

‘Telephone Law’ and the ‘Rule of Law’: The Russian Case

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By conventional measures, Russia lacks the ‘rule of law’. For evidence, we need look no further than the notorious *Yukos* case, in which its president, Mikhail Khodorkovsky, was railroaded into a criminal conviction and his company was bankrupted, with the proceeds mysteriously ending up in the hands of Kremlin insiders. The *Yukos* case is only the most infamous example of so-called ‘telephone law’, a practice by which outcomes of cases allegedly come from orders issued over the phone by those with political power rather than through the application of law. The media is replete with such accounts. The conclusion typically drawn by media commentators and social scientists alike is that the omnipresence of ‘telephone law’ makes any reliance on formal law or legal institutions in Russia foolhardy.

Generalizing from politicized cases with high stakes for everyone involved, including the state, is, however, problematic. Though the willingness of officials to mobilize ‘telephone law’ in such cases, either to further the interests of the state or for self-aggrandizement, clearly undermines the goal of equality before the law for all, whether it is reflective of practices in non-politicized cases is unclear. If it were, then we would expect to find a reluctance on the part of ordinary Russians to take their disputes to court. Yet the caseload data document just the opposite: the number of civil cases has more than doubled over the past decade. This gives rise to a puzzle: why are Russians willing to use a legal system that is so deeply and patently flawed? More importantly, what does it reveal about the prospects for the ‘rule of law’ in Russia?

By conventional measures, Russia lacks the ‘rule of law’. At the core of all definitions of this concept, whether ‘thick’ or ‘thin’, is a requirement of equal justice for all.¹ In this idealized legal system, no one is above the law, and no one, irrespective

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¹ There is a large and constantly expanding literature on the definition of the ‘rule of law’ (e.g., Brain Tamanaha, *On the Rule of Law: History, Politics, Theory*, 2005; Lon L. Fuller, *The Morality of Law*,

of their wealth or political influence, can dictate the outcome of cases brought to the courts. Few would dispute that Russia has fallen short on this criterion. For evidence, we need look no further than the notorious *Yukos* case, in which its president, Mikhail Khodorkovsky, was railroaded into a criminal conviction and his company was bankrupted, with the proceeds mysteriously ending up in the hands of Kremlin insiders.² But the *Yukos* case is only the most infamous example of so-called ‘telephone law’, a practice by which outcomes of cases allegedly come from orders issued over the phone by those with political power rather than through the application of law.³ The media is replete with such accounts.⁴ The conclusion typically drawn by media commentators⁵ and social scientists⁶ alike is that the omnipresence of ‘telephone law’ makes any reliance on formal law or legal institutions in Russia foolhardy. Put differently, the Russian government’s commitment to law is not seen as credible.

Generalizing from politicized cases with high stakes for everyone involved, including the state, is problematic. Though the willingness of officials to mobilize ‘telephone law’ in such cases, either to further the interests of the state or for self-

rev. edn., 1964). My goal is not to dispute the existing definition(s). On ‘thick’ versus ‘thin’ versions of the ‘rule of law’, see Randall Peerenboom, ‘Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China’, in *23 Michigan Journal of International Law* (2002), p. 471. For a more thorough discussion of whether certain elements of the ‘rule of law’ are present in Russia, see Kathryn Hendley, ‘Are Russians Still Soviet? An Analysis of the Efforts to Introduce Adversarialism to the Russian Arbitrazh Courts’, in *23 Post-Soviet Affairs* (2007), p. 240; and Jeffrey Kahn, ‘Vladimir Putin and the Rule of Law in Russia’, *36 Georgia Journal of International and Comparative Law* (2008), p. 511.

² William Thompson, ‘Putting Yukos in Perspective’, *21 Post-Soviet Affairs* (2005), p. 159.

³ Alena V. Ledeneva, ‘Telephone Justice in Russia’, *24 Post-Soviet Affairs* (2008), p. 324.

⁴ E.g., Limovtsev, ‘Telefonnoe pravo’, *Vremya Novosti*, July 1, 2008 (the governor of Stavropol krai is alleged to have used the criminal process to undermine the chances of a political rival) <http://www.vremya.ru/print/207335.html> (March 15, 2009); Sanatorov and Bogdanov, ‘Mera Tvera otstavili v koloniiu’, *Kommersant*, August 28, 2008 (the governor of Tver oblast’ engineers criminal charges to be brought against the mayor of Tver to provide an opportunity for a candidate loyal to the governor) <http://www.kommersant.ru/doc.aspx?DocsID=1017132> (March 15, 2009).

⁵ E.g., Schwirtz, ‘New Trial for Tycoon Is a Test for Russia’, *New York Times*, March 6, 2009, p. A6; Lipman, ‘Medvedev’s Promises on Trial in Russia’, *Washington Post*, April 8, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/07/AR2009040703377.html> (June 13, 2009); ‘A Matter of Judgment’, *The Economist*, November 27, 2008, http://www.economist.com/specialreports/PrinterFriendly.cfm?story_id=12628022 (March 15, 2009).

⁶ Rose captures this common wisdom by noting that ‘[t]he chief obstacle to democratization is not the absence of elections but the failure of governments holding elections to be bound by the rule of law.’ See Richard Rose, *Understanding Post-Communist Transformation: A Bottom-Up Approach*, 2009. E.g., Alena V. Ledeneva, *How Russia Really Works: The Informal Practices that Shaped Post-Soviet Politics and Business*, 2006; Ledeneva, ‘Telephone Justice in Russia’; Jonathon R. Hay and Andrei Shleifer, ‘Private Enforcement of Public Laws: A Theory of Legal Reform’, in *88 American Economic Review* (1998), p. 398.

aggrandizement, clearly undermines the goal of equality before the law for all, whether it is reflective of practices in non-politicized cases is unclear. If it were, then we would expect to find a reluctance on the part of ordinary Russians to take their disputes to court. Elsewhere, I have argued that the 'rule of law' can blossom only where the top-down supply of law and legal institutions is met by a robust bottom-up demand for law.⁷ Surely the steady drumbeat of negativity in the media regarding the legal system would have dampened any desire to litigate. Yet the caseload data document just the opposite. As Table 1 demonstrates, the number of civil cases has more than doubled over the past decade. This, in turn, gives rise to a puzzle: why are Russians willing to use a legal system that is so deeply and patently flawed? More importantly, what does it reveal about the prospects for the 'rule of law' in Russia?

Table 1. Trends in the caseload of the Russian courts of general jurisdiction: 1997-2007

<i>Type of case</i>	<i>1997: Total cases decided (in thousands)</i>	<i>2007: Total cases decided (in thousands)</i>	<i>Percent change</i>
Criminal	1055.8	879.7	- 16.7%
Civil	3881.6	9009.0	+ 132.1%
Administrative	1879.5	5553.5	+ 195.5%

Source: http://www.cdep.ru/statistics.asp?search_frm_auto=1&dept_id=8 (March 1, 2009).

To date, the voices of ordinary Russians have been missing from the analysis of the relative presence or absence of the 'rule of law'. Public opinion polls assessing the level of trust in courts have been used as a crude substitute, but the questions posed have not been sufficiently nuanced to allow us to parse the motivations behind the respondents' behavior. Indeed, the polling data only deepen the mystery. In the periodic surveys on the level of societal trust in various institutions run by the reputable Levada Center over the past 10 years, less than 20 percent of those surveyed evidenced confidence in the courts. Another survey organization took a blunter approach by asking respondents in a national survey whether they believed the courts to be independent from political influence, and got similar results. Only 13 percent believed the courts to be truly independent, while 42 percent believed them to be dependent in some way on the political leadership.⁸ On the other hand, when surveyed in 2007, more Russians indicated that it would

⁷ Kathryn Hendley, 'Rewriting the Rules of the Game in Russia: The Neglected Issue of Demand for Law', in 8 *East European Constitutional Review* (1999), p. 89.

⁸ A plurality of those surveyed (45 percent) took no position. Results available at: http://bd.fom.ru/report/cat/power/pow_just/d082322 (March 1, 2009).

make sense to defend themselves through the courts if their rights were violated (51 percent) than did when surveyed in 2003 (42 percent). But data suggest that this attitudinal shift had been slow to translate into actual participation in the legal system. Only a handful (less than 10 percent) of those surveyed had initiated a lawsuit. About 20 percent more had some personal experience with the courts, though mostly as witnesses.⁹ Taken together, these results from public opinion polls are more consistent with the common wisdom that the Russian courts are dysfunctional than with the reality of increased use of courts.

In this article, I challenge the common wisdom through a bottom-up approach. Frustrated by the lack of nuance in the available data, I decided to take a step back. I engaged in a series of semi-structured interviews with ordinary Russians during the summer of 2007 about the role of law in their lives. The conversations took place as part of a larger project on legal reform in Russia. With the help of the Institute of Sociology of the Russian Academy of Sciences, I convened 12 focus groups in Moscow and Saratov.¹⁰ The focus groups brought together people who had recently completed a home repair project or who had experienced a personal injury. After each of the focus groups, I asked several participants for follow-up interviews with the goal of probing more deeply into their attitudes towards law and their motivations for using and/or avoiding the legal system. Of the 59 focus group participants, I had these additional conversations with 39, 20 from Moscow and 19 from Saratov. I selected them in an effort to get variation along a number of criteria, including gender, education, age, class, and work experience. Tables 2 and 3 lay out background information about my respondents. The conversations ranged from one to two hours and were recorded. These 39 interviews serve as the source material for this article. While I make no claims that they constitute a random sample, the insights and the larger themes that emerge from them give rise to a number of hypotheses that deserve more systematic exploration.

⁹ Results available at: http://bd.fom.ru/report/cat/power/pow_just/d073324 (3/1/09).

¹⁰ The selection of these two cities was designed to provide a contrast. Moscow (population: 10.5 million) is the financial, governmental, and cultural center of Russia. Saratov (population: 836,100) is situated on the Volga River and serves as the administrative center for the surrounding region (Saratov *oblast*). During the Soviet era, its concentration of defense industry meant that it was closed to foreigners. These defense-related factories have since foundered, undermining the economic base. A comparison of the average monthly wage in 2007 illustrates the difference. While the mean wage for Muscovites was about 35,500 rubles (or about \$1365 at the then-prevailing exchange rate of 26 rubles to the dollar), Saratov residents have to settle a fraction of that (7252 rubles or about \$278). The unemployment rate for Moscow (0.8 percent in 2007) was trivial compared to that for Saratov (8 percent in 2007). These statistical data are available in *Regiony Rossii*. <http://udbstat.eastview.com.ezproxy.library.wisc.edu/catalog/readbook.jsp?issue=825442> (March 1, 2009).

Table 2. Moscow respondents

<i>Name</i>	<i>Age</i>	<i>Education</i>	<i>Profession</i>	<i>Prior court experience</i>
Anna	40	University degree	Realtor	Plaintiff
Dmitrii	21	University student	Travel agent	Parents were plaintiffs
Elena	35	University degree	Office manager	None
Evgenia	31	University degree	Office manager	Witness in neighbor's case
Fatima	25	University student	Charitable work	Defendant
Galina	56	University degree	College teacher	Plaintiff
Ivan	61	University degree	Pensioner	Plaintiff; Defendant
Klara	51	High school degree	Pensioner	Son was crime victim
Konstantin	45	University degree	Security guard	None
Liubov	56	University degree	Chief accountant	Defendant
Marina	58	University degree	Economist	None
Natasha	37	University degree	Music teacher	Plaintiff
Olga	59	University degree	Pensioner	Witness in friend's case
Polina	25	University degree	Social worker	None
Roman	31	University degree	Computer programmer	None
Tamara	24	University degree	Office manager	None
Tatyana	52	High school degree	Medical technician	Plaintiff
Valentina	43	University degree	Manager	Defendant
Vladimir	51	Incomplete university	Mechanic	None
Vladislava	35	University degree	Economist	None

Table 3. Saratov respondents

<i>Name</i>	<i>Age</i>	<i>Education</i>	<i>Profession</i>	<i>Prior court experience</i>
Anton	31	University degree	Geologist	None
Boris	20	High school degree	Security guard	None
Daria	55	High school degree	Pensioner	None
Elvira	44	University degree	State bureaucrat	Defendant
Inessa	45	University degree	Teacher	Crime victim
Irina	51	University degree	Doctor	Plaintiff
Iulia	29	University degree	Optician	None
Karina	42	University degree	Doctor	None
Katya	20	Ongoing university	Student	Plaintiff
Liudmila	44	University degree	Microbiologist	Witness in friend's case
Maria	39	High school degree	Beautician	Defendant
Mikhail	21	Ongoing university	Student	None
Nadya	20	Ongoing university	Student	Parents were plaintiffs
Pavel	18	University student	Student	None
Raisa	47	University degree	Doctor	Plaintiff
Sara	45	University degree	Manager	None
Svetlana	38	University degree	Doctor	None
Vera	35	University degree	Psychologist	None
Viktor	33	University degree	Doctor	Witness

RUSSIANS' ATTITUDES TOWARDS LAW: SWORD OR SHIELD?

I started the interviews by asking the respondents about their images of law in Russia. I asked whether they saw law as a sword and who typically wielded that sword. I was particularly interested in whether they saw themselves as entitled to use law in this way to advance their interests *vis-à-vis* the state or other citizens. I also asked whether they thought of law as a shield that they could use to defend themselves, both from the state and from other citizens. It goes without saying that any sort of demand for law would have to be intertwined with a conception of law that encompassed these images.

Relatively few people saw law in Russia as a viable shield. This is hardly surprising. The low levels of trust reflected in the public opinion polls captures the lack of confidence in the capacity of law to protect them.¹¹ Indeed, every person I spoke with raised the shortcomings of the Russian legal system in one form or another. The dissatisfaction bridged generational differences as well as other key variables, such as gender, location, education, and class. Older people, such as Daria,¹² a 55-year old pensioner from Saratov, expressed their longstanding frustration: 'In our country, it has never been possible to defend oneself with law.' Such sentiments were not limited to those who had lived through the Soviet era and who might be expected to retain some skepticism about the capacity of law to protect citizens. Polina, a 25-year old social worker from Moscow, spoke for many when she complained that 'we need to be protected from the law ... at present, law works against us.' For most, the anger expressed by Polina was combined with a sense of resignation and plaintiveness, as is reflected in this comment by Anna, a 40-year old realtor from Moscow who was trained as a lawyer and had previously worked in the bureaucracy of the courts: 'It is very sad that we live in this sort of state where we are completely unprotected.' Thus, even those who were intimately familiar with the inner workings of the legal system chimed in to decry its weaknesses. Ivan, a 61-year old Moscow pensioner, who had become a frequent and often successful litigant in his retirement years and who had taught himself enough about the legal system to represent himself, remarked that 'we write about the fact that we have a *pravovoe gosudarstvo* [a rule-of-law based state], but we don't. We've never had it and we never will.' This remark reveals a weariness with the claims of successive post-Soviet regimes to be moving closer to the 'rule of law' through institutional innovations. Though such changes may look good on paper, they did not resonate with my respondents.¹³

¹¹ Liliia Mirza, 'Krizis doveriia sudu', 12 *Chelovek i zakon* (2008), p. 51.

¹² Respondents were promised anonymity. Their names have been changed.

¹³ For example, few of them were aware of the justice of the peace courts (*mirovye sudy*), a Putina-era institutional innovation that ostensibly made the judicial system more accessible. When asked

Ivan's comment about the lack the much-ballyhooed *pravovoe gosudarstvo* moves us from law as shield to law as sword. The consensus – albeit not unanimous – was that the law was a blunt instrument used at the discretion of the state. Nadya, a 20-year old Saratov student expressed it best when she said, 'I don't think law works in our interest ... Probably it works in the interests of those who make the law ... like bureaucrats. I think their interests are the top priority.' While not disagreeing with her point, others conceded that this hardly marked Russia as unique. Across the globe, states and the bureaucrats who populate them are keen to protect themselves. The question is whether the law also leaves the door open for citizens to use it to protect and advance their interests.

In each interview, as the respondent shared his dissatisfaction with the legal system, I asked them who was to blame for this state of affairs. There was plenty of blame to go around. Many fastened on the legislature, blaming the Duma deputies for passing flawed laws that they saw as riddled with loopholes and as susceptible to multiple interpretations. Others extended blame to those responsible for implementing the laws, noting that the ministries had an unfortunate practice of creating a web of administrative regulations (known in Russian as *podzakonnyye akty*) that made it possible for some to get around the law. This dissatisfaction did not extend to then-President Putin. In an echo of the familiar 'good tsar, bad advisor' reaction that has persisted in Russia for centuries (with the notable exceptions of Gorbachev and Yeltsin), the people I spoke with were more comfortable blaming those around Putin (*okruzhayushchie*) than pointing the finger at him. When I pressed, I was told that he was just one man and could not be expected to control everything that the regime did.¹⁴

Those who were more knowledgeable about the technicalities of the law pointed to a troubling gap between the law on the books and the law in action. Sara, a 45-year old woman who had helped create a crisis center in Saratov for victims of domestic violence, said: 'our law is very well-written; there's no need to rewrite it. The fact is that we need to implement it.'

More telling was the disinclination of the people I spoke with to take any responsibility for the dismal state of affairs they described. Many were taken aback by the question and responded with some variation of 'what can I do? I'm just one person.' On one level, such attitudes reveal a serious collective action problem, which has only been exacerbated by the economic challenges that have plagued many since the collapse of the Soviet Union in 1991. My respondents tended to

about the constitutional court and/or the European Court of Human Rights, most had only a vague understanding of their purpose. Their refrain: 'they are very distant from our life'.

¹⁴ Given that people were willing to open up about activities that skirted the law, I did not take their reluctance to criticize Putin as pandering, but as a genuine reflection of their assessment of the situation.

be drawn from the lower middle class because these are the people who could be enticed to participate in a focus group for a small stipend. Simply keeping themselves and their families afloat took most of their energy. On a deeper level, these responses hint at a lack of appreciation of the societal role in fostering the 'rule of law'. Though understandable, the reluctance to share in the responsibility for the failure of law in Russia to shield citizens' rights helps explain why societal demand for 'rule of law' has been slow to materialize, and why Russians have not chafed at the retreat from any pretense of democracy under Putin.

RUSSIANS' ATTITUDES TOWARDS COURTS: A NECESSARY EVIL?

The skepticism expressed by the Russians I interviewed toward the capability of law to protect them only deepens the mystery as to why they are willing to rely on the legal system to resolve disputes. Kurkchian has argued that when people are skeptical about the evenhandedness of law, they are not going to make the effort to mobilize their rights.¹⁵ At first glance, it seemed that my respondents agreed with Kurkchian. Tatyana, a 52-year old medical technician from Moscow, told me: 'I guess now it is possible to decide everything in court. But our people don't trust courts.' Had she been surveyed, she surely would have responded that she did not trust the courts. The advantage of my methodology was that I was able to dig deeper. As the conversation progressed, I learned that, notwithstanding her doubts, she was in the middle of a lawsuit against the local housing authority over a botched home repair. Thus, her initial bluster about the inadequacies of the courts masked a grudging willingness to use them that she was almost embarrassed to reveal. To be fair, she did not relish the prospect of going to court. She had filed the lawsuit because her efforts to resolve the dispute informally through negotiations with the housing authority had failed. She bemoaned the fact that she had to use the courts, telling me that this would not have been necessary in the Soviet era 'when everything was different and problems were resolved without court.' She explained that her problem would have been handled quietly and quickly by a Communist Party official. Tatyana, like many others who had not been card-carrying Party members, looked back on those days through a haze of nostalgia.¹⁶ Putting aside the question of whether such Party-driven mechanisms of resolving

¹⁵ Marina Kurkchian, 'The Illegitimacy of Law in Post-Soviet Societies', in Denis J. Galligan and Marina Kurkchian, *Law and Informal Practices; The Post-Communist Experience*, 2003, p. 25.

¹⁶ Although this positive image of the ease of disputing in the Soviet era thanks to the facilitative role of the Communist Party was voiced most strongly by those who had been loyal Party members, it was also expressed by several people in their 30's, who could not possibly have had any personal experience or memory of it.

disputes were effective, their existence helps us understand why there is such a weak tradition of taking problems to the courts in Russia.

Of course, a reluctance to go to court is hardly unique to Russians. Few relish the prospect of litigation.¹⁷ Usually the hesitancy to litigate in Russia is attributed either to a fear of becoming a victim of 'telephone law' or to the general disdain for law inherited from the Soviet era.¹⁸ My research suggests these explanations fail to capture the core of what keeps Russians from mobilizing their rights in the post-Soviet era. Many of the objections to litigating I heard could just as easily have come from litigants in countries generally thought to have strong judicial systems. Contrary to the prevailing stereotype, fears of 'telephone law' did not dominate the conversations. Rather, the most common concerns were the time, money, and the emotional energy required to see a lawsuit through to its conclusion.

Politics was beside the point for Viktor, a 33-year old doctor from Saratov. He explained that 'the biggest [disincentive to suing] is time, not money. We all work – we have families. Litigation requires constant attention from morning to night. This takes a long time; few have that luxury.' Along these lines, many commented on the propensity of courts to delay hearings, requiring the parties to come to court over and over again. The patience of employers for absences to attend hearings was perceived as limited. All agreed that such delays had become a deliberate tactic aimed at wearing down their resolve. Moreover, it was not just the time spent in the courthouse that troubled people. They had to assemble the evidence, leading to complaints about the interminable bureaucracy and the endless quest for documentation. Most of those who opted for litigation took responsibility for pulling together the relevant evidence. The few who had retained lawyers used them sparingly to save money.

Rather than a fear of 'telephone law', respondents' reluctance to litigate was motivated by what they described as a culturally-driven dislike of conflict. Such sentiments ran through most of my conversations with women, with the exception of women in their 20s. Perhaps the fatalism that undergirds this attitude comes with age and with the challenge of raising a family in contemporary Russia, though fatalism is a personality trait that has long been associated with Russia. Svetlana, a 38-year old Saratov doctor, told me:

'As a rule, Russians try to steer clear of any kind of negative emotions. It is easier to brush off [*otmanut'sya*] such situations. Maybe it is a national characteristic. It is

¹⁷ Among my respondents, the only exception was Ivan. In the 6 years since retiring, he had initiated 10 lawsuits. Most were connected to various renovation projects he has undertaken at his apartment or at his children's apartments. Litigating seemed to have become his avocation.

¹⁸ Kurkchyan, 'The Illegitimacy of Law'.

easier to brush them off than to waste time resolving questions that are pointless to try to resolve. People want to store up their nerve. So it is simpler to resign oneself to one's fate and not to seek out the guilty and punish them.'

There was almost a sense that pushing a dispute to court was somehow beyond the bounds of good taste. In Russian, one often talks of whether behavior is acceptable (*prinyato*). For most of the women I spoke with, litigating was beyond the pale. Olga, a 59-year old Moscow pensioner, put it colorfully: 'the very idea of court strikes terror in me. I don't need it. For me, court is akin to death. Maybe some people love litigating – it's like going to the theater for them and they get pleasure from it. Not me. Just hearing the word court saps all of my energy.'¹⁹

This distaste for conflict became magnified when the dispute was with neighbors. This finding echoes Merry's argument that social distance affects the willingness to pursue a dispute, but with a Russian twist.²⁰ Almost everyone in Moscow and Saratov lives in apartments rather than stand-alone houses. These buildings can be mammoth, but do not have a single entrance and long corridors as in the United States. Instead, each stairwell has its own entrance (*pod'ezd*). Families who share an entrance often grow close to one another; they look after each others' children and keep spare keys for each other. The lack of a real estate market limited opportunities to move during the Soviet era. The advent of housing privatization under Yeltsin means that most apartment dwellers now own their apartments, but few have the necessary capital to relocate. Recognizing that they have to get along with each other over the long-term, they prefer to find a way to work things out when problems arise. The aging infrastructure makes water leaks a frequent occurrence. When water leaked into the apartment of Elena (a 35-year old office manager from Moscow) from her upstairs' neighbors, she called them. They immediately apologized and offered to repair any damage. Elena and her family stayed with friends for a few days and returned to find the apartment cleaned up and a box of candy on the kitchen table.

Not all of the neighbors were as accommodating as Elena's. Sometimes the offending neighbor paid for the materials and the victim did the repairs himself. One of my younger respondents, Boris, a 20-year old Saratov student who still lived with his parents, conceded that sometimes there could be a troublemaker in the *pod'ezd* and if they refused to negotiate in a civilized fashion,²¹ then it was

¹⁹ The fact that seven of the women I spoke with had initiated a lawsuit at some point suggests that their hostility to litigation may be more bark than bite. Unfortunately the way the official caseload data are reported do not permit any testing of this gender hypothesis.

²⁰ Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans*, 1990.

²¹ The phrase that he used, *dogovarivat'sya po-chelovecheski*, is quite evocative in Russian, but is difficult to translate. The root of the adverb is *chelovek*, which is the Russian word for person. In

always possible to proceed according to the law. If the alleged perpetrator refused to acknowledge their responsibility, then the victim had a choice as to whether to instigate a formal investigation. Such investigations are conducted by the housing authority and are aimed at determining whether the leak was an accident or whether someone was to blame. The alleged perpetrator is free to challenge the conclusions in court.

In addition to a desire to preserve relationships with neighbors, apprehension centered on the cost of going to court was raised frequently as a constraint on taking disputes to court. Like potential litigants the world over, Russians worry about the cost of legal assistance.²² Vladimir, a 51-year old mechanic from Moscow, captured this fear when he said: 'if I file a case for 20 thousand, then hiring a lawyer will cost about 30 thousand.' Though some were fortunate to number lawyers among their friends or former classmates, most had little idea how to locate a competent lawyer.²³ This tied back into the concern over cost because there was a commonly voiced fear that one could spend a lot and end up with very little value. Though lawyers have grown more plentiful in the post-Soviet era, thanks to the dramatic increase in the number of law schools,²⁴ widespread rumors of corruption in the educational system (including grade selling) and the lack of any meaningful accreditation system, make sorting out the shysters from the competent lawyers highly problematic.²⁵ In both Moscow and Saratov, I heard repeatedly about the shortage of reputable (*poryadochnye*) lawyers and the bountiful numbers of unscrupulous (*neporyadochnye*) lawyers. The people I spoke with had no knowl-

essence, Boris was indicating that refusing to work out your problems with those from your entryway was unacceptable behavior.

²² Once again, Ivan was an exception. Not only did he always represent himself, but he had discovered a number of loopholes in the procedural rules that allowed him to bring various kinds of lawsuits without having to pay filing fees.

²³ There are two words for lawyer in Russian: *advokat* and *irist*. Though the lines have become blurred in recent years, *advokaty* tend to be litigation specialists, whereas *iristy* are transactional lawyers. When talking about the obstacles to litigation, the respondents were referring to *advokaty*.

²⁴ William Burnham, Peter B. Maggs, and Gennady M. Danilenko, *Law and Legal System of the Russian Federation*, 3rd edn., 2004, at p. 133-134, report that 271 law schools were operating in Russia in 2004, only 108 of which were accredited. At the outset of the transition in 1986, there were only 100 law schools, all of which were state-run.

²⁵ In a January 2006 survey, the Foundation for Public Opinion, 76 percent of the respondents said that buying a diploma was easy. About the same number (78 percent) said that those who bought diplomas rarely had the requisite skills. Yet they conceded the importance of having the credential in getting a job. Despite the apparent widespread nature of this practice, few (23 percent) admitted knowing anyone who had bought a diploma. Results are available at: http://bd.fom.ru/report/cat/cult/edu_edu/high_education/dd0600114 (March 15, 2009). On corruption in Russian higher education, see 'V Samapre irist 4 goda prepodaval v vuzakh po poddel'nyim diplomam kandidata i doktora nauk', October 29, 2008, http://newsru.com/arch/crime/29oct2008/jur_diplomafersam_print.html (March 15, 2009).

edge of the reputation of local lawyers or law firms. They saw hiring a lawyer as a kind of lottery. The perception that lawyers were expensive and potentially disreputable left many reluctant to hire them and, more generally, to pursue dispute resolution through the courts. Such complaints about lawyers may feel familiar from other settings, but the unsettled standards of professionalization and the absence of any meaningful reputational sanctions for poor service mark Russia as different.

Another issue that has specific Russian characteristics is corruption. Almost every conversation eventually wound its way around to bribery. A few dismissed the common wisdom that a judge could be 'bought' (*podkupit*) as a myth, but the vast majority treated it as a fact of life in Russia.²⁶ Indeed, when pressed, they conceded that it was not a post-Soviet innovation. As Elena put it, 'nothing has changed for the better.' No one admitted to having 'bought' a judge themselves. Yet most spoke of bribes as a cost that would have to be born if they pursued litigation, indicating that they would be prepared to pay it (and perhaps had paid it in the past). A number of people believed themselves to have been victimized by the practice. For example, when the judge sided with her ex-husband and terminated her rights in the apartment where they had lived as a family with their son, Maria (a 39-year old beautician from Saratov) was convinced that the judge had been paid off. Along similar lines, Elvira, a 44-year old mid-level state bureaucrat from Saratov, was involved in a traffic accident. She believed that the other driver was clearly at fault; this had also been the conclusion of the traffic police. She was astonished when she was sued by the other driver and found to be liable. Lacking the assets to pay the judgment, her already meager salary was garnished. Elvira had no doubt that the judge had been bought and paid for. Her case also raises the specter of connections (*svyaz*). The other driver was the general director of a mid-size factory and she believed he and the judge knew each other well. Both Maria and Elvira presented compelling cases, but I heard only their versions of what happened.²⁷ Neither was represented by a lawyer. Neither could afford it.

²⁶ In one of the first interviews that Medvedev gave after being elected President, he railed against judicial corruption and the widespread legal nihilism of Russians. Barber, Buckley, and Belton, 'Laying Down the Law: Medvedev Vows War on Russia's 'Legal Nihilism'', *Financial Times*, March 24, 2008. <http://www.ft.com/cms/s/0/4b93ecde-f9c3-11dc-9b7c-000077b07658.html> (March 1, 2009). For a sampling from the Russian press, see Elisov, 'S polnoi otdachei', *Novaya gazeta*, June 7, 2007. <http://www.novayagazeta.ru/data/2007/42/14.html> (March 1, 2009); Gridneva, 'Sud prodazhnykh', *Moskovskii komsomolets*, July 3, 2003.

²⁷ In Elvira's version of the story, an alternative narrative was apparent. Although convinced of the other driver's fault, she did not file a counter-claim. Her reasons were a bit vague. She told me: 'I was always counting on the fairness of the court.' She believed that the judge would be able to see the truth, but she did not take any responsibility for her failure to assert her legal claims other than acknowledging her lack of 'legal literacy'.

According to what I learned from talking to the other respondents, that may have been their main mistake. Everyone agreed that lawyers act as the conduit for 'buying' judges. Vladimir explained that if an ordinary person dropped off money at a judge's chambers, he would be arrested. Instead, it was necessary to use lawyers as middlemen. He and others emphasized that these skills at wheeling and dealing were a key consideration when hiring lawyers. Anna agreed, noting that not all lawyers have the needed connections. More importantly, not all possess the skill to make the payoff so that no one is the wiser. She also cautioned that promises from lawyers to deliver a verdict for a price could prove illusory.

Money was not always the deciding factor. Sometimes one side was a neophyte while the other side had learned how to use the law (both procedural and substantive) to its advantage through experience. In Russia as elsewhere repeat players are often able to use their knowledge to prevail over one-shotters.²⁸ But few of my respondents believed experience was the deciding factor. Rather they assumed that any advantage was gained through illicit payments or favors with significant monetary value. It is the opaque character of the connections among the politically and economically powerful that frustrated my respondents and fueled their conspiracy theories. Whether their fears were justified or not is impossible to determine, but their belief that law takes a back seat to the tangled web of money and connections when judges decide a case helps explain the distrust of courts voiced in public opinion polls.

Just as intriguing as the view of judicial bribery as a cost of doing business was the sense of most that it did not constitute a type of 'telephone law'. My conversations revealed that Russians distinguished between two categories of cases: those involving ordinary citizens and those involving the state and/or individuals or entities with disproportionate economic or political power. Even those who had profound doubts about the capacity of law to protect them were willing to contemplate using the courts to deal with the first category of cases. They felt that they would be on a level playing field. The idea of suing the state was uniformly unappealing. The inveterate litigator, Ivan, put it bluntly when he said that suing the state is 'practically useless'. People were convinced that judges would invariably side with their fellow state bureaucrats. Valentina, a 43-year old Moscow manager, expressed this sentiment well when she told me that in cases involving state institutions 'one hand washes the other'. Whether the judge would need to be told to rule in favor of the state was unclear. The sense that I got from most of those interviewed was that no call would be needed; that judges understood what they

²⁸ Marc Galanter, 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change', in 9 *Law and Society Review* (1974), p. 95; Kathryn Hendley, Peter Murrell and Rani Ryterman, 'Do 'Repeat Players' Behave Differently in Russia? An Evaluation of Contractual and Litigation Behavior of Russian Enterprises', in 33 *Law and Society Review* (1999), p. 1401.

were expected to do, thereby illustrating the deep faith in the power of ‘telephone law’. Moreover, this cynicism about the inability of judges to be even-handed when confronted with the state as a party was not limited to those who had experienced the Soviet system (such as Ivan and Valentina). The youngest person I spoke with in Moscow, a 21-year old student who worked part time at a travel agency, Dmitrii, echoed these sentiments when reflecting on the *Khodorkovskiy* case: ‘No one is insured against such a fate, but people know enough not to subject themselves to disputes with the state.’²⁹ On the other hand, some people, even those old enough to remember the Soviet courts, such as the 56-year old Galina, who teaches accounting at a Moscow college, did not rule out litigating with the state. They viewed the state as a repeat player whose advantages could be blunted by hiring an experienced and expensive lawyer.

The foregoing hardly paints an appealing picture of the Russian judicial system. When talking to Russians about their courts, what tumbles out initially is this parade of horrors. This negative image of courts dominates the media. Given that, it is hardly surprising that public opinion polls would reflect a profound disdain for the courts. The methodology of semi-structured interviews allowed me to push past the first negative reactions of my respondents. Although the literature (both mass media and scholarly) has concluded that Russian courts are unappealing due to ‘telephone law’, I found few respondents who shared that view. Instead, their concerns mirror those of potential litigants around the world. Like their compatriots elsewhere, they saw litigation as an option, albeit an unappealing option.

Comparing the experiences of my respondents when they became embroiled in housing-related disputes (one of the most common types of disputes reported by my respondents) helps us unpack their attitudes. These disputes ran the gamut. Some had a Soviet-era flavor in that they revolved around questions of registration. This requirement that Russians live where they are legally registered dates back decades. The constitutional court has argued that it should be abandoned on the grounds that it violates citizens’ guaranteed freedom of movement, but it persists. Disputes that center on registration tend to bring up messy questions of family law. For example, when Katya’s father divorced his second wife, she petitioned the court to have Katya evicted as part of her effort to claim the apartment for herself, arguing that Katya had never been legally registered at the apartment. Though a minor at the time, Katya had to appear in court. Her stepmother’s claim

²⁹ Reactions to the *Khodorkovskiy* case were varied. Almost everyone who was aware of the case agreed that it was intended as a kind of show (*pokazatel'nyi*) trial, but there was disagreement over the intended audience. Most felt that it was not a typical case and was intended as a ‘lesson for other oligarchs’. A few (like Dmitrii) saw as a signal that no one was beyond the reach of the Kremlin. Everyone agreed that the case proved the danger of tangling with the state.

was quickly quashed. Katya came away with a positive impression of the court. But she was not naïve, noting, 'no one was afraid to litigate with [my stepmother] because she had no money. So everything was legal.' Her comment reinforces the overall impression that I gleaned from the interviews that mundane cases are treated differently. Her positive experience contributed to an openness to courts that she conceded was not typical of her generation. In her words: 'I guess there are people who think that going to court is useless. But I think that most issues can be resolved through legal means.'

For others, cases centered on registration undermined their faith in the courts. Valentina was sued by neighbors at a communal apartment where she had lived many years before with her husband and three children. When the marriage soured, she and the children left. She re-registered at her new apartment, but the legal residence of her children and estranged husband was still the communal apartment. Her husband continued to live there. He had fallen on hard times and was under psychiatric care. The neighbors wanted to expand their own apartment into Valentina's former space. They brought a case seeking to have Valentina's husband and children evicted on the grounds that their registration was flawed. Valentina was frustrated by the court's insistence on dealing only with the situation as it appeared on paper. They ultimately issued a ruling that evicted Valentina's family, but the neighbors were unable to enforce it because of the mental fragility of her estranged husband. Russian law forbids the eviction of such people. Valentina threw up her hands at the absurdity of it all. She emerged from the experience drained of any respect for the courts, yet her disaffection was not a product of 'telephone law'.

Other housing-related disputes had a post-Soviet character. Raisa, a 47-year old Saratov doctor, was one of the plaintiffs in an innovative lawsuit that challenged the privatization process being used for her building. Since 1984, she and her husband had been living in a 2-room suite in a dormitory intended as temporary housing for young married couples. The dormitory was controlled by the factory where Raisa's husband then worked. As so often happened, housing that had been intended as temporary became permanent. They raised their two sons in these cramped quarters, sharing a kitchen with four other families. When the factory offered residents the chance to privatize their rooms, Raisa was intrigued. But she balked at the terms offered. Though the price demanded was below the market rate, she would have had to pay about 40,000 rubles. She felt that her family should have been able to privatize the space at a nominal charge thanks to her husband's 15 years of service to the factory. Moreover, she questioned whether the factory had the right to demand payment, given that the property was actually owned by the ministry.

As Raisa talked to her neighbors, she discovered that others shared her indignation. Families began meeting to discuss how to proceed. A small ‘initiative group’ from her building resolved to take the factory to court. Raisa was not part of that group, but later decided to embrace its strategy. Eventually 90 families joined together. They learned that similar battles had already been fought over other buildings and began working with the lawyer who had helped in these previous cases. The lawyer was a specialist in housing law and was able to help them through this extraordinarily technical area of law. Each family paid the lawyer 3000 rubles and, in return, she advised all of them. She expected them to do most of the leg work. She gave them lists of the documents that the court would demand. In essence, with the help of this lawyer, the residents were waging a class action lawsuit, even though this procedural weapon is not technically allowed under Russian law. Raisa drew strength from the collective nature of the dispute: ‘of course, a group of people will be more capable of getting to the truth.’ The lawyer brought the cases to the court in groups of five or six. Those in the original ‘initiative group’ went first.

According to Raisa, she was seeking ‘justice’ (*spravedlivost*) when she got involved in the lawsuit. She believed that the factory’s actions were simply illegal (*nezakonno*) and should not be tolerated. She was not sure how to proceed, describing herself as ‘legally illiterate’ (*iuridicheski bezgramotny*) at the outset. Yet she was doubtful that the court could be the source of justice, telling me that she thought ‘nothing would come’ (*nichego ne poluchitsya*) from the case. Along with others residents, she assumed that the economic influence of the factory would sway the court to decide in its favor.

‘From the start we thought that the factory was such a monopolist – that they had connections and money – their production ... was connected with the oil industry. I thought that they would crush us. ... I thought that the decision would not be in our favor – I had no hope. ... Then when everything started, 5 people prevailed in court. We all took heart. Once again, something unexpected happened when all of the residents joined in. Everyone signed the complaint.’

Raisa gave full credit for the victory to their lawyer, who had shepherded them through the twists and turns of the case. Her experience had not quelled her doubts about the courts more generally. She still believed the courts, like every part of the Russian bureaucracy, to be profoundly corrupt. As she put it, ‘honestly any problem can be resolved [with money]. The only question is how much.’

As a general matter, my conversations reveal a somewhat chaotic image of the Russian courts. Their flaws escaped no one, but most were open to using them when necessary. The degree of openness varied, often depending on their own personal experiences. But some of those who had never had any direct contact

with the courts were the most vociferous in their denunciations.³⁰ A few tentative conclusions can be made. These mixed feelings about courts seem to be quite universal. They are not limited to any particular generation, nor are they skewed by class or gender. While women seem more likely to describe themselves as non-conflictual, they are willing to press their claims when their backs are to the wall. But the conversations confirm that Russians are reluctant litigators. This hardly marks them as unusual. Indeed, the complaints voiced about the time, money, and emotional energy needed to litigate were familiar. Even the allegations of corruption – whether in the form of money or connections – are not unique to Russia. In one form or another, the 'old boys' club' is a reality in most countries. The Russian twist comes with the conviction shared by so many of my respondents that the deck is going to be stacked against them. Listening to Raisa's story (which is typical of many others I heard), I was struck by how she went into the legal process convinced that they had no chance because the other side had power and influence. This confirms Kurkchian's thesis that 'the *negative* myth of the rule of law is dominant' in Russia and that it is self-perpetuating.³¹ But Raisa's willingness to seek justice via the courts contradicts Kurkchian's prediction that this myth will prompt people to continue to avoid the courts. Those in Raisa's position saw themselves in the role of David versus a more powerful and experienced Goliath. When the judge sided with these Davids, they felt vindicated by the system.³² For them, the courts were a necessary evil.

THE 'RULE OF LAW' IN RUSSIA?

Where Russia departs from other countries with somewhat dysfunctional court systems is in the persistence of 'telephone law'. There is no question that the Kremlin has been able to dictate the outcome of cases in which it has taken a strong interest.³³ The *Yukos* case is only the most well-known instance. Moreover

³⁰ One of the questions I explored during the interviews was the source of their views on the legal system. A full discussion of this issue is beyond the scope of the paper. Few gave much credit to what they had learned in school, remembering the lessons on the legal system as tedious and uninteresting. The media emerged as a critical source of information, not just through the news, but also through the emergence of the shows that dramatized cases, such as *Federal'nyi sud* [Federal Court], and *Sud idet* [Court is in Session]. Several people told me that, thanks to programs like these, courts are perceived as more accessible. For ratings of Russian television programs, see <http://www.tns-global.ru/rus/data/ratings/tv/> (March 15, 2009).

³¹ Kurkchian, 'The Illegitimacy of Law', at p. 30.

³² This stands in contrast to Kurkchian's findings (*idem*, at p. 33). When one of the 'Davids' she spoke with prevailed in court, he concluded that it was due to 'telephone law' type machinations that had worked in their favor for a complicated set of reasons.

³³ Olga Shvarts, 'Nezavisimost' sudei v Rossii: Mufy I real'nost', in 10 *Chelovek i zakon* (2008), p. 17.

strong arming the courts is not limited to the top echelons of power. Regional leaders are alleged to have engaged in similar tactics to take control over profitable companies.³⁴ The toleration of such behavior strikes at the very heart of the traditional concept of the 'rule of law'. It calls into question both the independence of the judiciary and the universalistic nature of law. It is a Russian variant of 'rule by law'.

How do we make sense of the combination of 'telephone law' in some cases and the adherence to the law in others? Clearly those who compile the various rankings of legal systems have punished Russia severely for this shortcoming. In recent years, Transparency International has equated Russia with countries like Bangladesh and Rwanda.³⁵ In its 'rule of law' rankings, the World Bank has put Russia on the same level as Paraguay, Laos, and North Korea.³⁶ This suggests that 'telephone law' is considered to be the defining feature of the Russian legal system.³⁷ Certainly this argument is viable. Several of my respondents evoked it by reminding me of the universal saying: 'a fish rots from its head'. By this, they meant that if those with power manipulate the law to serve their own ends, then this erodes the respect of ordinary citizens for the law.

My research questions whether the fish truly does rot from the head. 'Telephone law' has been a reality in Russian life for decades, if not centuries. Yet it has not resulted in a full-fledged 'rotting' of the entire legal system. Instead, this Russian version of 'rule by law' has peacefully co-existed with the 'rule of law' in more mundane cases. As my conversations reveal, Russians are able to use the courts to resolve problems with one another.³⁸ My work reinforces the findings of Feifer,³⁹ whose ethnography of Khrushchev-era Soviet courts showed that

³⁴ Ariane Lambert-Mogiliansky, Konstantin Sonin and Ekaterina Zhuravskaya, 'Are Russian Commercial Courts Biased? Evidence from a Bankruptcy Law Transplant', in 35 *Journal of Comparative Economics* (2007), p. 254.

³⁵ http://www.transparency.org/policy_research/surveys_indices/cpi (March 15, 2009).

³⁶ http://info.worldbank.org/governance/wgi/sc_country.asp (March 15, 2009).

³⁷ This policy does not seem to hold for all countries. Japan is an interesting case in point. Ramseyer and Rasmusen tease out evidence of a kind of 'telephone law' operating in Japan. They argue that judges are highly deferential to the preferences of the Liberal Democratic Party. See Mark J. Ramseyer and Eric B. Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan*, 2003. Other specialists on Japanese law disagree, e.g., John Owen Haley, *The Spirit of Japanese Law*, 1998. For a comprehensive summary of the two positions, see Frank K. Upham, 'Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary', 30 *Law and Society Inquiry* (2005), p. 421. Despite these doubts about the independence of the judiciary, Japan is given high marks by both Transparency International and the World Bank's Governance Project. For both, its rankings are similar to those of the United States.

³⁸ Woo and Wang's study of how courts operate in three Chinese provinces makes a similar point as to China. See Margaret Y.K. Woo and Yaxin Wang, 'Civil Justice in China: An Empirical Study of Courts in Three Provinces', in 53 *American Journal of Comparative Law* (2005), p. 911.

³⁹ George Feifer, *Justice in Moscow*, 1964.

they functioned fairly normally in ordinary cases⁴⁰ as well as those of Burbank,⁴¹ whose study documented the importance of courts for peasants in 19th century Russia. Nor does Russia stand alone in having a mixed system. Peerenboom (2002: 517) has shown how Chinese courts are 'rule of law compliant in some respects (with respect to commercial law) and not compliant in others (with respect to political cases).' He argues that:

'in the long run, such a system is not likely to be sustainable because for a system to comply with the standards of a thin rule of law in the commercial requires significant institutional development and autonomy. Once institutions gain a certain degree of autonomy and authority and those with the institution achieve a level of professionalism, the institutional actors are likely to pursue further changes to increase their autonomy and authority. As a result, there are likely to be spillover effects from one area of law to another as institutions develop.'

For those who subscribe to the Weberian view that societal dissatisfaction with authoritarianism can give rise to a rational legal order, the spillover argument is compelling.⁴² In my early work on the legal reforms in Russia, I was seduced by its siren call.⁴³ I have since come to rethink my position. Over the past two decades, urged on by the West, profound institutional reforms have been made to the judicial system.⁴⁴ To be sure, the resulting shift in incentives has changed judicial behavior, but only at the margins.⁴⁵ The practice of 'telephone law' has been slow to disappear. A review of the evolution of the state-society relationship in Russia suggests that waiting for a Weberian rational legal system to evolve is likely to be futile.⁴⁶ Instead, Russia's legal system is better seen as an equilibrium that somehow balances 'rule by law' and 'rule of law'.

But how should a legal system like Russia's be categorized? Assessing it according to the traditional 'rule of law' criteria is like trying to fit a square peg into a

⁴⁰ Gorlizki documents the vitality of 'telephone law' during Khrushchev period. See Yoran Gorlizki, 'Political Reform and Local Party Interventions under Khrushchev', in Peter H. Solomon, Jr. (ed.), *Reforming Justice in Russia, 1864-1996: Power, Culture, and the Limits of Legal Order*, 1997, p. 228.

⁴¹ Jane Burbank, *Russian Peasants Go to Court: Legal Culture in the Countryside, 1905-17*, 2004.

⁴² Max Rheinstein (ed.), *Max Weber on Law in Economy and Society*, 1954; Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law*, 2001.

⁴³ Kathryn Hendley, 'The Spillover Effect of Privatization on Russian Legal Culture', in *5 Transnational Law and Contemporary Politics* (1995), p. 39.

⁴⁴ *Idem*, 'Assessing the Rule of Law in Russia', in *14 Cardozo Journal of International and Comparative Law* (2006), p. 347.

⁴⁵ *Idem*, 'Are Russian Judges Still Soviet?'

⁴⁶ David McDonald, 'Domestic Conjunctures, the Russian State, and the World Outside, 1700-2006', in Robert Legvold (ed.), *Russian Foreign Policy in the Twenty-first Century and the Shadow of the Past*, 2007.

round hole. It fails to take account of the fact that, in the vast majority of the cases heard by Russian courts, decisions are made in accordance with the law. It focuses on the exceptional cases in which the outcomes are manipulated to serve the interests of the powerful. Neither reality can or should be left out of the analysis. Somehow we need to rethink the 'rule of law' concept such that it captures the true essence of the legal system. In his work on China, Peerenboom cautions against forsaking the concept of the 'rule of law':

'abandoning reference to rule of law is neither possible nor desirable. As a practical matter, people both in China and abroad will continue to invoke rule of law. Given that fact, it is better to try to bring some clarity to the different uses of the term, by distinguishing between rule by law and rule of law and between thin and thick conceptions of rule of law and different types of thick conceptions, than to insist futilely that the term be avoided altogether.'⁴⁷

Given that an entire industry has grown up around the project of assessing the 'rule of law' around the world, his admonishment deserves to be heeded.

But it is not clear that the existing labels of thin and thick notions of 'rule of law' truly capture the reality of post-Communist legal systems. Perhaps we need to return to basics and ask what citizens desire from their legal system. No doubt in a perfect world, citizens would want truly universalistic law and even-handed courts. Recognizing that we do not inhabit such a world, what do citizens' desires boil down to? Taking a page from Llewellyn, I contend that the key for most is reckon-ability.⁴⁸ In other words, citizens want predictability, even if it means that the law may not always protect them. In the Russian context, it would call for a system where citizens know when they can depend on the courts and when the courts are likely to be compromised. This is a much lower standard than what is usually seen as the 'rule of law', even in its thinnest versions. But as it has evolved in recent years, the concept of the 'rule of law' has come dangerously close to Western ethnocentrism, especially in its 'thicker' incarnations. Efforts to reform Russia along Western lines dating back to Peter the Great have consistently fallen short. Expecting them to fully embrace the Western concept of 'rule of law' and then chastising them when they fail to do so seems foolish.

Elsewhere I have argued that the Russian legal system is best conceptualized as dualistic.⁴⁹ In doing so, I am drawing on the dual state concept first articulated by Fraenkel to describe Nazi Germany.⁵⁰ But whether the Russia state can be divided

⁴⁷ Peerenboom, 'Let One Hundred Flowers Bloom', at p. 531.

⁴⁸ Karl Llewellyn, *The Common Law Tradition: Deciding Appeals*, 1960, at p. 17-18.

⁴⁹ Hendley, 'Assessing the Rule of Law in Russia'.

⁵⁰ Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (transl. by E.A. Shills),

into Fraenkel's prerogative state and normative state is not my concern.⁵¹ Rather, I am following in the path of Sharlet,⁵² who described the Soviet legal system under Stalin as dualistic, arguing that it had some regularity when dealing with non-politicized cases. Feifer documented this reality in Moscow during the early 1960s.⁵³ Notwithstanding the Western-style rhetoric of Gorbachev and Yeltsin about the desire for a *pravovoe gosudarstvo* (rule-of-law-based state), the division between politicized and non-politicized cases has continued in the post-Soviet period. If Russia had created a separate hierarchy of courts to handle 'hot button' cases, as Egypt⁵⁴ and Franco-era Spain⁵⁵ did, then it would be easier to analyze. But this division, which is opaque to outsiders, is clear to Russians. They understand this reality and adapt their behavior accordingly. This gives the Russian legal system the sort of reckon-ability that is necessary if it is to be useable.⁵⁶

Once we are able to appreciate the reckon-ability of the Russian system, the mystery of the increased caseload recedes. Underneath their bravado about the hopelessness of their legal system, Russians are actually savvy consumers. They know when to bring a case and when to stay away.⁵⁷ Demand has grown, but only where the playing field is perceived as fairly level. This, of course, takes us back to the question of universalistic versus particularistic law. I do not deny that Russians would prefer a legal system with laws that were enforced universalistically all the time. Nor do I deny that 'telephone law' undermines the respect for law. Medvedev alluded to this in his 2008 interview with the *Financial Times*, in his comments on Putin's well-known push for the 'supremacy of law' (*gospodstvo zakona*): "The only

⁵¹ Jens Meierhenrich, *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000*, 2008; Kanishka Jayasuriya, 'The Exception Becomes the Norm: Law and Regimes of Exception in East Asia', in 2 *Asian-Pacific Law and Policy Journal* (2001), p. 108.

⁵² Robert Sharlet, 'Stalinism and Soviet Legal Culture', in Robert C. Tucker (ed), *Stalinism: Essays in Historical Interpretation*, 1977, p. 155.

⁵³ Feifer, *Justice in Moscow*.

⁵⁴ Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics and Economic Development in Egypt*, 2007.

⁵⁵ José J. Toharia, 'Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain', in 9 *Law and Society Review* (1975), p. 475.

⁵⁶ My argument complements the judicial deference literature, which approaches this dualism from the perspective of the judge (e.g., Lisa Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile*, 2007; Alexandra V. Huneeus, 'The Dynamics of Judicial Stasis: Judges, Pinochet-Era Claims, and Judicial Legitimacy in Chile, 1998-2005', Ph.D. dissertation, Jurisprudence and Social Policy, University of California at Berkeley, 2007; Ramseyer and Rasmusen, *Measuring Judicial Independence*). I am integrating the views of litigants, who have typically been left out.

⁵⁷ Reckon-ability helps explain the willingness of Russians to litigate in the face of widespread allegations of judicial corruption. Like 'telephone law', obtaining desired outcomes by bribing judges violates a 'thin' version of the 'rule of law'. My conversations suggest that Russians are better able to perceive this risks and often opt out of litigation when it arises. Thus, corruption is part of the status quo to which Russians have adjusted.

way that Russia can count on having the supremacy of law is in a situation where the powers that be respect the independence of courts and judges.⁵⁸ But in contrast to the predictions that the existence of particularism in the system will cause people to avoid the courts, Russians have consistently proven that they will reconcile themselves to the situation as they find it and will use the courts.

What does this odd equilibrium suggest about the future of the Russian legal system? My conversations revealed little hope for the sort of systemic change that would be necessary for the 'rule of law' to take root in Russia. In its current form, the Russian legal system meets the short-term needs of both state and society. The changes needed for the 'rule of law' would require not only institutional change, but also a willingness on the part of society to take responsibility for ensuring that the state lives up to its promises. Few of the Russians I spoke with saw themselves in this role. Their demand for law has been manifested in a minimalist fashion. They go to court to have their disputes with one another resolved, but are less sanguine about using the courts when disputes arise with the state or other powerful actors. They may grumble among themselves about their inability to hold the politically powerful accountable through the legal system, but they have no stomach for fighting the *status quo*. As a result, the caseload statistics show a marked increase in use at the same time public opinion polls document a lack of trust. When outcomes are manipulated in cases with high political stakes, no one is surprised or outraged. In assessing culpability for this state of affairs, we are quick to point to the shortcomings of legislation and legal institutions. My work suggests that the weakness of societal demand for an end to particularistic law needs to be part of the explanation.

⁵⁸ Barber, Buckley, and Belton, 'Laying Down the Law: Medvedev Vows War on Russia's "Legal Nihilism"':

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