

CHAPTER ONE

INTRODUCTION

Exploring the Diversity of Experiences of Justice in Russia

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Much of the academic literature, analytical reports and media commentary suggest that the justice system in Russia is unreliable, corrupt and therefore ineffective (Freeland 2000; Pastukhov 2002; Solomon 2005; Transparency International 2007). Scholars and practitioners alike stress the numerous dysfunctionalities of the Russian justice system. They say it does not provide equal access to justice, it does not treat its litigants fairly, its enforcement of rights and obligations is erratic and it suffers from what some scholars describe as ‘telephone law’ (Ledeneva 2008; Sakwa 2009). The judiciary is deemed to be dependent on the state and is often thought to be pressured to deliver specified outcomes (Kononenko and Moshes 2011; Ledeneva 2008; Pastukhov 2002). The legal culture in Russia is described as being afflicted by legal nihilism, leading many citizens to avoid the law altogether if they can. Some cases – Yukos, Pussy Riot, the Greenpeace ‘piracy’ in the Arctic – have become so notorious that people tend to regard them as typical of the entire system. Most recently, Russia’s treatment of NGOs and refugees, and its military advances in the international arena, notably the annexation of Crimea and involvement in the civil war in Eastern Ukraine, have led many observers to seriously question the country’s commitment to both international law and the principles of human rights.

However, perhaps the full picture is not as discouraging. In this book we want to move beyond the stereotypes and ideological preconceptions. The scholarship presented here is intended to overcome the tendency to exaggerate the image of the Russian justice

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system as a flawed, homogenised monolith that imposes inadequate adjudication upon an ill-served populace.

We position this volume against a backdrop of empirical research that brings to light a more nuanced picture of how the legal system in Russia works for the vast majority of ordinary people. Evidence-based analysis of Russian justice shows that it is highly misleading to generalise about it. The politicised cases, with their high stakes and well-known defendants, are not typical. And it is questionable whether 'telephone law' assumptions are relevant to ordinary cases that have no political implications. One might wonder, if the justice system is really so unreliable, why does each year see more and more people actually going to court and voluntarily using the law to solve their disputes.

We are not suggesting that the legal system in Russia is free of corruption, and we acknowledge that it is certainly problematic in several other ways. But in this book we argue that Russian justice is a much more multifaceted system than is commonly supposed, and it both requires and deserves a more in-depth understanding. In our attempt to arrive at such an understanding, we have posed more subtle questions than are usually discussed. In what circumstances do distortions take place? What is distinctive about the social context of a particular case? What are the accepted rules of the game in a particular part of the legal system? How do ordinary Russian citizens feel about lawyers, courts and judges? These issues have long awaited proper academic scrutiny and discussion that draws on accurate information. This book is a step in that direction, and we hope that it is a significant step.

To help us in this pursuit we have invited a number of scholars who have studied Russia first-hand, through extensive field research. The intention was to map out the delivery of justice at every level of the Russian court system in order to assemble an empirical base from which to infer common characteristics of the Russian delivery of justice. In doing so, our volume identifies a number of tensions in the everyday life experiences of justice that illuminate some of the not at all obvious layers of what law means and how it works in Russia. These findings are summarised in the concluding chapter. For instance, the cases we report on show the culture of extreme formalism, found both in the literal-minded interpretation of statute law and in the way that officials and courts alike rely heavily on written documents, and the informality that is at the same time a legitimate part of the legal procedure in at

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least the low level courts where most of the cases are initiated. There is a mismatch between what people expect of their judges and the role that those judges feel they have to play in the overall delivery of justice.

Within a system that lacks uniformity and clearly defined boundaries, it is hardly surprising that people tend to become convinced that others around them are breaking the law with impunity, or at least getting around it somehow. However, such perceptions do not necessarily stem from an actual disrespect for law and legality. An excessively high expectation of what can be achieved by the letter of the law can also contribute to the legal cynicism that is widespread in Russian society. For example, if a judge exercises discretion his action can easily be misinterpreted as corruption. The public is then likely to suspect that the victorious party has either 'bought the judge' directly or drawn upon a network of connections and mutual favours of some non-monetary kind.

The evidence-based accounts presented in this book also aim to go beyond the commonly applied rule of law logic. Typically that logic measures Russia against a Western standard and finds that it falls short. Our viewpoint is that the Russian legal tradition should be judged on its own terms, a viewpoint that is commonly unheeded because Russia's historical development has been so jerky and turbulent. Every period of Russian history has been marked by drastic social change, often indeed by a full-scale revolutionary transition with a pronounced intention to break away from the dominant traits of whatever has come before. In such an environment of conflicting legacies it is admittedly quite difficult to arrive at a clear picture of any coherent legal tradition. Our contributors have treated that difficulty as both a challenge and an opportunity. Our ambition has been to appreciate not only the radical changes but also the deep-lying continuities in Russia's history. An in-depth empirical focus has enabled us to embrace this patchy legal tradition, and to see it as a source of legacies, recurring traits and nuances that are too often brushed aside by scholars. Where others may see mere idiosyncrasy, we see a unique legal culture that is significant and complete in itself. Empirical research on the ground in contemporary Russian society has compiled a stock of knowledge that transcends the normative assessment typical of the rule of law approach and replaces it with an evaluation of legal processes that takes full consideration of the Russian legal context.

To study Russia from within in this way does not mean that we avoid comparisons with the legal practices of other jurisdictions. Throughout

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its entire history, Russia has borrowed legal institutions extensively from the Roman law tradition, making it a close relative of the family. In fact, the similarities are so pronounced that they distract attention from the unique features of the Russian tradition. However, the comparisons in this book do not use the language of evaluation, and we are not interested in the degree of Russia's adherence to the Western rule of law yardstick. Our concern is to capture the everyday reality of Russian life, with all its instinctual practices and subtleties. This non-normative comparative perspective helps us to avoid yet another pitfall in Russian studies – the epistemological 'dead end' of Russian exceptionalism – in other words, orientalisising Russia, seeing it as dark, secretive and corrupt. Instead, a meaningful, evidence-based and impartial comparison enables the argument put forward in this book to avoid extreme positions. Where international similarities and differences are noted and discussed, the authors also question where they come from, why they occur and with what consequences.

Methodologically, the book presents a series of case studies which are selected systematically, allowing the contributors to consider examples from almost the entire hierarchy of the Russian structure of courts. The studies range from the courts of the Justices of the Peace upward to the appeal courts and the Arbitrazh courts. Between them the authors examine a wide variety of cases: from petty claims such as a mundane civil dispute with little of value at stake, up to major commercial confrontations involving giant corporations and vast sums of money. Some cases are administratively or criminally significant and affect the entire lives of those involved. Others are highly politicised and are decided by different rules from the rest of the institution of justice. The intention here is to give a 'thick' (Geertz 1975), thoroughly researched description of each case procedure, rather than to opt for broad generalisations about the outcomes of whole classes of cases.

To collect their primary source material, the contributors have drawn upon a mixture of quantitative and qualitative methods. Typically these include first-hand observations of court proceedings followed by interviews with the judge, litigants, witnesses and legal professionals; focus group discussions bringing together cross-sections of the general public; and statistical analyses of large data sets. The interviews were in depth, digging beyond the straightforward evidence and legal argumentation of a case, to inquire into the background of the problem at issue and the various assumptions and expectations on the part of those involved in the case. This approach has the advantage of reaching

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outside the courtroom and gaining some insights into the ways in which all parties involved in the process experience law. The rich and insightful array of individual contributions explores ideas about the various relationships that the actors hold vis-à-vis the different levels of the justice system hierarchy. These insights allow the editors to go beyond particular cases and tease out regularities that are common throughout the Russian institution of justice.

The volume starts with two chapters that look at the broader legal environment and experiences of justice in everyday life. In Chapter 2, Marina Kurkchian poses questions pertinent to the core purpose of *A Sociology of Justice in Russia* by examining the importance of the transformation of 'lay' law into a professionalised and autonomous legal space, and the implications that semi-professionalised conception of law has on the Russian legal culture. Kurkchian traces the evolution of the legal profession through the major stages of Russian history, before concentrating on the organisational form and identity of the legal profession today. She asks a number of crucial questions: What does the legal profession in contemporary Russia look like? How do its members operate? What kind of identity have they developed? What interests do they prioritise? What is the informal code of conduct within the profession that the members accept in their mutual dealings? What is the current trend in the professionalisation of law in Russia? This case study is based on historical sources in combination with original data that the author has collected over a number of years.

In Chapter 3, Kathryn Hendley focuses on the ideas that lay people hold about the access that is available to them to redress their grievances in her analysis of the handling of disputes in contemporary Russia. She asks why, when and under what circumstances people go to court in Russia. Her answer to that question is based on discussions with ordinary Russians during a series of focus groups conducted in 2014 in Moscow, Voronezh and Novosibirsk. The consensus that arises from this case study is that Russian people, just like those in other jurisdictions, see litigation as a last-ditch alternative. However, the participants' reluctance to go to court was not due to fears of potential external interference or corruption. Instead, they worried about the time and emotional energy required to see a lawsuit through to its conclusion. There was agreement among the participants in the focus groups that if informal negotiations failed, then litigation was a viable option. These results are generally consistent with the findings of legal sociologists in other countries, suggesting

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that the rhetoric about the dysfunction of Russian courts is overblown, at least for mundane civil cases.

Each of the subsequent chapters focuses on a different level of the pyramid of the justice system and each provides an intensive study of a specific case that is typical of that level. The lowest level court in Russia is the Court of Justices of the Peace. This is where Varvara Andrianova (Chapter 4) situates her inquiry into the experiences of justice by ordinary Russian citizens. Courts of Justices of the Peace are the local institutions of justice that deal with more than 90 per cent of all cases initiated in Russia. As the lowest and most accessible layer of courts in the country, these courts hear the majority of small civil, criminal and administrative cases. Such issues are deemed not to require legal assistance, which puts the pressure of dealing with the legal process solely on the court-users and judges. An examination of how court-users work through the maze created by these courts sheds light on the nature of the relationship between citizens and state institutions in Russia.

Andrianova's findings indicate a number of factors that contribute to creating particular experiences for Russian citizens who petition the lower courts. The first distinctive feature is the availability of direct access to judges during pre-trial sessions. These informal, non-recorded sessions give claimants an opportunity to assess the strength of their case and, even more importantly, to evaluate the judge's opinion of it. Numerous pre-trial sessions lead to most cases being decided before the hearings. As a result, the subsequent public hearings become mere formalities for the announcement of decisions, while in practice court-users' ability to participate in the legal process is limited to the pre-trial sessions and informal conversations with the judges. Andrianova's examination of people's experience of the Courts of Justices of the Peace reveals fully legitimate, relaxed procedural standards at the pre-trial stage and the lack of barriers between court-users and decision-makers. These features contribute to existing images of the favouritism and corruption attached to Russian state institutions, which in turn reflects a deeply rooted and pervasive attitude of distrust in the delivery of justice.

The next case study, by Agnieszka Kubal (Chapter 5), moves up a level in the Russian justice system hierarchy and focuses on the courts of general jurisdiction at district and regional levels. This first-hand empirical, ethnographically informed study looks at a specific type of legal case, the immigration law case. Russia is the third largest

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destination for migrants globally (after the United States and Germany) and with this chapter, Kubal contributes to a more complex picture of how law works in practice in Russia and how it is experienced by Central Asian migrants within the courtroom setting. This in-depth examination and analysis serves to open up a broader question: What do immigrant experiences tell us about the Russian justice system?

Kubal's findings indicate that the great majority of these immigration cases are adjudicated according to the so-called case file model, wherein the judges arrive at their decisions on the basis of the written evidence presented to them by civil servants. They do not seek to build up a full picture of the facts of the case, for example, by questioning the defendant about the circumstances and listening to his or her version of the relevant events. The written evidence produced by the Federal Migration Service seems to be unquestionable. It consists of material such as photographs of people working on a construction site, protocols from immigration raids and elaborate affidavits signed by the defendants, all of which appears to make these cases technically and legally simple to adjudicate. Through the prism of the immigration law cases, Kubal analyses the mechanisms of decision-making in Russian courts and investigates the potential new role of Russian judges as immigration law enforcers. Furthermore, these cases contribute to our understanding of how, in a situation where the law is not clearly determined and open to discretionary application, factors such as ethnicity and migrant status complicate a person's experiences of the justice system.

With the next case study we leave the different levels of the courts of general jurisdiction and turn to a specific kind of dispute in Russia, the commercial dispute in an Arbitrazh Court. In contrast to the popular understanding that the Arbitrazh Court system involves mainly commercial disputes where 'big money' is at stake, Timur Bocharov and Kirill Titaev (Chapter 6) also discuss the various types of disputes that fall under the jurisdiction of the Arbitrazh Court. Their mixed-methods analysis, combining qualitative with quantitative sources, demonstrates that the largest group of cases in the Arbitrazh courts is made up of mundane disputes in which the authority of the court is used to sort out petty contractual disagreements or simply produce documentation for administrative records.

What emerges from the analysis of the Arbitrazh courts in Russia is that the system enjoys a significantly high level of independence with no obvious evidence of corruption. These courts are relatively well developed in comparison with other branches of the Russian legal

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system; they attract the most qualified professional resources available in the country, and they make good use of advanced technology. Yet, the direction of the future development of Arbitrazh courts is far from being certain.

The next case study, by Maria Popova (Chapter 7), remains within the broad area of civil cases but narrows its focus to the particular issue of judicial independence in the context of defamation complaints against the media. Popova uses an original longitudinal data set containing close to 2,000 civil defamation complaints against media outlets that were adjudicated by Russian courts from the majority of Russian federal regions between 1997 and 2011. This rich data set allows her to investigate whether the various types of plaintiffs have different probabilities of winning in court. Do politicians win more often than ordinary plaintiffs? If political office does help, are regional or federal incumbents the more privileged in court? The analysis takes into consideration the significant changes in the media environment that occurred during the period being studied, as well as relevant innovations in both legislation and judicial practice.

Popova's findings contribute to the already nuanced picture of Russian civil justice. On the one hand, the data suggest that defamation cases are not foregone conclusions and that the likelihood of victory is not predetermined by external interference. Political affiliation, Popova argues, is not a significant factor determining the outcome of defamation cases. The plaintiff success rate in Russia has declined over time from about 75 per cent to around 50 per cent, bringing the ratio in line with the probability of success in the American context. On the other hand, scrupulous analysis does indicate that the judgments are not free from bias and that what is often referred to as 'administrative resources' do interfere with the legal process. This scrutiny of selected cases does tell us about the nuances of the Russian legal procedure, such as an extreme formalism and the tendencies to avoid using discretion among judiciary. Also, the absence of 'public interest' arguments in defamation disputes makes it problematic to strike a reasonable balance between the protection of dignity and the freedom of the press.

The following two chapters, by Peter H. Solomon and Lauren A. McCarthy, deal with the types of relationships discernible to a socio-legal scholar studying criminal justice in Russia. Peter H. Solomon's analysis (Chapter 8) focuses on the accusatory bias that is embedded, arguably, in the Russian criminal justice system. Historically, both the

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Soviet Union and post-Soviet Russia had extremely low rates of acquittal in criminal cases, a pattern that conventional wisdom associates with an accusatorial bias. However, when we extend the initial viewpoint and adopt a broader comparative perspective, we find that other countries like Canada, Germany, the Netherlands and France also have low rates of acquittal. This comparison suggests that this indicator alone cannot be used as evidence of a predisposition of the Russian judiciary to convict the defendant. Therefore, Solomon argues, in order to test whether Russian criminal justice does indeed suffer from accusatory bias, one has to examine the absence or presence of pre-trial screening, dispositions imposed by prosecutors such as the withdrawal of charges, or some other diversion.

After a brief history of the low acquittal rate in Russia, Solomon examines the use of prosecutorial discretion to screen cases before trial in Germany and other Western countries, especially through the exercise of quasi-judicial functions by prosecutors. These practices are juxtaposed against the absence of significant pre-trial filtering of cases and allows him to explore their implications for understanding the statistics of the outcomes of criminal cases in Russia. The analysis highlights the impact of new measures to avoid full trials (reconciliation and plea arrangements), as well as the continuing weakness of judges in Russia, the nature of the role of investigators and the absence of meaningful changes in criminal procedure.

Lauren A. McCarthy's case study (Chapter 9) focuses on a unique type of case resulting from a significant legislative change: the introduction of human trafficking laws into the Russian Criminal Code in 2003. She uses evidence from court documents in over 100 cases of human trafficking to explore how decision-making processes play out in reality when judges are provided with space for a novel approach. In effect they are invited to adopt 'outside the box' interpretations of the new legal concepts and determine how to apply them. McCarthy's study traces how the criminal system responds when judges and prosecutors find themselves on untested ground. She argues that over time the system tends to move away from a bold and novel approach towards a conservative 'safety zone', where trafficking crimes are defined in such a way that well-established and tested laws can apply. She explains this trend as a concern of both judges and prosecutors, to avoid having their judgments overturned on appeal because that would reflect unfavourably on their careers. However, as McCarthy points out, such a tendency is not unique to the Russian justice system. In almost all Western

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jurisdictions, cautious approaches towards new laws, in particular trafficking laws, are often the norm. Nor is Russia unique in the use of quantitative indicators to assess the performance of legal actors. But it certainly is true that the Russian mindset of legal positivism exacerbates the practice.

The last case study uses a backdrop of ordinary, everyday cases to highlight the high-profile cases that the Russian legal system is so infamous for: cases in which politics may and indeed does interfere with justice. Jeffrey Kahn (Chapter 10) follows the case of Mikhail Khodorkovsky, one of Russia's wealthiest citizens, who was first arrested for various 'economic crimes' in October 2003. Many observers believe that his fall from grace was meant only to warn his fellow oligarchs that their Yeltsin-era wealth would remain safe only as long as they stayed out of politics. Khodorkovsky paid the price for breaching that understanding. Under that interpretation, his fate was perhaps unjust, but it is not broadly replicable. However, the very fact that the justice system can be manipulated by politicians to achieve predetermined outcomes necessarily generates a 'Richelieu effect', as Kahn terms it. This effect occurs when political pressure corrupts and weakens the internal 'checks and balances' mechanism of the system, while nevertheless doing so under a veneer of formal legality. To make his argument, Kahn places under microscopic analysis the final verdict read out by the judge at the Khodorkovsky trial, testing it against the principle of the right to a reasonable judgment. Kahn's perspective on the matter is unique, having been directly involved in drafting a report that was ultimately delivered to President Dimitry Medvedev, arguing for the annulment of Khodorkovsky's second conviction.

The concluding chapter (Chapter 11) highlights the main themes that emerge from the empirical studies included in this volume. It adopts a bottom-up approach, concentrating on the underlying themes that guide the discussion in each chapter. This technique allows the editors to go beyond familiar arguments such as the culture of autocracy or the impact of the post-Soviet transition in describing the characteristics of Russian legal culture. The main contribution that links this book's accounts of the different corners and contexts of the Russian justice system is the emergence of a specific and unique model of justice delivery, which we dub 'the administerial model of justice'.