largely irrelevant to business. With the above discussion on legal structure in the background, we may now take up an analysis of the institution of the Constitutional Court which played an important role in raising the legal consciousness in Russia.

The Constitutional Court, the first incarnation of which appeared in October 1991, has arguably been the "strongest example and manifestation of respect for law" to emerge in Russia since Gorbachev resurrected the rule of law in Soviet society. This should not come as no surprise, given that the court was Russia's first truly post-communist institution.\textsuperscript{32}

In the last years of Soviet Union and first year of newly independent Russia, change moved at a lightening speed and was often expressed in legal forms. The period between 1991-94 saw a series of changes in three areas:

1. the new constitutional rules of game;
2. The emergence of a separation of powers doctrine; and
3. the creation of a Constitutional Court.

Constitutional reforms of 1990 in the Russian Republic had laid the groundwork for the establishment of a separate and independent judicial structure for the purpose of adjudicating constitutional conflicts horizontally within the separation of powers and vertically between the central state and its subnational units. By late spring 1991, the Russian

Supreme Soviet had drafted the necessary enabling legislation for the court, but political differences over the extent of the court's power, how the high judges would be selected and who they should be, delayed the final passage until mid-September 1991. In the fall of the same year 13 of the 15 judges bench was elected by the parliament to limited life tenure (until 65) from a field of 23 candidates, with the remaining seats to be filled later.

Towards the end of 1991, Valerii Zorkin was appointed as the chief justice. Despite Russians’ efforts to emulate western Constitutional Court by depoliticizing justice, the Constitutional Court especially the chief justice had been awash in politics since its inception. However, this political involvement has been a positive influence on the Russian political system as a whole and the court itself as a new judicial institution.

(i) The Court’s Legislative Mandate

Prior to the arrival of Mikhail Gorbachev, the Soviet communist law did not acknowledge the need for an independent judiciary, an independent tribunal, exercising judicial review and the acts of officialdom. All authority including judicial authority came from and was supervised by the leadership of the Communist Party. A tentative move towards judicial review was made in January 1990 with the creation of USSR Committee on Constitutional Supervision, a part of Gorbachev's reforms. The Committee
exercised some independent authority, striking down several of Gorbachev's decrees yet some considered it a failure.\textsuperscript{33} With the demise of the Soviet Union, the Committee was disbanded on 23 December 1991.

As part of the constitutional reform for the Russian Soviet Federated Socialist Republic not the USSR, which never made it to that stage – a Constitutional Court was proposed in the November 1990 draft constitution, with very broad powers of judicial review.\textsuperscript{34} Without waiting for a new constitution on 12 July 1991, the RSFSR adopted an elaborate eighty-nine article statute containing hundreds of detailed provisions establishing a fifteen-member Constitutional Court with automatic tenure until retirement at age 65 and vast powers, only slightly diminished from those listed in November draft constitution. The enabling statute endowed the Russian Constitutional Court with generous powers while imposing few restraints. The court's independence was proclaimed and work proceeded under conditions which excluded any outside influence (Article 6). Its rulings, options, messages, submissions, demands and decrees were

\textsuperscript{33} Although it had limited authority, the Committee was increasingly seen as an alternative source of political power and as a potential guarantor of human and civil rights. The Committee's inadequacy resulted from the illegitimacy of the law it was entrusted to uphold and from the fact that its rulings were treated as recommendations and as such were not binding on the government. Nevertheless, the Committee succeeded on more than one occasion in having legislation overturned.

obligatory for all addresses in the Russian Federation (Article 8). The court had the right to initiate legislation in the parliament (Article 9), presumably so that similar cases will not return to Russian Constitutional Court. Only jurists with the exception of the official representatives, might represent parties before the court (Article 36). Decisions or complaints were accepted from individual citizens as well as judicial persons (Article 66, 67). All the decisions of court was final and not subject to appeal or review (Article 50).35

At the end of October, thirteen of the fifteen judges including chairman Valerii Zorkin were appointed from among twenty three candidates proposed by President Yeltsin. While the selection process was unduly politicized and was criticized for producing only one justice with any prior judicial experience, it nonetheless signaled the birth of a new legal order in Russia.36

(ii) Working of the Constitutional Court: Major Decisions

The Constitutional Court played a constructive role in raising the legal awareness of the Russian masses and overall political institutionalization in post-Soviet Russia. In the few months of its

36 Sharlet, cited in Ahdieh, n.32, p.79
existence, the Russian Constitutional Court established itself as an aggressive tribunal determined to safeguard the emerging Russian democracy. As it proclaimed shortly after its inception:

the constitutional court does not intend to get in (the way of reform)... but any changes in the life of the state, even the most beneficial ones, should occur within the framework of law... (As) the Supreme body of legal authority it intends to take a series of steps to defend the constitutional system in the country and prevent dictatorship and tyranny from setting in, no matter from where they emanate.37

During the first year of its existence, the court tried to chart a course between the groves of law and dense political thickets of Russian transitional politics. Of the court's major cases decided during the first half of 1992, two involved review of legislative action, one concerned an executive decree, another treated federal relations and two were devoted to individual rights. In all these cases, the court declared the action under review to be unconstitutional. In only one instance was the court's authority defied - in the case most overly fraught with politics. Three of the other cases involved political agencies exercising political power, but the intensity of politics involved was muted and muffled effectively by the court's multi-layered and judicially complex legal rulings.38 The remaining

37 "Constitutional Court Pledges to Thwart Dictatorship", BBC Summary of World Broadcasts, 8 January 1992, quoted in Schwartz, n.34, p.188.
major cases entailed purely legal questions, but ones fraught with significant socio-economic implications. For the purposes of this discussion we propose to take three significant decisions considered by the Constitutional Court that had a far reaching bearing on the evolution of judicial institutions and rule of law in the Russian Federation.

a. The KGB (ISS) – MVD Merger Decree

The Constitutional Court's major dramatic ruling was handed down in its first month of operation. In January 1992, the court struck down as unconstitutional President Yeltsin's executive decree merging the police and the internal security forces into single ministry. Shortly after the August coup 1991, the KGB was partially dismantled, renamed the Inter Republic Security Service (ISS). The change left few differences between the remains of ISS and MVD and a good deal overlap, according to government officials who supported the Decree on the merger.

Accordingly, exercising decree powers given to him by the Supreme Soviet on 1 November 1991 in connection with economic reform, Yeltsin ordered the merger on 19 December 1991 to which public reacted with shock and fear. President Yeltsin's commitment to constitutional democracy was questioned by some human rights activists and former
dissidents. These fears were compounded by a simultaneous press law that would have severely inhibited journalists.

Such concerns prompted a petition by 51 Deputies to the Constitutional Court challenging the merger decree, and on 26 December 1992, the Supreme Soviet passed a resolution directing President Yeltsin to annul the decree. On the next day the Constitutional Court met quickly and issued an order temporarily suspending the merger decree until a definitive ruling, with a hearing set for 14 January 1992. At the same time, Chairman Zorkin began to make a series of public statements on the court's role and other matters. For example, the day the court issued its suspension order, Zorkin:

expressed his deep concern over instances in which legislative and executive authorities have clearly ignored constitutional principles and norms. He said that in its activity the Presidium of the Russian Federation Supreme Soviet frequently goes beyond its constitutional powers, usurping the powers of legislative and executive authorities. The Russian President's decree on organizing a Russian Ministry of Security and Internal Affairs is contrary to the principles of organizing a state based on rule of law. 39

In the meantime, the government had accelerated the merger after the petition was filed and began planning the forcible suppression of any disruptions that might result from the lifting of price constraints. These

plans were kept secret which angered the court. President Yeltsin also tried to postpone the hearing indefinitely in order to continue with the merger despite the suspension order, but his request was denied. After eight hours of deliberation, a unanimous court declared the merger as unconstitutional because the Decree violated the principles of separation of powers under the 1977 Russian constitution which has remained in effect pending the adoption of the new constitution.

The court also stressed that the Supreme Soviet has the constitutional authority to participate in the development of basic defense and state security measures and that other branches of government could not remove such issues from the Supreme Soviet's authority. Concluding that the decree violated the spirit and letter of numerous other resolutions of the Supreme Soviet, the court found that the Decree "in practice deprived

40 The challenges argued that the Decree was a threat to democracy and to individual rights; Sergei Sakharai, State Counselor for Legal Policy disputed this and stated that it was within the Russian President's powers.

41 The Ruling read as follows:

Having heard in open court, the case testing the constitutionality of the Russian President's (merger) Decree, the court has decided to declare this Decree to be not in keeping with the RSFSR constitution from the standpoint of the separation of the legislative, executive and judicial powers established in the Republic and codified in the constitution. The decision is final, can not be appealed and enters into force immediately after its proclamation. This means that the Russian President's Decree on the formation of Ministry of Internal Security and Internal Affairs and all other acts based on this Decree or reproducing it lose their legal force and are to be considered invalid, and are to revert to the state existing before the adoption of the unconstitutional Decree, See Rudnev, "Constitutional Court Rescinds Yeltsins Decree on the Creation of Security and Internal Affairs", Soviet Press Digest (19 February 1992), p.13 and Izvestia (15 January 1992), pp.1-3.
the RSFSR Supreme Soviet of the opportunity to participate in the formation of basic measures in...defense and...national security" in violation of the constitution.\footnote{See Schwartz, n.34, p.180.} This, the Constitutional Court found, affected the most fundamental rights of citizens such as the right of inviolability of the person, of privacy, of the name, and of the secrecy of communications.

The immediate aftermath was confusing and President Yeltsin's first reaction was ambiguous. Zorkin reported that he had to obey the court's rulings. A few days later Yeltsin issued an order separating the two agencies.

Thus, the court's first foray into judicial review - albeit only of an executive decree, not legislative action – clearly showed a determination to insist on the rule of law. This determination reflected itself not only in the decision but also in the many extra-judicial statements by its chairman.

\textit{b. The Tatarstan Referendum Case}

The case on federal relations, called as the Tatarstan Referendum case was a major setback for the court in its first year of work. The authorities of the Tatar Autonomous Republic announced their intention to conduct a public referendum in March 1992 on the question of whether Tatarstan should be a separate state within the Russian Federation. This
was perceived as a secessionist referendum in Moscow. The case came to the court which concluded that the referendum as well as key parts of the antecedent Tatar Sovereignty Declaration contravened the constitution of the Russian Federation. The court, therefore, ordered the referendum cancelled. However, the court's verdict did not deter the Tatar Republic in going ahead with the referendum plan. In this sense it was a setback to the power and authority of the Constitutional Court. Despite its setback in this Tatarstan Referendum case, the Constitutional Court had accrued legitimacy and judicial authority giving it still greater leverage for trying to mediate Russia's profound political and constitutional crisis.

The problems with Tatarstan began to take constitutional form on 30 August 1990 when its government issued a Declaration of Sovereignty just three months after Russia declared its sovereignty. Tatarstan Declaration which was to be the basis for a new Tatarstan constitution and laws omitted any reference to Tatarstan remaining part of Russia. The Russian authorities, preoccupied with their own problems vis-a-vis the country at large did nothing. Thereafter, in April 1991, Tatarstan revised the preamble to it's constitution and the titles of certain constitutional articles so that they no longer included Tatarstan in the Russian Federation or accepted the
supremacy of the Russian law over the laws of Tatarstan. Russian authorities continued to ignore the issue.\textsuperscript{43}

Then on 29 November 1991 and 21 February 1992, Tatarstan nationalist pressure produced a series of laws that scheduled a referendum on 21 March 1992 on the following question: “Do you agree that the Tatarstan Republic is a sovereign state and a party to international law, basing its relations with the Russian Federation and other republics and States on Treaties between equal partners? Yes or no?”\textsuperscript{44} At the same time, in late January or early February 1992, Tatarstan stopped transmitting tax collections to Moscow. This time the Russian authorities reacted and strongly.\textsuperscript{45} The real meaning of the question posed in the referendum remained obscure.\textsuperscript{46}

Fearing the referendum proposal as both a vehicle of Tatarstan secession on 5 March 1992, a group of Russian Deputies led by Constitutional Commission Secretary General Oleg Rumyantsev petitioned the Russian Constitutional Court to review the constitutionality of the referendum. The Deputies argued that the referendum might lead to change


\textsuperscript{44} Ibid.

\textsuperscript{45} See Schwartz, n.34, p.183.

\textsuperscript{46} Tatarstan Representatives admitted that the question was deliberately ambiguous so that people would vote ‘yes’ without realizing that they were voicing for secession.
in the Russian Federation's territory, a move that the constitution forbids republics to attempt unilaterally.

The court promptly scheduled a hearing for 13 March. After several hours of argument and testimony, the court found that both the 1990 Declaration of Sovereignty and the Referendum violated the Russian constitution in several aspects:

- The denial of supremacy of federal laws over the laws of members of the Federation is contrary to the constitutional status of the Republics in a federated state and precludes the establishment of a law-governed state;

- The Decree is .... a legislative instrument, predetermining the direction and the context of the legislative process;

- Without denying the national group's right to self-determination exercised by means of a legal expression of the electorate's will, we must proceed from the fact that international law limits it to the observance of the requirements of the principle of territorial integrity and the observance of human rights;

- According to the constitution of the RSFSR, the Tatarstan Republic is part of the RSFSR (Article 71); the territory of the Tatarstan Republic must correspond to the RSFSR and may not be changed without its consent (Article 70); the constitution of the Tatarstan Republic must correspond to the RSFSR constitution (Article 78).....; and

- The ambiguity of the questions deprives citizens of the right to express their will freely and to participate in the discussion and adoption of laws and decisions of state-wide significance.47

47 See Schwartz, n.34, p.185.
The court's reasoning on the declaration of sovereignty seems to be perfectly sound. Chairman Zorkin in subsequent 'extra-judicial' statements, justified the court's involvement on grounds that a positive response to referendum would have provided all legal grounds to secede from the Russian Federation, should a more nationalist leadership come to power in Tatarstan. In the days between the decision and the referendum, Chairman Zorkin continued to call for obedience to the court's decision, warning of "a collapse of the constitutional order". Nevertheless, on 21 March 1990 the referendum was held.

In retrospect, Tatarstan's defiance is not surprising. The issues of judicial supremacy and respect for court became intertwined with and subordinate to the overriding issue of Tatarstan's adherence to the Russian Federation and its institutions in general. Whatever might have been the result and future course of the case, the Tatar situation obviously represented a serious challenge to the Constitutional Court. Although the court had many difficult issues on its docket, few of these cases like the Tatarstan case raised the danger of defiance inherent in a conflict with a national or ethnic group that was trying to escape from federal authority.

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49 Despite a last minute plea from President Yeltsin, 61% of the total 82% turnout voted yes. Within Kazan, the largely Russian capital, 51% however, voted no and there were apparently negative results in other large cities, see Schwartz, n.34, p.186.
c. The CPSU case

One of the most important cases heard by the Constitutional Court was that related to the Communist Party Case which occupied most of its first year of operation. The case not only brought the court into national spotlight, it also catalyzed its descent into politics of the most partisan kind. It represented the beginning of a constitutional jurisprudence in Russia, but the end of the Constitutional Court itself (first phase). In terms of the development of a law-based state, this case was a watershed.

The CPSU case arose out of the cauldron of events surrounding the abortive coup of 1991. Not long before the coup, the then recently elected President of Russia had begun a legal campaign against the Russian Communist Party. On 23-25 August 1991, Yeltsin issued decrees suspending the Russian Communist Party and taking both Russian Communist Party and the CPSU's property into safe keeping pending a judicial investigation into their complicity in the coup. (Ukaz 1991a & 1991b). In those heady days little could be made of the fact that Yeltsin's decrees exceeded presidential authority under the RSFSR constitution, preempted prevailing law and usurped judicial functions. Events rushed and

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50 See Ahdieh, n.32, p.80.
a few months later, as the Soviet Union was coming apart, Yeltsin issued his 6 November Decree converting the suspension into a ban and formally nationalizing the parties' buildings and bank accounts. The three decrees taken together formed the basis of the CPSU case in the amended petition submitted to the Constitutional Court by the Ivashko-Kuplsov group of deputies on 7 February 1992.\textsuperscript{52} In its final version, the Deputies petition asked the Constitutional Court to review the constitutionality of Yeltsin's August decrees as well as his November edicts.

The case revolved around the constitutional and legal status of the Communist Party and whether in the light of this Yeltsin could permissibly disband the party and seize its property and assets. More specifically, the case concerned the constitutionality of Yeltsin's Decree numbers 79, 90 and 169 respectively of 23 and 24 August and 6 November 1991. With these decrees Yeltsin first suspended the Communist Party and took its properties into temporary receivership and then banned the party permanently and nationalized all its property holdings.

A group of Communist Party Deputies first set the case in motion with a 7 February 1992 petition to the court arguing the decrees to be beyond Yelstin's constitutional authority. Yeltsin's anti-communist allies

\textsuperscript{52} See Sharlet, n.35, p.17.
decided to complicate the case and in early May, just before the court was
scheduled to begin hearings on the party's petition, filed a petition
requesting that the court address the legality of the party and determine its
status under the constitution. The court proceeded to join both the petitions.

With the merger of the two petitions, the case came to encompass
three distinct questions, each of a mixed legal and political character.\(^53\)

- The first was the largely factual question of whether the
  Communist Party had been involved in the attempted
  August 1991 coup against Gorbachev, the event that was
  the original impetus for Yeltsin's decrees;

- Second, and far broader question, was what kind of
  organization the Communist Party actually was. Resolution of this involved the submission of thousands
  of pages of documents and lengthy testimony as to whether the party was reforming itself by August 1991 or
  was unreformable; whether the party was the state,
  controlled the state or was a separate entity therefrom or
  whether its property was, in fact, state property.

- Finally, the hearings addressed the constitutionality of
  Yeltsin's Decrees themselves.

Only this last issue, the original one was a truly legal question. The
party, therefore, argued that the decrees violated both the division of
authority with the executive branch and the separation of powers between
the executive, on the one hand, and the legislative and judiciary, on the
other. The long and the contentious trial drew wide public and media

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See Ahdieh, n 32, p.81.
attention, with all eyes anxiously scrutinizing the work of the fledgling court on this hot issue. A prominent example of the media spectacle that the case became was the former President Gorbachev's refusal to respond to summons to appear as a witness, Yeltsin's resulting decision to deny him visa to travel abroad and Gorbachev's consequent self anointment as the first post-Soviet "refusenik". The case was also perceived, by the way, as a determining factor in whether Russia would move forward or remain caught up in its past. This changed political atmosphere made neutral and effective decision-making by the court a near impossibility:

For the Constitutional Court, the CPSU case presented opportunities, but also posed dangers. The proceedings afforded the court a highly visible occasion to establish itself among elite and the public alike as the indispensable "third branch" of government in the emerging separation of powers doctrine in Russia. At the same time..... (it) represented a classic political question that the court was supposed to avoid.

To the surprise of all, the court announced its decision only weeks after it closed its six months of hearing. The actual decision was solomonic, a compromise which gave each side something. Disappointing to both parties, it did not stand on particularly firm legal grounding either. The court upheld the constitutionality of Yeltsin's decrees, but only as against

54 Sharlet, quoted in Ahdieh, n.32, p.82.
55 Ibid.
56 For a detailed analysis of the verdict (30 November 92), see Donald Barry D., Constitutional Politics: The Russian Constitutional Court as a New Kind of Institution in Russia and America: From Rivalry to Reconciliation (Armonk: ME Sharpe, 1993).
the party's national bodies, which could be logically implicated in the coup and which had most visibly merged into the state. The party's national institutions thus should be distinguished from its local and regional cells, which Yeltsin could not constitutionally ban. The court similarly limited the confiscation of property, authorizing local party groups to bring petitions in the regular courts to regain their property.

The CPSU case was replete with dangers for the court as a still very new and novel institution in Russia. It was a constitutionally untidy case, since the state's character was in flux between Yeltsin's August and November Decrees. Yet the court carved out a niche for itself as an impartial mediator of disputes between other branches. Following the CPSU verdict, the Constitutional Court Chairman Zorkin immediately plunged into the swirling politics of the Seventh Congress of People's Deputies and the aftermath. By the end of the session in mid-December 1992, the chief justice had reached the zenith of his extra-judicial career emerging as an honest broker on a deal between President and parliament to escape constitutional crisis and political gridlock. The Constitutional Court by this time faced the formidable challenge to the very institution and its stability as the third leg of Russia's evolving separation of powers. In spite of being buffeted by the powerful crosswinds of the political arena, the court emerged afloat as both parties rose to the raging conflict of spring
1993 and turned again to the Constitutional Court to adjudicate and in effect mediate their contradictory constitutional means.

The Constitutional Court played a constructive role in raising the legal consciousness of the masses. Early on, the public came to see the Constitutional Court as a forum where their rights might be defended. The scope of activity of the first Constitutional Court, in its early years of working could be contrasted with that of the United States Supreme Court, which generally eschewed such bold jurisprudence over a hundred years. A similarly gradual expansion of the Russian Court’s purview would have better allowed it to secure each step and thereby ensure its long term viability and influence. Unfortunately, however, the pace of unfolding crisis in Russia proved itself too formidable for the court-brokered fragile truce between the President and the Parliament to sustain itself. In the process, the prestige of the court suffered a setback. Its perceived neutrality led to a decline of public estimation of this institution.

(iii) The Decline of the First Constitutional Court

As already mentioned, Constitutional Court in Russia did not have the luxury of acting as a purely judicial body. Russia’s difficult process of transitional politics made it imperative that the court walks a highwire between law and political expediency. As justice Virtouk argued:
I believe that the principal shortcoming in the court's work during this period was its gradual transformation from a temple of justice into an instrument of political struggle as it drifted away from law and entered into the political frey....\textsuperscript{57}

Two events which particularly made an adverse impact on the authority and prestige of the court were when in January 1993 Zorkin condemned the idea of a referendum as destabilizing and when he rushed to condemn Yeltsin's announcement on 20 March 1993, of a 'special rule' even before he had seen the document in question. The most powerful challenge to the court's authority was posed by Yeltsin's decree of 21 September 1993 that suspended the old constitution of Russia. By the same decree the court was urged not to meet until Federal Assembly began its work. The court with its heightened political activity was not in a mood to take these extra ordinary developments. Ten out of fourteen judges condemned the presidential decree which led Yeltsin in October to bring out another decree suspending the court itself.\textsuperscript{58}

Thus, as pointed out earlier, the court had tried to assert its authority as a worthy representative of judicial authority to achieve the separation of powers, but the titanic struggle between the executive legislative authority marginalised the judiciary and trampled on the rule of law in its entirety.

\textsuperscript{57} Vitrouk Comments, quoted in Ahdieh, n 32, p.89.

\textsuperscript{58} See S.K. Jha, The Constitutional Court in Russia (Paper presented to a seminar in JNU, New Delhi), p.7.
The procedures of the Constitutional Court was attacked for its alleged encouragement to acts of political adventurism.

(iv) The Constitutional Court Under the 1993 Constitution

The dissolution of the old legislature and the suspension of the Constitutional Court seemed to illustrate the old Russian principle that law is subordinate to politics. The 1993 constitution established a new Constitutional Court of nineteen judges (Art 125). The judges are appointed by the Federation Council, the upper chamber of Russian parliament, on the basis of nominations made by the President. The new court has a more restricted range of powers than its highly active and politicized predecessor. It is now deprived of the right to initiate cases on its own. Designed to ensure that federal laws and decrees conform to the constitution, the Constitutional Court has lost some of its prerogatives concerning the interpretation of relationship and areas of jurisdiction between the central authorities and components of the federation. Mechanisms have been meticulously established to ensure that unrestricted appeals to the Court are more difficult as part of the attempt to transform it into a more professional and less politicized body. The Court now has a stable constitution to work with rather than the earlier constantly changing text.
According to the 1993 constitution of Russia, the Constitutional Court shall resolve cases relating to compliance with the constitution which include:

- federal laws and normative enactments of the President, the Federation Council, the State Duma or the Government of the Russian Federation;

- the constituents of the republics and the charters of components of Russian Federation and laws and other normative acts issued by them on matters falling within the jurisdiction of bodies of state power or the joint jurisdiction of the bodies of state power of the Russian Federation and bodies of state power of the components of the Russian Federation;

- treaties between bodies of state power of the Russian Federation and bodies of state power of components of the Russian Federation and treaties between bodies of state power of the components of Russian Federation;

- international treaties of the Russian Federation that have not entered into force.

The constitutional Court shall resolve disputes over areas of jurisdiction:

- between federal bodies of state power;

- between bodies of state power of the Russian Federation and bodies of state power of components of the Russian Federation;

- between the highest state bodies of components of the Russian Federation.

The Court on the basis of complaints regarding the violation of citizen's constitutional rights and freedoms, shall examine the constitutionality of the law that has been applied or is applicable in the specific case, in accordance with the procedure laid down by federal law.
The Constitutional Court shall provide an interpretation of the Constitution of the Russian Federation. The Constitutional Court, on the application of the Federation Council, shall issue a ruling on whether the presentation of a charge against the President of treason or the commission of some other grave crime complies with established procedure.

The right to appeal to the Constitutional Court has been given to the President of the Russian Federation, the Federation Council, the State Duma, one-fifth of the members of the Federation Council or Deputies of the State Duma, the government of the Russian Federation, the Supreme Court or the Superior Court of Arbitration, or bodies of legislative and executive power of the components of the Russian Federation.

Furthermore, the new law concerning the Constitutional Court, adopted in mid-1994, considerably reduced its scope for independent political activity. Under the present dispensation, the judges are no longer allowed to accept cases for consideration on their own initiative. Besides, the range of 'official entities' that could move the Court are severely restricted now. Whereas earlier any deputy could send questions, now this could only be done with the approval of one-fifth of the deputies of any chamber or by the majority vote of the Federal Assembly as a whole.
However, in certain respects, the authority of the Court has experienced an improvement, too. For example, the ruling of the Court on the constitutionality of the presidential decree, a government resolution or parliamentary law is final and cannot be appealed against. Similarly, any legal act that is ruled as unconstitutional loses its force. From the procedural point of view, it is necessary for the Court to examine cases in the strict chronological order in which they are presented, though it can consider similar cases together.

The reconstitution of the Constitutional Court under the new constitution was not entirely problem-free. Some of the judges on the new bench remained from the old Court, but the confirmation of the new names took over a year to complete because the President's nominations were repeatedly rejected. Finally, on 7 February 1995, the Federation Council approved the nominations of the nineteenth judge whereupon the court could begin its activities. The new chairman of the Court, Vladimir Tumanov, significantly stated that 'in the transitional period constitutional stability is the highest value', but he also warned against general lack or respect for the law which in his opinion posed the gravest challenge to the Court.
The Constitutional Court in Russia, like its East European counterparts, is a post-communist phenomenon. During the transition to democracy the Court tried to play a definitive role and make significant contribution in the promotion of constitutionalism and rule of law in Russia. Most of its decisions were sensitive to and supportive of civil rights and liberties. In many respects it conducted itself with 'thoroughness, professionalism and without political bias.' In its work, the public observed for the first time a relatively open legal process in which till-then inviolable state powers were forced to answer for their actions, under the terms of the law, to a superior body of review. Despite the inexperienced first court, our overall assessment of its two year tenure should not be entirely negative. At least, at the outset, by carrying itself well, the court effectively advanced the role of law on the political landscape and acquired "a great authority in the eyes of the people". But in the height of activism, the court could not recognize that it was commingling law and politics that provoked a torrent of personal criticism of its Chairman Zorkin and also led the public mood go against the very spirit of this nascent institution in post-Soviet Russia. Not surprising that the court had to pay a heavy price in

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59 Belyaeva, Russian Democracy, quoted in Ahdieh, n.32, p.83.

60 Justice Nikolas Virtouk, the interim chairperson in 1994 acknowledges that the court's political involvement during its first two years resulted in systematic violations of procedural norms, see Nikolas Virtouk, Comments at Mentor Group Conference on Russian Constitutional Affairs, 14-18 November 1994, Conference Report, 44, quoted in Ahdieh, n. 32, p.84.

61 Ernst Ametistov, Member of Russian Constitutional Court (16 August 1993), quoted in Ahdieh, n. 32, p.83.
terms of its diminution of authority and prestige. However, in the 1993 constitution of Russia, this institution has been retained and it is here, at this level, that a substantive difference could be made. It appears that the working of the present Constitutional Court will have fresh opportunities to refurbish its judicial image and rebuild its political credibility. How the Court will fare during the next few years remains yet to be seen. But as far as democracy and rule of law is concerned it can make a significant contribution in keeping Russia on course towards a state based on rule of law.

To summarize our findings in this chapter we see that under Socialist system in which the Soviet Union functioned, the role of law was understood in its relation to the state. Its purpose was to discipline people and create some kind of bureaucratic consistency in the administration of state affairs. Contrary to Weber’s bureaucratic law model, this legal system was not predictable. But with Gorbachev’s rise to power, Soviet law became central to the study of Soviet politics, as Perestroika defined itself through the medium of law and new legislation. As party authority declined and social forces released by Gorbachev’s policies gained ground, the rules of the game in Moscow shifted from Partinost to Zakhonnost.

As Russia moved through its turbulent post-Soviet transition, law became a defining idiom of the ongoing political struggle. The strengthening of law and the legal institutions, a process that had gained
momentum in Gorbachev period accelerated in post-Soviet Russia with the emergence of dozens of laws concerning property rights, land use, private enterprises, banking etc. The coming into force of the civil code in January 1995 was a major step towards stability and predictability in post-Soviet jurisprudence. Although the initial efforts to introduce juries have had mixed results, yet Russian juries have as a whole, shown greater maturity and worked far more effectively than anticipated. Our discussion on judicial reform shows that the lack of a cadre of legal personnel hampered the effective operation of the legal system. The situation slowly improved since the creation of the first national bar association, the Union of Advocates of the USSR in February 1989, and the adoption of the concept of judicial reform (1991) and the law on the status of judges of the Russian Federation 1992. In the new constitution, for the first time in Russian history, there exists the basic framework to create a functional judiciary and a new constitutional order. However, the change in legal structure and procedures have to be accompanied by equally far-reaching changes in legal culture. The main challenge for law and legal institution continues to be the people's attitude towards these. They must come forward to view the courts not as institutions of state but as institution for serving them justice.