Dictatorship or Reform?
The Rule of Law in Russia

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PREFACE

Russia's difficulty in achieving the rule of law is the weakest link in its post-Communist transformation. Yet Vladimir Putin is a lawyer by profession, as are many of his key advisors. On becoming president of Russia, in 2000, he stressed a commitment to the imposition of a law-based society. Within a year a series of legal changes were under way. New civil and criminal codes were introduced. Trial by jury replaced a judge-based system whose acquittal rate was less than one per cent, or lower than that under Stalin.

It was a promising start but, since then, the attack on judicial independence, as evidenced by the Yukos affair and other violations of the right to a fair trial, has done enormous damage to Russia's reputation. Admittedly, rule-of-law reform is arduous and slow. Judges, lawyers, and bureaucrats have to be retrained. Fixtures like court systems, police forces, and prisons have to be restructured. Yet the primary obstacles to such reform are not technical or financial. They are political or even human – which is to say, rule-of-law reform will only succeed if it tackles the problem of bureaucrats and politicians who refuse to be ruled by the law.

The relationship between the rule of law and liberal democracy is profound because the rule of law makes possible individual rights, which are at the core of democracy. Unfortunately, they do not seem to be the core values of the Putin presidency. The Foreign Policy Centre believes that only the rule of law can uphold political and civil liberties that have gained status as universal human rights over the last half-century. The three essays in this pamphlet look at the consequences of Putin's "dictatorship of law", in particular at how political corruption undermines individual freedoms and increases the power of bureaucrats in the police and prison systems at the same time as weakening civil society.

It is important that governments and non-governmental organisations remain fully engaged with this debate because the success of rule-of-law reform in Russia will depend less on technical or institutional measures than on enlightened leadership in the post-Putin era. Sweeping changes in the values and attitudes of those in

power are needed. Above all, Russian officials must refrain from interfering with legal decision-making and accept the judiciary as an independent authority. In other words, they must give up the habit of placing themselves above the law.

Stephen Twigg
Director
The Foreign Policy Centre

Dictating the Law in Putin's Russia: Hyper-legalism and "Vertical Power"

Hugh Barnes

The rule of law is hardly a new idea. Over two and a half thousand years ago, Solon wrote laws for the Athenians so that they could be governed legally in accordance with rules. Unsurprisingly the idea fell out of favour in Late Antiquity, during centuries of absolute rule, but the Magna Carta reintroduced the concept which has since become a venerable part of Western political philosophy.

Suddenly it is everywhere. The rule of law is a cornerstone of democracy and essential to a well-functioning market economy that protects individual human rights. Since the end of the Cold War, however, policymakers in the West have seized on the rule of law as an elixir for Eastern bloc countries in transition. Yet Russia in particular, a country that is almost unmanageably vast, has little experience of the rule of law. So it is ironic – but again perhaps unsurprising – that in the six years since he pledged to uphold democracy as a "dictatorship of law", President Vladimir Putin has increased the role of the federal security service in governing Russia and arbitrarily wielded the power of state institutions such as the courts, the tax inspectors and the police for political ends.

The periods of freedom and the rule of law in Russia were always brief and precarious – fleeting episodes in the long history of autocratic government, in which the country was governed not by law but by the will of its rulers. The Communist era is an obvious example. Within two or three years of seizing power, Lenin abolished in favour of the state all private property except small landholdings. Stalin completed the process by "collectivising" agriculture. The Soviet state always used the pretence of respecting the law in its actions against dissent. The same tactic is evident in today's Russia, and so this pamphlet will examine the recent shift to "hyper-legalism" as a weapon used by the authorities under the lawyer president Putin." It now seems clear," writes Andrew Jack, a former Moscow

bureau chief at the *Financial Times*, "that the 'dictatorship' is playing a greater part than the law."[1]

The two essays which follow, by distinguished experts in the field, Mary McAuley and Alena Ledeneva, will look at how political corruption in today's Russia undermines individual rights and freedoms, and weakens monitoring of executive and legislature as well as the accountability of other levers of government. Both essays suggest that Russia is in danger of returning to the Soviet model where a lack of prosecutorial independence effectively undermined the rule of law. In the words of Yelena Bonner, the widow of the country's best-known human-rights campaigner, Andrei Sakharov, Putin is "modernising Stalinism".

The Yukos affair is a case in point. In October 2003, Mikhail Khodorkovsky, chief executive of the Russian oil giant Yukos, and thought to be the richest man in Russia – not to mention a major financier of the reformist Yabloko party – was arrested on charges of fraud, forgery, embezzlement and tax evasion. Many observers believe the affair was triggered not only by Khodorkovsky's rising political ambitions, but also by an incident between Putin and the so-called oligarchs earlier that year, when Khodorkovsky supposedly criticised the widespread corruption and misrule of law in today's Russia.

Nothing typifies the contradictions of Putin's Russia quite like the Khodorkovsky saga. It dramatises the tension between the rule of power and the rule of law, exemplifies the opacity of decision-making, and divides opinion about Putin's real motives, especially in the West, where the Yukos trial was widely perceived as politically motivated. Such allegations of prosecutorial misconduct raise questions about judicial independence and selective application of investment and tax laws. Similarly, a series of cases of alleged espionage has led to concerns regarding the lack of due process and the influence of the FSB in judicial proceedings. Yet instead of insisting that Russia uphold the rule of law and respect fundamental

[1] Andrew Jack, in *Kremlin Echo: Three Views on Presidential Power, Law and the* Economy (Foreign Policy Centre, 2005), p. 2.

human rights, the European Union has failed to exert the necessary pressure.

History is partly to blame. In the aftermath of the Cold War, it became fashionable in the West to assume that the Russian Federation might transform to Western standards of market economics and democracy. Perceiving a new democratic spirit in Russia under former president Boris Yeltsin, the EU signed the Partnership and Cooperation Agreement (PCA) with Russia in 1994, outlining the framework for future relations. The agreement, which took three long years to ratify, encompassed assistance to help reform legal systems (criminal, civil, administrative, and commercial laws and regulations) as well as judicial and law enforcement institutions (ministries of justice, courts and police, including their organisations, procedures, and personnel). Indeed creating the proper institutional attributes in Russia – the necessary laws, a "well-functioning" judiciary and a "good" law enforcement apparatus – became for many US policymakers in the Clinton era the goal of reform efforts. The Russia that was "lost", in other words, was more of an opportunity, or an ideal, than a down-to-earth reality: a society with the rule of law, with law and order, and with a government bound by the law, and by human rights.

By the end of Yeltsin's second term of office it had become clear that the Russian president was neither able nor willing to guide the country towards this Western model of perfection. The spoils of privatisation led to organised crime and corruption. A greedy band of insiders carved up Russia's vast natural resources. Many of these oligarchs were closely linked to the Kremlin, and the resulting kleptocracy often blurred a line between economic and political power to the detriment of citizens' rights. Like the other "robber barons", Khodorkovsky, who was already rich due to some clever wheeling and dealing in the last years of the Soviet Union, became super-rich thanks to a pact between business and the Kremlin to ward off a Communist comeback in the 1996 presidential elections. In return for supporting Boris Yeltsin, he was allowed to buy control of his oil company, Yukos, for $309m in 1995. His own bank, Menatep, ran the auction. Like his fellow magnates, he expanded his

business empire by dealing ruthlessly with business partners, creditors and minority shareholders.

The last half-decade has undoubtedly witnessed a number of improvements. The most significant is that a small group of obscenely rich Kremlin cronies no longer run the country. Russia under Putin has had more predictable and efficient justice than it did under Yeltsin. The reduction of corruption has helped to ensure that the central government can rule, regular businesses can operate, and local government officials do not have impunity before the law. Putin set out on a road to create a stable and safer Russia. Unfortunately that road does not always lead in the direction of what you might call a democratic country. Curbing corruption has become one of the catchphrases for legitimising Putin's "strong presidency" and rebuilding the so-called "vertical power" – Putin's main project to modernise and strengthen the Russian state. In line with this project, the former KGB colonel has amassed more power at the central level, re-establishing executive control over the Duma and much of the judiciary and reinstating elements of state power such as the reformed security service, or FSB. It is also evident that such verticality is becoming a powerful tool in the hands of the president who may turn it selectively against unhelpful officials or political opponents. Under Putin, the role of law as a political tool is back in fashion, and so it doesn't help that many of the country's criminal procedures still date from the totalitarian era, as do the judges and prosecutors implementing them.

The Kremlin and its apologists often speak of "consolidation". They argue that a firm stance is necessary after the chaotic liberalism of the Yeltsin era. Russia is, apparently, too big and too backward to be governed like a Western country. Democracy is fine in principle, but it must be managed. The first step is to get people to obey the law, and that must be done by establishing a sense of order and authority. Only "vertical power", or so the argument goes, can push through necessary economic reforms to create the middle-class Russians who will, in time, become cheerleaders for true democracy and the rule of law.

The Yukos case is important in Putin's Russia not for the details so much as for the broader picture it paints of the continued failings in the country's law enforcement system. As Mary McAuley and Alena Ledeneva show in the remarkable essays which follow, Russia's legal institutions have shed few of their Soviet habits and remain ineffective, politically subordinated, and corrupt. The government may have attempted a number of reform initiatives, including the drafting of new civil and criminal codes. Yet these have been neutralised by the tendency of Putin's henchmen, the shadowy *siloviki*, to act extralegally and by the new private sector's troubling lawlessness. The operations of Moscow's Basmanny Court – where the judges had close connections to the Kremlin and the prosecutor-general's office, and consistently found in their favour – even gave rise to a new derogatory phrase, the *basmannatsia* of the legal process, as Ledeneva observes.

Putin's sacking of the prosecutor-general, on 2 June 2006, therefore sent shock waves through Russia's political spectrum, as it was completely unexpected and seemed to entail a redistribution of power among powerful clans inside the Kremlin. The prosecutor-general is the top law enforcement official in Russia, and until his dismissal Vladimir Ustinov had set a record for prosecutorial longevity in post-Soviet history. His candidacy, submitted by Putin to the Federation Council, was first approved in May 2000. In April 2005, the senators extended his powers for another five-year term. Thus Ustinov had retained his job for over six years, while his predecessors in the 1990s never held out for more than four years and sometimes ended their careers in jail or in public disgrace. Alexei Ilyushenko, the prosecutor-general from 1994 to 1996, was found guilty of embezzlement and spent several years in prison. Yuri Skuratov, the prosecutor-general from 1997 to 1999, was secretly filmed in bed with two prostitutes, and ignited a political crisis in Russia in 1999, when he refused to leave office until the *kompromat*, or "compromising" footage, was shown on state television.

The departure of Ustinov could mark a turning-point for Russia's "dictatorship of law". After all, it was his report, in 2003, warning that Putin faced a "creeping oligarchic coup" that led to Khodorkovsky's eight-year jail sentence in Siberia. It also led to the takeover of

Yukos assets by the state oil company Rosneft, whose chairman Igor Sechin is not only the most powerful of Putin's *siloviki* but also, coincidentally, the father-in-law of Ustinov's son. Some experts claim that Putin finally grew tired of dealing with the "family" connection between his prosecutor-general and the *siloviki*. Others suggest that the manner in which Ustinov was sacked – hurriedly, without any explanation, by a change to the Federation Council session agenda – helps us to understand what the prosecutor-general's office has been all these years: not the punishing sword of justice, but a Kremlin tool in the struggle against overt and alleged opponents of all the president's men.

On 30 November 2007, the current Partnership and Cooperation Agreement between the Russian Federation and the European Union expires. It will be automatically extended on an annual basis - unless either side withdraws. As mentioned above, the agreement, among other mostly economic issues, gave Yeltsin's administration the benefit of the doubt over its "respect for democratic principles and human rights". Under Putin, law and order has improved, as has the predictability and stability of legal institutions. Yet the executive is less bound to the law. Meanwhile, human rights are now more threatened by the state. In Moscow, several judges have been removed from the city court after disagreements with the court's chairwoman. It is not unusual for a judge to be removed in the middle of a trial, and for the new judge to dismiss the entire jury and select a new one before the trial continues. The European Court of Human Rights has cited Russia for manipulation of jury selection, especially in sensitive cases.

The economic background to the PCA may hold the key. The European Union struck the original agreement with a poor country still emerging from the post-Communist twilight. Twelve years on, the boom in oil and gas prices has changed everything. Never in its history has Russia been so prosperous, with its $200 billion in foreign exchange reserves, shrinking debt, a stock market up 83% last year, dozens of companies preparing for IPOs and well over a hundred thousand dollar millionaires, quite apart from the billionaires in the Forbes list – a trend that has led Goldman Sachs to project

that by 2025 Russia could be a six-trillion-dollar economy and number five in the world GDP league table.

The fundamentals of the Putin boom are proximity to the “vertical power”, debasement of judicial independence, the establishment of a new Kremlin-based oligarchy, and fuel diplomacy which Russia is now beginning to use as a lever for its newly resurgent foreign policy. In the long run, however, Russia will face problems because Putin has deliberately avoided introducing something he claims to hold dear: the rule of law. When the robber barons who built the foundations of American industry got too powerful at the end of the nineteenth century, the government passed antitrust laws to break up the barons’ monopolies, and enforced those laws evenly and openly. Putin prefers to limit the influence of business on politics by rewriting laws and regulations. That is the easy part. Far-reaching institutional reform, also necessary, is arduous and slow. Judges, lawyers, and bureaucrats must be retrained, and fixtures like court systems, police forces, and prisons must be restructured. The judiciary is reliant on magistrates’ schools, law schools, bar associations, clerks and administrative workers, and other supporting groups. Police require prisons, intelligence services, bail systems, and cooperative systems with border guards and other law enforcement bodies, among other institutions.

To see how much remains to be done in Putin’s Russia, the Foreign Policy Centre is attempting to measure the country’s “rule of law” according to five different criteria. The rule-of-law measurement, to be published as an Index later this year, will assess Russia’s performance in terms of government bound by law, equality before the law, law and order, predictable and efficient government and human rights. The aim of such an index will be to present data in a way that allows for comparison between states. Not only will it seek to make clear that rule by law is the sine qua non of the rule of law. The index will also show that it is now a matter of urgency for Russia to respect judicial independence and abide by the principles of the European Convention on Human Rights and other international agreements, including the PCA, as a legal framework based on respect for democracy, the law and human rights.

Prisons in Russia and the Rule of Law

Mary McAuley

'The penal system cannot change on its own, separately from society as a whole. Its reform is possible only as part of a wider range of measures aimed at creating a democratic state and the introduction of legal and judicial reforms.' (Kalinin, 2002)

Detention (or 'deprivation of liberty', as it is usually called in Russia) should only be used when there are overriding reasons for depriving an individual of his or her rights to living, as a free person, in society. These may be those when an individual represents a real danger to society or to him or herself. Quite apart from the infringement of rights, detention has adverse effects, both social and psychological, upon those detained. It is also extremely difficult to administer closed institutions, particularly when among the inmates are violent and difficult individuals, in a way that encourages respect for the law as a way of managing conflicts within society. International conventions pay particular attention to the unlawful use of force in such institutions. If a society or government wishes to encourage respect for the rule of law, and for human rights, its priorities should include limiting the use of prison and ensuring that prisoners enjoy safeguards. And, in turn, implementation of such reforms will require an independent justice system and democratic involvement.

Developments in Russia under Putin demonstrate this. Russia joined the Council of Europe in 1997, and since then a reform-minded deputy-minister, Yuri Kalinin, an advocate of alternatives to detention, has been in office.[1] In keeping with Council of Europe requirements, the penal institutions were transferred in 1998 from the Ministry of the Interior to the Ministry of Justice. Between 1997

[1] As regards children, the situation is different. Although in their case the above rights of course also apply, the UN and Council of Europe conventions state clearly that detention (either in remand cases or as a sentence) should only be used in extreme cases, that length of detention should be kept to a minimum, and that alternatives to detention should be actively used.

and 2002 more than 2,300 federal laws or amendments to existing legislation were adopted to bring Russia in line with its commitments under the international conventions. The conventions, including those for the defence of basic rights and freedoms and for the prevention of torture and inhuman or degrading treatment or punishment, do not, as regards adults, rule out the use of prison. They are concerned with the right to a fair trial and to adequate defence, with the presumption of innocence, and with the right not to be subject to torture, inhuman or degrading treatment by police, investigators or prison personnel. Upon his appointment as head of FSIN in 2004, unconsciously echoing Winston Churchill's sentiments of a century earlier, Kalinin reiterated: *"Prison does not re-educate anyone, does not provide anything positive. I don't believe that it is possible to re-educate an individual by imprisonment. I simply want us to find a way of putting fewer people behind bars. Prison should only house those who have committed crimes that really represent a danger to society."*[2] And in the past three years there has been further legislation and funding of the prison system has been greatly increased.

Yet, despite a reform-minded deputy-minister and despite a veritable avalanche of legislative amendments, the incarceration rate remains very high, and prisoners still engage in mass self-harming actions in protest against their treatment by the prison administration. The reasons for this can be attributed to Putin's conception of the appropriate way to rule. His 'dictatorship of law' has revealed itself to mean *the use* of the justice system by political authorities as a means of control and for the achievement of political ends, and that has little to do with the rule of law. Russia's penal system under Putin is depriving too many people of their freedom and is in

[2] (Ross gaz. 17.12.2004). Winston Churchill, on introducing the prison bill in the House of Commons in 1910: *"The first principle which should guide anyone trying to establish a good system of prisons should be to prevent as many people as possible getting there at all. There is an injury to the individual, there is a loss to the state whenever a person is committed to prison for the first time, and every care, consistent with the maintenance of law and order, must be taken constantly to minimise the number of persons who are committed to goal'.* A principle that seems to have been forgotten by today's political leaders in the UK.

desperate need of reform. Without the recognition that the judiciary must be independent and act as a check upon political power; without independent monitoring of law and order agencies, and the acceptance of a role for independent NGOs and of a free media, existing practices will not change. Without the infrastructure that would make reforms possible, they will remain on paper. The failure of the attempts to limit the size of the prison population, the poor protection of prisoners' rights, and finally the uncertain future of an alternative sentencing policy, despite the reforms, are all witness to this.

The use of detention and size of the prison population

In the 1980s, a political prisoner, Valerii Abramkin, observed with dismay the profile and fate of his fellow prisoners. The great majority were people who had committed small criminal acts. They were, he noted, no different from people outside but now they were sentenced to spend several years in prison, subject to a regime that destroyed their lives, with damaging consequences for society. Why is the government locking up so many people, he wondered, when there is no reason to believe that Russians are inherently more criminal than other people? In 1989 he set up an organisation, Prison and Freedom (subsequently renamed The Centre for Exerting Influence on the Reform of Criminal Justice) to address the issue. By 1999 he had an ally in Kalinin: *"Out of the total prison population only 12-16% are people who are really dangerous, with a particular caste of mind. Fifty-sixty percent constitute a passive group. They are not part of the criminal class but under certain conditions they can certainly join it. It is those people that we ought to be looking after, otherwise society will simply be working on behalf of its prisons…the prison population ought be reduced to the minimum, by using alternative types of sentences - a system of fines, conditional and suspended sentences, corrective work…"*.

So far, despite legislative change, there is a long way to go. The situation Kalinin inherited in the mid-nineties was admittedly daunting. Already high rates of detention rose sharply in the nineties (as did crime rates) until by the year 2000 Russia had more than 1 million in remand centres or serving custodial sentences. TB was

rife. Some died from overcrowding or malnutrition. Russia topped the international league table of incarceration rates. Since then numbers have been reduced, and Russia has moved down to second place behind the United States, but its figures are still high compared with those of its European neighbours and in 2005 numbers began to move up again. The incarceration rate (per 100,000 of the population) was 528 in 2004, higher than that of 1993 (before the rise began) and today must be higher still. The victims of AIDS have joined the prison population. Abramkin suggests that one in four adult males in Russia have spent time in custody. This must surely be too high a figure for today, when very few Gulag survivors are still alive. Another suggestion is that 1 in 5 of the adult population or one of their relatives or close friends will be or have been behind bars. Whatever the correct figures, they are high, far too high, if the use of detention (the most severe after capital punishment) is accepted to be damaging to the individual, unwarranted for less serious offences and linked to future societal problems. Still, it seems, the system is sweeping in a mass of people who pose no serious danger to society. What determines such a high level of detention?

Investigation and remand

As a continental system, Russian criminal justice is based upon the existence of Codes (the Criminal Code, the Code of Criminal Procedure, the Code for the Implementation of Sentences) and on inquisitorial principles (establishing the truth) rather than adversarial. The investigator and prosecution aim to bring a case to the judge which demonstrates the guilt of the accused; an acquittal by the judge means that the prosecution has not done its work properly. Prior to the court case is the period of investigation and this is where the suspect can be seriously at risk. Police brutality is openly recognised and has a knock-on effect through the system. Everywhere police like to see cases solved but when they are poorly paid, when promotion depends upon clean-up rates, and their use of force or receipt of bribes is glossed over by both judicial agencies and political masters they can become a danger to the public. According to a judge, four out of five accused complain before the court of police torture. A NGO activist similarly reports: *"In this and last year (1999) I attended 42 court hearings where the accused not*

only complained of torture but named the individuals, the place where the torture was used, reported in which safe the electric shock baton is kept, and the gas masks that were put over their heads, named the doctors, provided medical certificates. In all 42 cases the procurator replied: request to open a criminal case refused." It is not accidental that the last two cases won by Russian citizens before the Court of Human Rights in Strasbourg relate to the use of torture or police brutality and the refusal of the justice system to take up their complaints.[3]

Sentencing policy

Whilst the system of prosecution plays a crucial role in determining numbers of future prisoners, it is of course the judge who decides the verdict and the sentence. Traditionally, and still today, prosecutor and judge work closely together, and the acquittal rate is less than 1%. Although the defence is now guaranteed more rights than previously, the cards are still stacked in favour of the prosecution. However, under a continental system, the content of the Criminal Code will be critical in determining the fate of those convicted. The Criminal Code lays down in detail those actions that constitute a crime, the seriousness (average, serious, extremely serious) of crimes, and the sanctions that can be applied, depending upon a first-time or repeat offence, whether an offence was committed individually or in a group, etc. etc. Judges have to apply the sanctions specified in the Codes and only in some cases is there flexibility.

[3] The UN Committee on Torture (2002) requested the Russian Government to include in its legislation the concept of torture as defined in the UN conventions. However those drafting amendments to the Codes shied away from this. Instead, the existing article (117) on torture included the definition "physical or moral suffering to compel an individual to give evidence or act against his will, and also if the aim is to punish" and an additional clause in article 302 (on using force to gain a confession) make the investigator responsible if torture is used with his knowledge or with the silent consent of a third party. Human rights lawyers argue that this leaves 'torture' as acts which may be committed by anyone - in the home, by an organised crime group – and do not single out as 'torture' suffering caused by law-enforcement officers in the execution of their official duties.

The Codes of the mid-nineties were recognised to be unduly harsh, both as regards the classification of actions as crimes, and in the choice of sanctions, restricted essentially to the choice between custody or a suspended sentence. From the early nineties until 2005, judges were using custodial sentences in approximately one third of convictions (more for adult men, less for children, and for women with children); conditional or suspended sentences accounted for 40-50%; corrective labour at place of work for a few (many of those convicted during this period had no work) and fines for a very small number of cases. The consequence was a mass of petty criminals in the colonies. In 2002, in the words of a journalist, writing with an eye to those above, *"The President understood that our prisons are overflowing not because there are more criminals in Russia than in other countries but because something is wrong with our legislation"* and set up a working group to prepare proposals for the Duma.

In December 2003 the Duma passed a comprehensive packet of legislative amendments to the Codes. Some less serious acts of 'hooliganism' were reclassified as 'administrative infringements' (and hence excluded from the criminal code)[4], the laws on drug possession were softened and a range of crimes were reclassified as 'average' rather than 'serious'. Articles which concerned the treatment of 'repeat offences', the definition of 'dangerous recidivist', were 'humanised'; judges received, for example, greater flexibility in sentencing for first offences and in taking into account changed circumstances. The minimum sentence was reduced from six to two months and, for a whole series of crimes, alternatives to a prison sentence would be introduced: correctional work (not only at the individual's place of work), fines, and 'compulsory work'. Applications

[4]Russia also has a Code for Administrative Infringements. These are not criminal offences. Previously a shop-assistant or waitress short-changing a customer (giving less than the appropriate measure) was a criminal offence. This allowed the police to put in an order, then charge the shop-assistant or waitress, making it clear that in exchange for a bribe they would not proceed. 'Theft' however was redefined as a minimum of 2,500r rather than x4 the minimum wage, which could lead to 'more theft', if the police register such cases. In December 2005 the laws on drugs were retightened.

for parole were made easier. Officials from the justice ministry and prison reform activists reckoned the amendments would cut the prison population by at least 100-150,000, maybe even more. Not only would they result in fewer sentences, but existing detainees would qualify for release or for reduced sentences (and indeed 33,000 were released, and the sentences of a further 160,000 were reduced). By 2005 the courts were struggling – with 25-30,000 parole cases coming up each month – and the chair of the Supreme Court was arguing in favour of new parole boards made up of justice officials and psychologists.

However, the substantial reductions in the prison population achieved in the early years of the new millennium were largely achieved by other means. The system operated, traditionally, by sentencing large numbers, almost indiscriminately, and then releasing particular categories under such mechanisms as amnesties and Presidential pardons. An amnesty would be pronounced by the Duma – to coincide with a special occasion such as Victory day – and usually include women with children, invalids, young offenders, and those sentenced for minor crimes. In May 2000 222,000 were released, and 43,000 had their sentences reduced. December 2001-May 2002 24,000 women and young offenders were released. Several thousand more were traditionally released annually by Presidential pardons.

It is, surely, an irrational way of operating: sentence large numbers to detention (with all the costs involved), subject them to an unhealthy and demoralizing prison environment, and then release them back into the outside world, where they are going to find it more difficult to find housing and work than they did before. Although this was never stated, recognition of the counterproductiveness of such a penal policy may have encouraged the political leadership to attempt to move away from it. If the Codes got it right, and alternative sanctions existed, then neither pardoning nor amnesties should be needed. From 2002 onwards Putin has pardoned very few, abolished the central pardoning commission, and passed the process down to the regional governors (whom he now appoints). And in 2005, when a generous amnesty was expected for the 60th celebration of Victory Day, and an appropriate document prepared

by the Public Council of FSIN, the Duma unexpectedly limited it to 2nd World War veterans and *blokadniki* – in all 262 already very elderly individuals. This caused an uproar. Who was responsible for this, it was asked? Some suggested that it was FSIN itself – with numbers at a long-term low, the management was anxious that any further cuts would mean employees out of work and a cut in finances. The President agreed that some further measures might be needed, but none were produced; the issue was never clarified, and the result was a summer of discontent in the colonies as thousands of prisoners who had expected release or shorter sentences found themselves kicked in the teeth. The prison administration struggled to maintain order, and in some cases failed.

Prisoners' rights and their safeguards

In 2002, speaking to a London audience, Kalinin suggested that: *'The regime [inherited from the Soviet period] under which those serving their sentences lived was so organised as to cause prisoners hardship and suffering: for these reasons it was very harsh and constituted an unnecessary curtailment of a large number of prisoners' rights. This is why the health of many prisoners deteriorated sharply while they were serving custodial sentences, why family ties broke down; prisoners deteriorated, they absorbed the prison sub-culture while losing the socially-useful skills essential for life outside'* . He welcomed the changes that had been introduced and were underway.

The international conventions are clear that prisoners have rights: to be treated humanely and with respect, and to legal rights specified clearly in appropriate legislation. The Russian Federation has signed the appropriate conventions and amended its own Codes, in particular the Code for the Implementation of Sentences and that relating to conditions while held under remand. In many respects the rules (governing the obligation of staff and prisoners to use the polite term of address, the receipt of parcels, telephone calls, extended visits, exercise time, work and leisure time) are very respectable, and those governing punishment are no longer savage. Both sociological research, ex-prisoners' testimonies, and NGO activists confirm that it is better to be in prison today than it was in the Soviet

period. Conditions are not so harsh, people are better fed and, with a good governor who maintains a strict but fair regime, and finds work for prisoners, life, while stressful, is bearable. It is always tense because people are living in close proximity with each other (there may be up to 80 closely ranked double-tiered iron bedsteads in a barracks, with small bedside lockers for the prisoner's few private belongings); lining-up, marching, searches all raise the tension, not only between prisoners and supervisors, but between the prisoners themselves. They respond by establishing strict informal rules on appropriate behaviour, on punishments to be meted out, and by having one of their own to act as informal judge and arbiter. All are afraid of *'bezpredel'* – an uncontrollable situation – and a prison governor who attempts to prevent this by using his own (violent) recruits from among the prisoners is hated and despised. All recognise that failure to act as required by a prison supervisor can result in a savage beating against which it will be useless to register a complaint.

A survey of prisoners' views in 2000-2001 on whom it is best to involve for a speedy resolution of conflicts within the prison produced the following:

	Russia (1310)	Kazakhstan (396)	France (58)
Prisoners' informal representative	33.4	39.4	17.9
No one external to the conflict	33.3	26	23.8
Prison administration	20	25.8	48.7
Judge, procurator	1.6	2.8	9.5
No answer	11.7	6.1	

Abramkin likes to quote Dostoevsky *"You can judge how civilised a society is by the state of its prisons"*, a quotation that draws attention to the relationship between the prison system and society. Prisons

may be closed institutions with highly developed informal rules of their own but they reflect changes occurring in the outside world. The way prisoners are treated tells us something of the conventions and rules of governance that operate outside. A case-study of the events surrounding a mass protest which occurred in the summer of 2005 draws attention to practices and the authorities' response.

The L'gov mass protest

On 28th June news appeared on several web-sites that up to 250 prisoners in L'gov colony in Kursk region had cut their wrists, legs, stomach and faces in a mass protest. The first response came from the regional procuracy: it had already sent an investigative group, headed by the procurator himself, and including his deputies, 12 investigators, 5 legal-medical experts, and criminologists; the investigation had already established that the protest was well planned, it had begun simultaneously in 10 sections (or barracks); it was aimed at destabilizing the situation in the colony and resulted from *'the unwillingness of the prisoners to obey to the legal demands of the administration regarding the observance of the prison regime'.* The prisoners' wounds were superficial and being treated. No previous complaints of the prison administration's behaviour, the report added, had been received by the procuracy. However, later the same day news came that the procurator had filed charges of "exceeding official competencies" against two members of the administration. These were subsequently identified as a deputy governor and one of his assistants, and were charged with beating 4 prisoners on the evening of 27th. One of the prisoners had been so badly beaten he only managed to crawl back to his barracks where, in despair, he cut his stomach. The news had now spread, relatives of prisoners travelled to the colony (and camped outside), Ekho Moskvy (an independent radio station), and web-sites reported information received from news services. Figures quoted for the numbers involved varied wildly.

The following day two groups arrived from Moscow: one from FSIN, the other included Valerii Borshchev, who chairs a 'Public Council' attached to the Justice Ministry and representatives from the office of the Commissioner for Human Rights. They were given free

access by the prison administration. They reported that of the 437 prisoners who received treatment, 36 had needed stitches, and only two had cut their veins. ‘The picture is gradually becoming clearer’ said Borshchev, tension had been building up as a result of frequent infringements of prisoners’ rights by the administration, and he criticised the procuracy for not responding earlier. (Prisoners’ relatives, whose camp had been forcibly moved further way from the perimeter fence by special troops from FSIN, claimed that they had sent earlier complaints to the procuracy; some announced a hunger strike until the governor, Bushin, his deputy and the officer charged with beating 4 prisoners were dismissed.) The situation was gradually calming down, claimed Borshchev, and he would be making his report to Kalinin. Minor hunger strikes occurred among some of the prisoners.

Over the next two months the regional FSIN and the procuracy maintained that the action had been instigated and organised by ‘criminal authorities’, one of whom had recently been moved to the colony, others of whom had directed the action from outside. The human rights community, including Abramkin’s organisation which tries to monitor the situation in colonies by the letters they receive from prisoners, was very sceptical. It is very difficult, Abramkin argued, to plan such an action without the administration’s learning of it (from their ‘assistants’ among prisoners); usually such actions arise almost spontaneously, in response to a particular incident, when the atmosphere in an institution is already very tense, and, in this case, as in many colonies, anger and frustration at the derisory amnesty of May 2005 was probably responsible. A protest can spread like wild-fire; the communication system among prisoners is very highly developed. In this case the beating of four prisoners by the deputy governor and his assistant was enough to ignite the protest, although it was quite possible that outside criminal authorities then played a part in it.

How did matters end? On 2nd September Bushin the governor took sick leave, and Kalinin announced that he had decided to remove him from his post. On 16 November the four identified by the prosecution as the ringleaders received additional sentences of from 8 months to 4 years in ‘strict regime’ colonies; the case against the

two members of the prison administration, scheduled for 21 November, was deferred by the judge because the remand centre staff failed to bring one of the accused to the court as required (!), and because the prosecutor had entered the wrong official description of the deputy governor's title in the charge papers which therefore had to be sent back for correction. The media lost interest…Further smaller mass protests, either of self-harm, or hunger strikes occurred in some other colonies and remand centres during the following months.

Some of the prisoners' relatives had managed to get there within a day, and camped (what if it had been winter?). European legislators are sometimes not aware of the degree to which distance may affect the implementation of rights. Many of the colonies are built in isolated areas, far from towns and transport. Even when relatives want to visit, many cannot afford the train fare or the time (a journey of several days). Telephone calls may be exorbitantly expensive: a 15-year old girl may find herself two thousand miles from home. Rules may mean little if the prisoner is 500 miles as opposed to 10 miles from home. Something should be done to bring the colonies back closer to the community. The way prisoners are treated when they are transported from the court room (after sentencing) to the colony is still often appalling. The following two examples are both from 17-year old girls:

'To be honest, I was scared of the thought of etap (the transport). They took us under guard, with dogs, to the stolypin railway cars. They were coarse and cruel, shouted at us, insulted us, pushed us around, and even kicked us, those damn guards. But we were lucky, the boys really got it. They beat them, much more and worse, humiliated them every which way, it was awful to watch. The boys cried and begged for help, but nobody can help them, there's no one to turn to. They took them into an adjoining car and beat them, we heard the sounds, and then saw their bloody faces. It's awful to remember'.

'I left Ekaterinburg at 4 in the morning. There were 6 of us kids and a 19-year old girl. The prison van took us to the station, to the stolypin railway car. The convoy gave orders: out quickly, no looking to the

right or left, run across the rails. We dragged our suitcases and got into the railway car…after a day and a half we got to Ulyanovsk. After being searched we spent two days in a horrible cell, filthy, cold, damp and dark. Then on to Ryazan which took less than 24 hours, there they sent us up to a cell – it was awful There were 40-50 people in it, 10 were kids, the rest were women, some really hardened criminals, others were like men. Thank goodness we were only there for three days, and then they sent us to the colony…'

Recourse against infringements

To whom might the children and the prisoners in L'gov colony turn with their complaints? To whom should they? The procuracy is the 'guardian of legality', responsible for ensuring that the justice agencies – police, prosecutors, judges, prison staff – act within the law. But its response in the L'gov case was standard: it mounted a large inspection which exonerated the prison administration as a whole, found two culprits, and blamed 'outsiders'. The 'instigators' were found and sentenced without difficulty, while the trial of the prison staff ran into procedural obstacles. Public scepticism over the willingness of the procuracy to combine its role as prosecutor with that of defending citizens against unlawful behaviour by the law and order agencies is nothing new. But it seems to have become even more pronounced in recent years. A representative survey of the adult Russian population carried out in February of this year found that only 2% of the whole sample believed that the procuracy and courts would defend their rights if they were infringed by the police. It is unlikely to be much different in the case of prison officials. Putin has raised the profile of the procuracy, a centralised institution that reports to the political leadership, and uses it quite openly as an instrument for pursuing political ends. There has been no attempt to tackle the issue of its dual contradictory competencies – those of prosecution and ensuring legality on the part of law and order agencies.

The Ministry of Justice carries out inspections of practices in places of detention. In 2002 150 employees received disciplinary sanctions. In the same year the Ministry set up a department for the control of human rights observance in correctional institutions. According to

the deputy-minister this was to provide “an independent channel of information on the real state of affairs” for the prison service. But at meeting of the collegium of the Ministry of Justice in March 2003, Sergei Tarakanov, its director, made no particular impression and, according to the journalist reporting the meeting, it quickly became clear that “the Prison Service HQ view the its activities as yet another useless check by authorities”. The use of the word ‘independent’ is telling. How can a department set up within the ministry be ‘independent’? This is recognised by some within FSIN: prisoners’ complaints on inhuman treatment are reviewed by those against whom the complaints are directed, and resources do not exist for outside checks. Who else might conduct them?

Since the mid-nineties NGO’s have been pressing for the introduction of ‘public monitoring councils’ or ‘prison visitors’, independent bodies with the right to visit and carry out inspections. (Whilst the legislation provides for ‘observation councils’ of local representatives, these are largely toothless bodies.) Although a draft law on ‘public monitoring bodies’ passed a first reading, it was dropped from the legislative agenda in March 2004 and all concerned have returned to the drawing board. If Russian organisations do not yet have such rights, some international organisations have recently run into difficulties. In 2000 an agreement was signed between the Red Cross and the Russian government that provided the Red Cross with access to any institution where prisoners are held. For three years the agreement held but from 2004 obstacles were being put in its way, even as regards visiting institutions far from Chechnya. A meeting with representatives of the Foreign Ministry, Procuracy, Security Services, and Ministry of the Interior (why not from the Justice Ministry?) failed to resolve the issue: the new ‘terrorist’ environment made such visits inappropriate.

While the setting up of a Public Council attached to FSIN is to be welcomed, its value lies in its being chaired by Valerii Borshchev, who has an established human rights and democratic record. It has no independent status. The L’gov protest received publicity through independent media sources, because the Public Council and the

Commissioner for Human Rights reacted. But Borshchev's report (to the best of my knowledge) was not made public and no one suggested that an independent enquiry should be held. Why have independent enquiries? There have been none into the tragic outcome of the hostage-taking at the North-East musical. The security services did their own investigation – presumably for the President. The system relies on personalities and a hierarchy of power. There are no institutional checks and balances. No independent oversight. This is as true of the prisons as it is of government institutions. The prison governor only needs to look up to his superiors. He may be 'a good person but he's in a bad place', and Kalinin's claim in 2002: 'The prison system has become open to social control' should be read perhaps as a personal wish rather than a reflection of reality, a reality which under Putin has included the curtailment of both media freedoms and the ability of independent NGO's to operate. Independent NGO's and an active media will not guarantee the protection of prisoners' rights but without them there is even less chance that grievances will be addressed.

Recommendations

Two sets of issues relating to penal policy and human rights are paramount in Russia today.

- First are those issues that relate directly to the penal system and its inmates. These include, as this paper has shown: the dual role of the procuracy as prosecutor and overseer of the lawful behaviour of law and order agencies, in particular of the police and penal institutions; the lack of a system of independent monitoring of penal institutions, and of an accessible and trusted system of dealing with prisoners' complaints; the lack of a professional and properly funded probation service. On these issues there has been no visible progress under Putin and, as regards the procuracy, regress.

- Second there are those issues related to political development. Whilst these only indirectly affect the penal system, they have far wider repercussions for society and government. These

include the curtailment of media freedoms and limitations to the activities of independent NGO's, both of which are crucial to society's ability to monitor developments and defend the rights of citizens. The role of the justice system as a check on political power and government officials at all levels has been undermined by a series of politically-inspired cases. As the opening quotation suggests and this paper has demonstrated, the penal system can have no immunity from its political environment. This can only mean, given prevailing trends under Putin, that the political 'dictatorship of the law' will keep overriding the rules and guidelines of the Russian criminal justice system. European politicians should be listening to the statements of the Russian human rights community on all these issues and taking them up with their Russian counterparts.

BEHIND THE FAÇADE: 'TELEPHONE JUSTICE' IN PUTIN'S RUSSIA[1]

Alena Ledeneva

In an interview broadcast on *Ekho Moskvy* radio, in December 2003, a well-known author Arkady Vaksberg identified the worst tendency in contemporary Russia as *basmannoe pravosudie ("*Basmanny justice"):

This is the rapid and demonstrative transformation of law enforcement agencies: not only into simply obedient but into zealous executors of political orders, who break the law and don't even bother to camouflage it, who present it as a merit, and show off their muscle and impunity to the world.[2]

Such dependence of the legal system on political orders is in fact a reinvented Soviet practice known as *telefonnoe pravo*, or "telephone justice". The new term appeared in conjunction with a book published in 2003 by a non-governmental organisation, the Centre for Aid to International Defence and entitled *Basmannoe pravosudie* ("Basmanny justice").[3] It included notes taken by observers who sat through daily hearings of the Basmanny district court as part of a wider project to monitor the city's courts. Many of the reports in the book pointed to a special relationship, a mutual understanding or "trust" (doveritel'nost') that seemed to exist between prosecutors and

[1] **Acknowledgements:** Alena Ledeneva is grateful to Professor Peter Solomon for his comments on earlier drafts of her paper and for his generous help with materials; and to Alexei Trochev for his help with information on the current state of affairs with "telephone justice".

[2]See "Fakty i mneniia. 2003 god: optimism, pessimism, siurprizy." Roundtable with Lev Roitman and guests: Yuri Boldyrev, Arkadii Vaksberg, Leonid Radzikhovskii, December 30, 2003. http://www.svoboda.org/programs/rt/2003/rt.123003.asp.

[3]Another NGO, the Institute of Collective Action, held a press-conference on Basmannoe pravosudie-2 on March 20, 2006. They disclosed facts regarding law breaking by judges of the Russian Federation. See http://ikd.ru/Aficha/News_Item.2006-03-03.0968.

judge. The name itself was picked at random – *basmannoe pravo* could have referred to any other court in Russia – it should be noted that this particular court often ends up with political cases due to its proximity to the main investigative department of the prosecutor-general's office.

Thus the term *basmannoe pravo* came to denote a biased or – in the words of Karinna Moskalenko, one of Mikhail Khodorkovsky's former lawyers – a prejudged (predvziatoe) kind of court hearing in Russia, and thus it soon became associated with the wrong and unfair decisions taken by the court, presumably on political orders. In this essay, however, I use the older term, telefonnoe pravo, meaning "telephone justice", to describe the extent to which political influence is exercised informally in Russia's legal system.

What do we know about "telephone justice"?

For outsiders, the term *telefonnoe pravo* does not mean much, even when translated as "telephone justice". It is a metaphor that describes the phenomenon by what it is not – it refers to an unfair overruling of legal procedures as "justice". It would be more accurate, perhaps, to translate this phrase as "telephone injustice" or "telephone overrule" but then it would lose its irony. Rasma Karkins suggests that "telephone justice" illustrates a crucial legacy of Communist regimes that were ruled by a handful of Party elites who had exceptional powers and were above the law: "An example involves the so-called telephone law whereby Communist party leaders would pick up the telephone and call prosecutors and judges and tell them what outcome the party expected in specific cases."

Although the phenomenon of "telephone justice" is often referred to in academic literature, it has not been researched directly. Looking for etymological roots or explanatory notes for this phrase in Russian and Soviet dictionaries, one soon discovers that the entry *telefonnoe pravo* does not exist. The phrase *telefonnoe pravo* is rare even in post-Soviet dictionaries, though it made headlines of *Pravda* during Gorbachev's *glasnost'* in an open discussion on "Democratisation

and Legality".[4] The term refers to the non-transparency and corruption of the legal system; it emphasises prevalence of oral commands over written instructions; hints at the effectiveness of informal ways of conflict resolution and the culture of informality; points to the limitations of Soviet and post-Soviet bureaucracy; and implies that networks and mediation are essential instruments of governance. Let us look at the Soviet roots of this phenomenon in more detail.

Soviet and post-Soviet times

Much of the spread of informal practices in politics, economy, and the legal sphere in the Soviet Union can be blamed on the Communist Party. It was the "leading role" of the Party, its status above the law, and its protection vis-à-vis law that undermined the independence of the legal institutions and created the legacy that turned out to be so difficult to undo. Communist governance resulted in what Peter Solomon has called the "logic of intervention" or the logic of the "directive from above" where the Communist party had the last word.[5] Eugene Huskey emphasises the key defects in administration of justice in Soviet Russia that allowed but also depended on informal practices. He points to the principle of "dual subordination" – that is, at each territorial level the officials of the Justice Commissariat answered vertically to their superiors in the commissariat as well as horizontally to local government – and the principle of strict centralisation in the Procuracy (Prosecutor General's Office). "Behind this carefully cultivated façade of judicial independence functioned a corps of judges who conformed to the expectations, and occasionally the explicit commands, of the Communist Party, the Procuracy, the Ministry of Justice, and even local soviets," he observes.[6]

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[4]Arkady Vaksberg, "Kak slovo otzovietsia," Pravda, May 7 1986, p. 12.

[5]Solomon, Peter Jr., "Soviet Politicians and Criminal Prosecutions: The Logic of Intervention", in James Millar (ed.) Cracks in the Monolith. Armonk: M. E. Sharpe, 1992.

[6]Huskey, "The Administration of Justice: Courts, Procuracy, and Ministry of Justice" in Executive Power and Soviet Politics: The Rise and the Fall of the Soviet State edited by Eugene Huskey, pp. 221-246, p. 223, 1992.

Judicial and administrative reforms in the post-Soviet era have brought some changes. For example, a business report released in October 2003 by the experts of the International Finance Corporation (IFC) at the World Bank, ranked Russia's legal system the 60th out of 130 countries on the basis of efforts to register a new business, to receive a contract enforcement decision in a court, to hire or employ personnel, to receive a loan or to liquidate a firm. The IFC specialists calculate that in Russia one has to go through 12 procedures in order to register a business, which can take under 29 days, and through 16 procedures in order to receive a court decision related to contract enforcement, which is likely to take about 160 days. Liquidation of a firm might take up to one and a half years. Since the year 2000 Russia, alongside Latvia and Slovakia, has reformed its regulatory system most actively.[7] Although post-Soviet reforms resulted in some impressive ratings and in better statistics on the use of courts in civil and commercial disputes, they did not seem to go far enough. It has been reported that legal institutions in Russia are used manipulatively, where court cases serve purposes other than law and justice. Local experts also note that a decision in court does not guarantee enforcement and the implementation of court decisions normally presents a problem. The weakness of the bailiff institution often results in the selective enforcement of court decisions with the use of alternative agencies of contract enforcement. Today's "telephone justice" is associated with the influence of authorities not only over business disputes but also over the enforcement of courts' decisions. Needless to say, such reports undermine the meaning of the statistics and imply that the workings of legal institutions are not fair and independent.

According to the post-Soviet opinion polls conducted by the All-Russia Centre for Public Opinion (VTSIOM) in 2001, references to "telephone justice" occur rather often. The polls show that practices of telephone justice are more associated with prosecutors than judges. When asked about judges, respondents emphasised that corrupt payments are the main incentives for bending the law, while intervention from above or the "telephone justice" is rarely

[7] Igor Fedyukin, Alexei Nikolsky 'Den'gi/Vlast'. Arbitrazhnyi proryv.' edomosti, 2003-10-09. See full ranking table of countries in the source.

mentioned. In a way, this is hardly surprising given that bribery and extortion have been reported to be one of the important corruption markets in Russia. Thus, the Chairman of the Supreme Court Vyacheslav Lebedev noted that in 2003, sixty eight judges and chairmen of courts were suspended on corruption charges. Two hundred twenty four judges and chairmen of courts received disciplinary warnings. Moreover, the General Prosecutor of the Russian Federation, Vladimir Ustinov, presented seven cases where judges violated the law, and six of them were confirmed. Four judges were prosecuted on this basis. These official figures are impressive.[8]

In relation to the prosecutor-general's office, a significant number of respondents refer to telephone justice. Thus, 54 percent of respondents think that in its actions the prosecution is guided not only by law but also by other considerations.[9] In response to an open question, "What else, apart from the law, guides the prosecutor-general's office in its work?" respondents indicated mainly two factors: directives "from above" and the personal interest of officials. Thus, 16 percent of respondents are convinced that the Prosecutor-General and his office are guided by "their personal ambitions", "kinship" and "material interests". Moreover, 14 percent assume that the actions and decisions of the prosecutor-general's office are influenced by "telephone calls from the Kremlin". "President gives his word, his decision," according to one respondent, "and the prosecutor-general's office takes it into account.[10]

Journalists make a more inclusive claim suggesting that the practice of telephone justice extends to judges as well, and that judges just do Putin's bidding:

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[8]Rossiiskaya Gazeta, November 30 2004, quoted from Akhmadeev and Rezyanova, 2005.

[9]One should note a general distrust of the General Prosecutor's Office: 29 percent of those surveyed trust the institution; 44 percent – these are younger and better educated people in comparison--do not trust it.

[10] Fond "Obshchestvennor mnenie" – Vserossiiskii opros gorodskogo I sel'skogo naseleniia. December 8 2001. 1500 repondents. In "Ezhedel'nyi bulleten" sotsiologicheskikh soobshchenii FOM-INFO (07.12.01- 13.12.01). Official website of the Foundation "Public Opinion".

The Kremlin has ordered them to find Khodorkovsky guilty… so they did. President Putin wants everyone to know that judges will do his bidding, and they do. Not long ago, for example, Chief Justice Valery Zor'kin ruled that Putin's decision to abolish gubernatorial elections was unconstitutional. Now the same judge says his "interpretation" has changed. Just as in Soviet times, Russia's courts are nothing more than a mechanism for the state to get its way.[11]

A striking parallel has been suggested by the former World chess champion, Garry Kasparov, now the Chairman of the Committee-2008, an alliance of liberal parties:

It is very important that neither Yeltsin, nor his liberal ministers, say, Gaidar and Chubais – as the most significant figures of that government – targeted the foundations of the nomenklatura state. They conducted a reform that enabled them to renovate the nomenklatura. But we still live in a country where telephone justice predominates. The executive branch of power still controls all the pressure points. No judicial reform has been taking place, and the parliament has turned into an appendix of the executive, just as the Supreme Soviet used to be, while the government is in fact an appendix of the Presidential administration. Thus, in essence, we have the same old scheme: The Central Committee of the CPSU that dominates the Soviet of Ministers and the Supreme Soviet. It's clear to everybody that the decisions are taken in the Central Committee, which is today's Presidential administration.[12]

This is however only one side of the story.

What do judges say about telephone justice?

When judges are asked about the phenomenon of the telephone justice, it is usually dismissed as the behaviour of particular

11 Gessen, The Week, January 7, 2006, p. 12.
12 "Ekho Moskvy": Interview with Garri Kasparov, a chess champion and the Chairman of the Committee 2008 by Aleksei Vorob'ev. See http://www.echo.msk.ru/interview/25296/ Accessed December 2005.

irresponsible judges or as “gossip and myth”. The Chairman of the Moscow City Court, the largest city court in Europe, Olga Egorova, says:

I have worked in the court for 34 years, and for 34 years there has been talk about telefonnoe pravo. I am convinced that those who allow it receive calls. All judges are in the public eye, and people know all about them—who takes bribes, who allows telephone calls and similar approaches to solve some problems. To those who do not allow it, nobody calls or will call because they know that this judge will not cooperate and will take one’s own, rather than the suggested decision.[13]

The Head of the Supreme Arbitration Court of the Russian Federation, Anton Ivanov, in a commentary about “telephone justice” to a newspaper, makes a similar statement:

I am appalled by such situations [attempts to influence a court decision]. In the half year I have worked as the head of the Supreme Arbitration Court, I did not experience a single attempt to pressure me on the telephone or in any other way. But the problem exists nevertheless. Many citizens, it seems, think that like in old times, a big boss can pick up the phone and give an order to a judge.[14]

Thus, very senior judges clearly and repeatedly state that “telephone justice” is a myth but at the same time acknowledge the problem. Interestingly, the examples given in various interviews are somewhat revealing – they focus on requests by unauthorised callers (outsiders or deputies of the Duma) and judges’ competence to identify them. The following example, given by Olga Egorova, is as much evidence of her resistance to informal influence as it is evidence of an elaborate telephone communication system, an existing formal and

[13]Boris Yamshanov, “Basmannoe pravosudie so sluzhebnogo khoda”, Interview with the Chairman of the Moscow City Court Olga Egorova, Rossiiskaya Gazeta, March 24, 2005, at http://www.rg.ru/2005/03/24/egorova-pravosudie.html.

[14]Vladislav Kulikov, “Telefonnoe pravo podsudno,” Rossiiskaya Gazeta, September 6, 2005. http://www.rg.ru/2005/09/06/telefonnoe-pravo.html.

informal hierarchy of telephone lines, availability of a direct line from the Kremlin, and unwritten rules about what can or cannot be said on a city line (supposedly more vulnerable to surveillance). Consider the following incident.

'Well, I can tell you an example. I am sitting in my office. All telephone lines are switched to a secretary, apart from the first, the Kremlin one. Suddenly, my direct city phone rings – this is the number known to very few people.

> *"Hello, Olga Aleksandrovna, this is Rushailo Vladimir Borisovich [former Minister of Interior, head of the Security Council], I need to speak to you. Can you talk?"*
>
> *I say that I can but am thinking to myself: "What is it? On a city line? I am shocked [Italics added]."*
>
> *And suddenly the line is broken. I immediately dial Rushailo's number from the ATS-1 phonebook [Automated Telephone Station]. A secretary picks up the phone.*
>
> *I say: "Hello, this is the Chairman of the City Court, I have just been talking to Vladimir Borisovich, but we got disconnected."*
>
> *There's a pause on the other side: "I did not connect him to anybody." The secretary passed our conversation to Rushailo, he also became interested and took the phone. His voice is different. And then my city line rings again and I answer it. I ask: "Are you really Rushailo?"*
>
> *"Yes."*
> *"And I am talking to him right now on a direct line, and the voices are really different." The prank caller hangs up.'*

When a correspondent of the *Parlamentskaya Gazeta* asked the Chairman of the Moscow District Federal Arbitration Court, Liudmila Maikova, "How strong is "telephone justice" in Russia? Is it hard for the Court to be independent?" she replied: "It is hard to work, not because of the 'telephone law' but because of the myth about

'telephone justice'."[15] The determination of the acting judges to show that the workings of "telephone justice" are exaggerated is not shared by those judges who lost their positions. Not only are they much more outspoken on the subject of telephone justice, some of them went on record suggesting that at a higher level, influence with judges and prosecutors can yield desired results in criminal, commercial, and civil trials, and if unfavourable judgments are handed down, there are ways to ensure they are not enforced. One former judge, Sergei Pashin, made the following testimony in an interview:

Q: We hear a lot about political pressure put on judges. How does this work?
A: The mechanism is traditional – distributing favours and privileges. Let's say you are the chairman of a court, and you want to become a member of the Supreme Court. Are you going to refuse to take the advice of the chairman of the Supreme Court? No, you're not. Or for example, the mayor calls you up and says you are in a lot of debt. But I'll pretend not to see it, he says, and, by the way, I have a libel case in your court tomorrow. For some reason, the mayor always wins.[16]

Places on boards of companies and business opportunities also become part of the "carrot-and-stick" in state-run capitalism. By using "telephone justice" the power holders are able to arrange for criminal cases to be opened or closed, tax evasion charges to be pursued (or conveniently forgotten), law enforcement officials to continue an investigation (or abandon it), and arbitration courts to arrive at certain conclusions – this list could be continued with other abuses of what came to be known as administrative pressure (Pastukhov 2002) or *administrative resource* grounded in the lack of *de facto* separation between branches of power. Such a system is

[15] "Interv'iu predsedatelia Federal'nogo Arbitrazhnogo Suda Moskovskogo okruga Liudmily Nikolaevny Maikovoi Parlamentskoi gazete", Parlamentskaia Gazeta, No. 165, September 21, 2005. The official website of the Federal Arbitration Court of the Moscow District at http://www.fasmo.arbitr.ru/news/msg.asp?id_msg=56.
[16] RFE/RL Newsline, October 17, 2000, www.rferl.org/newsline/.

replicated in the regions, where the dependence of the judiciary and other branches of power on a governor makes them vulnerable to the governor's informal pressure.[17] In my forthcoming book *How Russia Really Works*, I argue that interfering with legal procedures – opening, suspending, and closing cases; influencing official investigations and sanctions, on the phone and otherwise; applying informal pressure to legal institutions, state security organs, and recently, the tax police – constitutes only one type of an existing range of informal sanctions, but the one that is most difficult to research.

In his forthcoming biography of Boris Yeltsin, Timothy Colton observes that oral and personal commands used to be much more important, and were more often obeyed, than written decrees (*ukazy*) and instructions in Soviet days and seem to a large extent to be as important today. In one of his interviews, he came across a story about Prime Minister Chernomyrdin, who reproached his subordinate for implementing his written instruction. "If I wanted you to do something,' Chernomyrdin said to his subordinate, "I would have called you." The punch line of this story offers not simply a commentary about the significance of oral communication in the top echelons of power in Russia but also implies that subordinates have to be alert to the status of various documents and be able to interpret them. This obvious difference between the formal flow of signed documents and the informal (oral) commands to implement them illustrates the degree of discretion and the continuing non-transparency in post-Soviet governance. The governance patterns rest upon, and help reproduce, the "unwritten rules" among those who know them. A key function of such non-transparency, informality, and discretion is to avoid accountability. At any level in the hierarchy, the fear of responsibility, pending punishment, and dependence on one's superiors provide reasons to perform oral commands from above, rather than to stand up to them, yet also to give oral commands to those below. In other words, one must not view "telephone justice" simply as a way of obstructing justice or of

17 "Zhizn' dorozhe svobody," Novaia Gazeta No. 16 April 24-30, p. 15, 2000.

pursuing personal interests. It also serves the purposes of preserving the state power and "national interests."

The prospects of "telephone justice" in Russia

Although it might be difficult to measure the impact of practices of "telephone justice" on the rule of law, it is essential to view them as qualitative indicators pointing to defects in the institutional framework, often described in terms of "de-formalisation of rules" (Radaev 2002), or "de-institutionalisation" as explained by Evgenii Saburov in his criticism of Putin's administration.

De-institutionalisation is not the same as the lack of institutions. It's different. Institutions exist on paper. We have constitutional rights. We have property rights. But institutions designed to help exercise these rights are in fact under heavy influence of informal institutions. Just like in old needy Soviet days, when a fridge went out of order, people did not throw it away but used it as a cupboard. It was good for storage, and the neighbours could see that there was a fridge in the house. Thus there was a fridge but there wasn't a fridge at the same time. Thus, for example, we announce that privatisation is not going to be reversed but then also start the Yukos affair. And we do not bother to explain how this is possible. "We do have a fridge in the house," they say. "But it does not work," we say. In response we only hear the same but on a heavier note: "We do have a fridge in the house."

It does not matter that Yukos did not break the law. Basmannoe pravosudie rules according to informal justice and informal codes (po sovesti i ponyatiyam). This is the tradition. This is the custom. When there was a complete institutional mess and no operational laws to speak of, cases were judged according to "revolutionary justice." Who does not remember the important institution of "telephone justice"?[18]

[18]Evgenii Saburov, "Deinstituliazatsiia" in Neprikosnovennyi zapas: debaty o politike i kul'ture, Moscow: Novoe Literaturnoe Obozrenie. http://www.nz-online.ru/print.phtml?aid=25011099 Accessed December 2005.

Recently there have been interesting developments in the area of "telephone justice." The first sentence for use of "telephone justice" was given in September 2005 to a citizen attempting to influence the outcome of court proceedings.[19] In December 2005, The Chairman of the Supreme Court, Vyacheslav Lebedev, suggested a draft code of administrative court proceedings that contained a detailed instruction to judges and citizens on how to proceed with an appeal against bureaucratic abuse or arbitrariness (December 13, 2005). In March 2006, the Presidium of the Soviet of Judges of the Russian Federation approved the guidelines suggested by the Ethics Commission with regard to interference with court cases and recommended the document "On reaction to inquiries by citizens and civil servants about cases in court proceedings" for practical use.[20] The guidelines suggest various forms in which an inquiry can be registered by a judge. Special record books will include data on the timing of an inquiry, personal details of the person making an inquiry, and the content and nature of it. It is also suggested that such a registration can be backed up technically, by the possibility of tape recording such an inquiry, and somewhat controversially, with a possibility to use these tapes as evidence in criminal cases involving interference in legal proceedings, slander, or in civil cases involving personal reputation, honour, and dignity. In an interview, the Chairman of the St. Petersburg Soviet of Judges, Yuri Kozlov, speaks in support of this document, because "we have to do something about this problem," and laughs at the implications of a possible automatic message on every judge's phone "Hello, you have called Justice such and such. Please note that this telephone call is recorded for training purposes."[21]

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[19] Vladislav Kulikov, "Telefonnoe pravo podsudno," Rossiiskaya Gazeta, September 6, 2005.

[20] See Postanovlenie of 30 March 2006, No. 95, Kislovodsk, on the official site of the Supreme Court www.supcourt.ru/print_page.php?id=4285; see the commentary in Kommersant Rostov-na-Donu, No, 74, April 26, 2006, http://www.kommersant.ru/region/rostov/page.htm?Id_doc=669733

[21] Artem Kostyukovskii, "Allo, Femida!" Argumenty i Fakty, St.Petersburg, No. 17 (662), April 26, 2006. http://www.aif.ru/online/spb/662/04.

On suggestion of the Vice Prime Minister German Gref, tackling corruption in the legal sphere was suggested as a key aspect of the program on the "Development of the legal system in Russia for 2007-2012." After an upset reaction among the judges, the fight against corruption among judges (implying that the judges are corrupt) has been reworded as a necessity of anti-corruption protection for judges (April 25, 2006).

It remains to be seen if these measures will work. The good news is that civil society was able to confront the workings of "telephone justice." As in the recent case of jailing a driver for killing a speeding politician in a car accident, the pro-Kremlin United Russia party changed its course to support the convicted motorist as the ground-swell of public opinion became clear. "That prompted hope that his conviction could be overturned in a country where 'telephone justice' is still thought to prevail," reports the Guardian correspondent in Moscow.[22] The problem, however, is not simply that direct orders are given to the courts but that the courts seem to be under the pressure of opinions expressed by the regional authorities, the President, the Kremlin administration, or the majority party, whether they convict or acquit.

[22] The Guardian, March 22, 2006, p. 18.

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