

**Distrusted Courts: The Impact of State (In)capacity on
Judicial Power in Post-Communist Countries**

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Recently, political scientists from Canada to South Africa to Spain have begun to measure public attitudes towards courts in order to understand the process of judicial empowerment.¹ Since 1992, Russians were not excluded from this 'invasion' of the court-attentive pollsters and diligently evaluated judicial performance in countless public opinion surveys.² After some dozen years of post-communist transition, these surveys

¹ See, e.g., Joseph F. Fletcher and Paul Howe, "Canadian Attitudes toward the Charter and the Courts in Comparative Perspective," *Choices* 6, no. 3 (2000): 4-29; Lori Hausegger and Troy Riddell, "The Changing Nature of Public Support for the Supreme Court of Canada," *Canadian Journal of Political Science* 37, no. 1 (2004): 23-50; James L. Gibson, Gregory A. Caldeira, and Vanessa A. Baird, "On the Legitimacy of National High Courts," *American Political Science Review* 92 (1998): 343-58; James L. Gibson and Gregory A. Caldeira, "Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court," *Journal of Politics* 65, no. 1 (2003): 1-30.

² Russia's federal judiciary has three branches: regular courts in charge of civil and criminal cases, Constitutional Court, and arbitrazh courts in charge of commercial disputes.

present a paradox of waning public trust in stronger courts: if in 1995, about a half of Russians reported they trusted courts, by 2002, only 3-4 percent of surveyed said they trusted courts. During the same period, however, all Russian courts experienced an explosion in litigation rates. Moreover, the chances of successfully suing the state were growing and reached some 70% by 2003. So, why do more and more Russians sue their state in courts and win, yet the public confidence in the judicial system appears to be declining year after year?

To address this puzzle, my paper is divided into five parts. First, I examine possible answers to this mismatch between attitudes and litigation behavior to suggest my own solution: Russians increasingly distrust their judiciary because they lack the knowledge about their chances of successful litigation and because the state authorities fail to implement unfavorable court decisions and create a public perception that going to court is a waste of time. Next, I examine the evidence from public opinion surveys in the past decade to show that Russians increasingly distrust their judiciary yet they hold dear the abstract notions of judicial independence and the rule of law. Then, I discuss the actual judicial behavior of top-level and local courts to argue that the explosion of litigation rates in Russia and the high chances of successfully suing the state cannot explain the declining public support for the judiciary. Finally, I explore what happened with these court victories to assess the actual impact of judicial policy-making in Russian governance. Using the areas of the litigation, which involved the transfer of monetary awards – taxation and debt-recovery payments, I argue that ordinary Russians are cynical about their courts because the Russian state often fails to implement court-ordered

policies. In conclusion, I place my explanation of Russia's experience with public distrust of stronger courts in comparative context.

Public Perceptions and State Capacity

Waning trust in stronger courts is a puzzling relationship for students of post-authoritarian transitions, who view the Rule of Law institutions, like independent courts, as essential elements of the democratic consolidation processes.³ According to "transitology," citizens, at least those who successfully sue the state in courts, should view the powerful and independent judiciary as a highly legitimate institution of new post-communist regimes. This is because stronger courts are supposed to uphold democratic values, protect individual rights, and serve as a bulwark against the return to the totalitarian past. Some even argue that by subjecting their policy choices to judicial review, post-Communist rulers demonstrate their commitment to democracy and the rule of law to their domestic constituencies and to the rest of the world.⁴ In short, this theory predicts that citizens in countries like Russia should increasingly approve of judicial empowerment in the process of democratic consolidation.

Facing the Russian reality, "transitology" scholars could argue that Russians increasingly distrust their judiciary because it lacks power, impartiality and independence. By using YUKOS affair, citing President Putin's retreat to authoritarianism and referring to numerous Soviet-era legacies of powerless bench, the

³ See, e.g., Juan J. Linz and Alfred Stepan, Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe (Baltimore: Johns Hopkins University Press, 1996); Jan-Erik Lane and Ersson Svante, The New Institutional Politics: Performance and Outcomes (London: Routledge, 2000).

⁴ Carla Thorson, "Why politicians want constitutional courts: the Russian case," Communist and Post-Communist Studies 37 (2004): 187–211.

critics could argue that the Russian judges are not there yet: they lack powers, discretion and authority necessary to champion the rule of law. However, as I will discuss below, Russian judges at the top and the bottom do behave independently, possess wide degree of discretion and do not hesitate to rule against the state.

Some scholars, who view democracy as simple majority rule, suggest one possible solution to this puzzle. They argue that the review of government actions by non-elected judges is essentially anti-democratic. When the judges strike down government policies as unconstitutional, such judicial decisions run against the will of the majority of citizens, who, in turn, treat such anti-majoritarian judicial behavior with suspicion. Therefore, the more often the courts rule against government, the less likely the voters trust in an unelected judiciary. This approach assumes that post-communist voters hold dear democratic values similar to the citizens in advanced democratic polities.

Historical-culturalist scholars question this assumption. They suggest that post-communist voters, who had little or no experience with democratic rules and procedures during the centuries of autocracy and arbitrariness, simply have distaste for democracy and judicial empowerment. The more these voters experience democratization, the less and less they tend to trust democratic institutions, including strong courts. Evidence from numerous public opinion surveys, however, shows that the Russians hold in high esteem abstract commitments to judicial independence and the rule of law. The steadily growing litigation rates in the post-communist Russia also shows that individuals and NGOs increasingly use courts to try to achieve social change.

I suggest that Russians increasingly distrust their courts because:

- 1) people do not know much about the trends in judicial decision-making and about their chances of successful litigation; and
- 2) the state authorities fail to implement unfavorable court decisions and create a public perception that going to court is a waste of time.

My paper suggests that the possible answers to the above-mentioned puzzle are incomplete because they assume that post-communist voters easily receive and understand judicial decisions, and that the state automatically implements each and every court decision. I argue that these assumptions may not pertain in the actual dynamics of post-communist governance.

My answer to this paradox of declining trust in stronger courts may lie within the machinery of governance, namely the state capacity to inform the public about unfavorable judicial decisions and to carry out court-ordered policies. Lacking both the power of the purse and the power of the sword, most courts, be it high constitutional tribunals or local Justices of the Peace, depend upon the cooperation of other government bodies. Patterns of this cooperation, or the lack thereof, depend in turn, less on the formal institutional arrangements, which are fragile in nascent post-authoritarian regimes. Rather, the structure of informal sanctions and incentives influences the extent to which bureaucrats are willing and capable of carrying out judicial decisions. The chronic non-implementation (defiance or the lack of capacity to enforce) of court decisions may make voters more cynical about the judicial branch of government.

Just like the rule of law, state capacity is both a buzzword for international development agencies and a “black box” for political scientists. This paper deals with only one dimension of state capacity, namely with the extent to which the institutions of

public governance are “court-friendly”: Are public agencies open to judicial intervention? Are bureaucrats prepared to comply with court orders and judge-made rules? Are there real mechanisms of external accountability of government officials? Such “court-friendliness” of public bureaucracies is the capacity of government agencies to respect and implement judicial decisions. This aspect of state capacity is only one element of Weberian vision of formal-rational law-abiding governance and constitutes a part of what Michael Mann called an *infrastructural* power of the state – the capacity to actually penetrate civil society and to implement political decisions throughout the realm.⁵

Traditionally, political scientists have studied the role of courts in governance by focusing solely on the judgments of top national, and most recently, supra-national courts and their impact on public policies. Scholarly discussions, however, rarely discuss the role of courts in strengthening or weakening of state capacity. Charles Tilly and his colleagues regret the omission of judicial system from their analysis of state building in Western Europe. Tilly warns, “it is easy to forget how large a part certain kinds of courts played in the day-to-day construction of Western states.”⁶ More recently, some scholars include the judicial system in the analysis of governance and state capacity by exploring how these courts created and enforced the rules of the political game in developing countries.⁷

⁵ Michael Mann, “The Autonomous Power of the State: Its Origins, Mechanisms and Results”, in Michael Mann, ed., States, War and History (Oxford: Blackwell Publishers, 1988), 5.

⁶ Charles Tilly, “Reflections on the History of European State-Making,” in Charles Tilly, ed., The Formation of National States in Western Europe (Princeton: Princeton University Press, 1975), 3-83, quote is at 6.

⁷ See, e.g., Merilee S. Grindle, Challenging the State: Crisis and Innovation in Latin America and Africa (Cambridge: Cambridge University Press, 1996), 33-34; and Goran Hyden, Julius Court, and Kenneth Mease, Making Sense of Governance: Empirical Evidence from 16 Developing Countries (Boulder, CO: Lynne Rienner Publishers, 2004).

My vision of court-friendliness of bureaucracies is broader and consists of three inter-connected components:

1. the capacity to obey policies, as pronounced by the high national courts,
2. the ability to be accountable for its activities before the courts, and
3. the ability to enforce everyday judgments of local courts in civil and commercial disputes.

Thus, using Grindle's elements of state capacity, a court-friendly bureaucracy must possess not only *institutional* capacity to govern under the court-mandated rules, but also *political* capacity to mediate disputes with citizens through the judicial system, and *administrative* capacity to implement mundane judicial decisions on a daily basis. For example, in cases of illegal construction sites court bailiffs should have the resources to make the defendants destroy all properties, found by the court to be built in violation of the property rights of neighbors or of the environmental regulations.

Moreover, the court-friendliness in cases of administrative justice requires government agencies to do more than penetrating civil society. It requires government departments responsible for the enforcement of court decisions to penetrate other government agencies, which violated individual rights. For example, in cases of illegally issued traffic tickets, court bailiffs must have the resources necessary to force the municipality to pay back the value of the traffic ticket to the driver, who successfully sued the city parking office. This *administrative* capacity (or its absence) to enforce the routine court decisions influences public perceptions about the effectiveness and impartiality of judicial system no less than the landmark judgments of high national courts because this is where ordinary citizens meet face to face with the state apparatus,

and where successful litigants see (or fail to see) that their court victories really protected their rights.

Exploring the successes and failures of high and local Russian courts to have their anti-government judgments respected by state agencies is a challenge. Few of these agencies openly defy judicial decisions while many bureaucracies secretly sabotage them. Judges, litigants, scholars and the general public can rarely access this information. Exploring the structure of informal sanctions and incentives within any organization is a daunting task. However, not all government agencies disobey court decisions. Also, Russian bureaucrats tend to comply with anti-government verdicts in some public policy areas faster and fuller than in others. In this paper, I investigate how Russian bureaucracy, from top to bottom, responded to judicial decisions which involved financial penalties for the state authorities at the federal, regional and municipal level. I do not explore compliance with court decisions in politically sensitive cases because governmental defiance in such cases rarely depends on the capacity of the state bureaucracy. If most low-key judgments, which carried financial penalties for the state budget, were enforced and the plaintiffs received compensation through courts, then my thesis that Russians disapprove of their courts because the judiciary is ineffective in protecting their rights, is wrong. Therefore, I examine the dynamics of the reaction of the Russian bureaucracy to judicial decisions in the areas of taxation and property rights through official statistics, published and unpublished interviews and scholarly accounts of the organizational cultures of federal and local agencies.

In short, when evaluating the work of courts, ordinary citizens also express their opinions about the court-friendly capacity of the state. But this capacity depends on the

degree of cooperation between courts and other government departments, or the extent to which the rest of the executive branch of government is court-friendly. Russia's failures to build an effective court bailiffs agency and to make the top-level and street-level bureaucrats more court-friendly shows how difficult it is to make the rights revolutions real. To be sure, the chronic incapacity of public officials to carry out court decisions may fuel the growing public skepticism towards judicial performance, a subject to which I turn next.

Public Image of Russian Courts

Just like citizens in other countries, Russians are being increasingly polled on many issues of their lives. What do public opinion surveys tell us about Russian attitudes towards courts? They reveal that the social demand for independent and powerful courts is present, even if it is hidden under cynicism about the current state of the judicial system. After all, as I will explain in the next section, every year the Russian courts hear thousands of cases against the government and side with private litigants.⁸ Moreover, since the beginning of the 1990s, three-quarters of Russians believed that a “judicial system that treats everyone equally” was important for democracy, and this value of the judiciary topped all other values attributed to democracy as did the right to judicial protection.⁹ Similarly, surveys of normative attitudes of ordinary Russians reveal a

⁸ For an insightful analysis of the lack of correlation between the attitudes towards the law and the litigation behavior, see Kathryn Hendley, “‘Demand’ for Law in Russia – A Mixed Picture,” East European Constitutional Review 10, no. 4 (2001): 72-77, at 74.

⁹ James R. Millar and Sharon L. Wolchik, “Introduction: The Social Legacies and the Aftermath of Communism,” in The Social Legacy of Communism, ed. James R. Millar and Sharon L. Wolchik (New York: Woodrow Wilson Center Press, 1994), 8. Inga Mikhailovskaia et al., Prava cheloveka i sotsialno-politicheskie protsessy v postkommunisticheskoi Rossii (Moskva: Proektnaia gruppa po pravam cheloveka, 1997), 54-57.

consistent respect for the rule of law in the past decade, on a par with other European nations.¹⁰ This is why 2 out of 3 Russians consistently supported judicial reform between 1997 and 2001 as a way to get rid of corruption and of the Soviet-era legal system.¹¹ Moreover, despite high popularity of re-elected President Putin, in 2004, 6 out of 10 Russians believed that the judicial system should be completely independent from the President.¹²

This abstract support for judicial independence spills over to the Russian Constitutional Court (RCC). According to one survey, excluding those with no opinion, 77 % of Russians surveyed during Yeltsin's presidency, believed that their government should obey the RCC.¹³ Similarly, surveys of Russian elites, carried out under both Yeltsin and Putin in 1998 and 2000, show overwhelming support for a strong constitutional review: only 3-4 % of elites in Moscow and the regions agreed with the statement that "the President shall be able to overrule the Constitutional Court."¹⁴

This consistent public support for abstract judicial empowerment, however, does not imply that Russian judiciary enjoys stable support in the society. Numerous public opinion surveys conducted between 1992 and 2004 indicate that public trust in Russian

¹⁰ James L. Gibson, "Russian Attitudes towards the Rule of Law: An Analysis of Survey Data," in Law and Informal Practices: The Post-Communist Experience, ed. Denis J. Galligan and Marina Kurkchian (New York: Oxford University Press, 2003), 77-91.

¹¹ "Otnoshenie rossiian k sudebnoi reforme ostaetsia ustoichivo pozitivnym," Strana.Ru, 15 November 2001.

¹² Nationwide survey of 1,500 Russians conducted by VTsIOM in November 21-22, 2004. "Otnoshenie rossiian k sudebnoi vlasti."

¹³ William L. Miller, Stephen White, and Paul Heywood, Values and Political Change in Postcommunist Europe (New York: St. Martin's Press, 1988), 151-52, as quoted in Gibson, "Russian Attitudes," 81.

¹⁴ Anton Steen, Political Elites and the New Russia (London: Routledge Curzon, 2003), 55.

courts is waning every year.¹⁵ According to the New Russia Barometer, in 1994, two out of three Russians reported little or no confidence in courts.¹⁶ At the end of 1995, 45 percent of Russians said they trusted the courts and 39 percent said they did not.¹⁷ In the same period, only 22 % of Russians distrusted the Constitutional Court. In fact, a much larger proportion of voters from both left and right distrusted both the President and the Russian Parliament.¹⁸ In 1998, according to the New Russia Barometer, the only institution that surpassed courts in the degree of public trust was the military. Back then Russians trusted their courts as much as they trusted the church and the people.¹⁹ But by early 2000, distrust in courts prevailed by 53 percent to 34 percent, according to the ROMIR polling agency, and by 50 percent to 18 percent, according to the pro-Kremlin FOM polling center.²⁰ In the fall of 2000, according to the nationwide Russian Citizen Survey of 1,804 persons, 71.4 % of Russians had low or no trust at all in Russian courts as compared to 50,7 % of those who distrusted the Constitutional Court. However, 8 % of respondents said that they had very strong trust in the RCC while only 4 % reported very strong trust in courts in general.²¹ A survey of 102 well placed jurists in Moscow in the

¹⁵ Due to the lack of reliability of polling data in Russia, recognized by both Western and Russian experts and RCC Justices, I provide survey data on courts from both Western and Russian sources. On the challenges of conducting reliable public opinion research in Russia, see, e.g., Theodore P. Gerber and Sarah E. Mendelson, "Research Addendum," *Post Soviet Affairs* 19 (2003): 187-88; and Natalia Konygina, "Obshchestvennoe mnenie vozmut pod kontrol," *Izvestiia*, 6 August 2003.

¹⁶ Steen, *Political Elites and the New Russia*, 183.

¹⁷ Timothy J. Colton, *Transitional Citizens: Voters and What Influences Them in the New Russia* (Cambridge: Harvard University Press, 2000), 281, fn. 39.

¹⁸ V. P. Kazimirchuk, ed., *Konstitutsiia i zakon: stabilnost i dinamizm* (Moscow: IGP RAN, 1998), 65, 183.

¹⁹ William Mishler and Richard Rose, "What Are the Origins of Political Trust? Testing Institutional and Cultural Theories in Post-Communist Societies," *Comparative Political Studies* 34 (2001): 30-62, at 57.

²⁰ As reported by ROMIR on its website, <http://www.romir.ru>, and by FOM on its website, <http://www.fom.ru>.

summer of 2004 also suggested a stronger respect for the Constitutional Court than any other court in Russia. Legal elites perceived the RCC as the court least likely to experience attempts by political and economic actors to influence judges.²²

In the spring of 2001, a VTsIOM nationwide survey revealed that nearly 2 out of 3 Russians (64%) did not trust the courts, and another poll found that only 18 % of Russians, as compared to 20 % of Ukrainians and 28% of Belarussians, trusted the courts.²³ In February 2002, a ROMIR survey of 2,000 Russians confirmed the trend: 59,4% of Russians distrusted the courts and 26,2% reported trust in the judiciary.²⁴ By October 2002, two polling agencies reported independently of each other that only between 2 and 5 percent of Russians trusted courts.²⁵

According the authoritative All-Russian Center for the Study of Public Opinion (VTsIOM), between February 2001 and September 2002, the RCC, like other Russian courts, received 2.77 - 2.91 mark on a 5-point scale, trailing behind the President, the Federal Cabinet, the army, the security services and the law-enforcement agencies.²⁶ The

²¹ One-fifth of Russians did not know about their trust in the RCC as compared to only 9 % Russians, who were undecided in their trust of courts in general. Anna Jonsson, "The Constitutional Court of the Russian Federation, 1997-2001," Uppsala University Working Papers, no. 73 (October 2002), 20.

²² Russian Axis, The Judicial System of the Russian Federation: A System-Crisis of Independence (November 2004), available at <http://www.russianaxis.org>.

²³ "Zhit stalo khuzhe, no my prisposobilis," Gorodskoi telekanal (Iaroslavl), 17 May 2001, <http://gtk.yaroslavl.ru>. Stephen White and Ian McAllister, "Dimensions of Disengagement in Post-Communist Russia," Journal of Communist Studies and Transition Politics 20 (2004): 81-97, at 84.

²⁴ As reported by ROMIR on its website, <http://www.romir.ru>.

²⁵ Private agency Monitoring.Ru and FOM conducted surveys independently of each other. See "Rossiane doveriaut rodnym, družiam i prezidentu," RTR-Vesti.Ru, 28 October 2002, <http://www.rtr-vesti.ru>; and October 2002 survey by FOM, <http://www.fom.ru>.

²⁶ Russian schools use this 5-point scale with 1 (fail) and 5 (excellent), 3 being a passing grade. See L. A. Sedov, "Obshchestvennoe mnenie v sentiabre 2002 goda," VTsIOM na Polit.Ru, 10 October 2002, <http://www.polit.ru/documents/507813.html>.

same pattern of a weak public approval of the Court seems to continue in 2003. According to one poll, only 14% of the St. Petersburg residents reported that the RCC “worked well” in 2002-3.²⁷

Note that these low levels of satisfaction with the RCC were recorded during the first term of Putin’s presidency, precisely when the Court became bolder in its decisions regarding federalism and human rights cases, and when politicians amended the 1994 RCC Act to strengthen the punishment for defiance of the Court.²⁸ Paradoxically, when it comes to particular RCC decisions, Russians tend to approve them, as happened in 2002 with the speedy introduction of judicial arrest warrants²⁹ or presidential powers to remove regional governors.³⁰ But when it comes to the general evaluation of the RCC, citizens are so critical of this tribunal that even Putin’s administration has chosen to comment in public only on favorable RCC judgments. As one official in the presidential administration admitted: “We do not criticize constitutional court decisions – we either approve of them or keep silent.”³¹ Contrary to existing theories of institutional legitimacy, specific public support of landmark judgments did not broaden diffuse

²⁷ “Bolshinstvo peterburzhtsev dovolny rabotoi Prezidenta Rossii za poslednii god,” 300online.Ru, 1 July 2003, <http://300online.ru/articles0/5969.html>.

²⁸ Alexei Trochev, “Implementing Constitutional Court Decisions.” East European Constitutional Review 11, no. 1-2 (2002): 95-103.

²⁹ In a nationwide survey, the majority (52%) of Russians supported this March 2002 judgment with 30% disapproving of it and 18% having no opinion on the matter. “Rossiianam nraivitsia pravo ubivat radi samooborony,” Lenta.Ru, 4 April 2002, <http://lenta.ru/russia/2002/04/04/arrest>.

³⁰ In a poll of St. Petersburg residents, 59% of surveyed supported this RCC decision, 30% said that President Putin should appoint regional governors, and 19% feared that this move pushes Russia towards a “police state.” Agentstvo Biznes Novostei, 11 April 2002, <http://www.abnews.ru>

³¹ Interview with the official of the presidential administration, Moscow, May 25, 2001.

support for the RCC but instead translated into the disapproval of the Court's work in general.

If anything, these surveys tell us that once respected, Russian courts are losing their legitimacy. Russians increasingly distrust their judiciary not simply because they distrust all other political institutions. Citizens appear to distrust their courts because litigation does not deliver expected results to successful litigants. This pattern of waning confidence in the judicial system goes hand in hand with the growing perception among voters that suing the state in Russian courts is a waste of time. If in 1996, according to a survey of 3,000 Russians, 41.3 % said that they would turn to a court if any authority took a decision violating their rights, in April 2004, only 1 % of those surveyed was prepared to challenge the government actions in court.³²

In sum, the more deeply the Russians distrust their judicial system, the less likely they are ready to turn to their courts, regardless of their chances of winning against the government, and the less likely they are to learn about the impartiality and independence of the judicial branch. Indeed, in the mid-1990s, one-half of Russians reported that they have never heard of the Russian Supreme Court.³³ At the end of 2004, only 10% of surveyed Russians reported that they knew a lot about the work of courts, while one-third of those surveyed said that they knew nothing about the work of courts. Surveyed in June 2003, 2 out of 3 residents of St. Petersburg, the second largest city in Russia, reported that they knew nothing about the work of the Constitutional Court.³⁴ This widespread

³² See Peter H. Solomon, Jr. and Todd S. Foglesong, Courts and Transition in Russia, 82. Aleksandra Samarina, "Sudam doveriaet lish kazhdyi sotyi," Nezavisimaia gazeta, 21 April 2004, 2.

³³ Gibson et al., "On the Legitimacy of National High Courts," 348

³⁴ "Bolshinstvo peterburzhtsev."

ignorance explains why, for example, Russians simply ignored the landmark RCC decision banning the death penalty until the introduction of jury trials across the country, even though 4 out of 5 Russians consistently favor capital punishment.³⁵ Similarly, while 80% of Russians reported that they felt unprotected from crime in the past decade, they voiced no objections to dozens of groundbreaking RCC decisions on the due process rights of the suspects, the accused and prisoners.³⁶

One could improve the Court's reputation if the citizens knew more about it. Research on public attitudes with respect to the US Supreme Court has clearly shown that those who know the court tend to view it more favorably, even if individuals disagree with particular judgments. The public approval of the Court comes, in part, from beliefs in 'principled decision-making' of judges, fair and legalistic procedures in the court, and other ideals of judicial neutrality, impartiality and independence.³⁷ Thus, Russian judiciary faces the challenge of informing the public about its decision-making. This task of spreading reports about judicial neutrality, impartiality and independence is daunting in the context of waning public confidence in this institution as well as in the rest of the judicial system. Repairing the reputation of courts involves both supplying positive information about their performance and increasing the demand from the public to strengthen the legal accountability of political branches.

³⁵ RCC decision 3-P of February 2, 1999, SZ RF, 1999, no. 6, item 867.

³⁶ "Rossiane stali individualistami," IA MiK, 9 January 2003.

³⁷ See, e.g., Tom Tyler & Gregory Mitchell, "Legitimacy and Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights," Duke Law Journal 43 (1994): 703-815; and Vanessa A. Baird, "Building Institutional Legitimacy: The Role of Procedural Justice," Political Research Quarterly 54 (2001): 333-54.

Russian Courts in Action

This disastrous view of judicial legitimacy runs in the face of the official court statistics. While at the beginning of the millenium 3 out of 4 Russians believed that courts would fail to protect their rights against the government, the regular and arbitrazh courts increasingly exercised judicial review of governmental actions and ruled against the government in about 80 percent of cases.³⁸ Consider how Russian courts dealt with lawsuits against the state.

Russia's federal judiciary has three branches: the courts of general jurisdiction, Constitutional Court, and *arbitrazh* courts. The courts of general jurisdiction, or regular courts, that hear all cases outside the jurisdiction of other courts, consist of a traditional hierarchy of about 2,500 district courts, 89 regional courts, and the Russian Supreme Court (to which were added, in 2000, a new lower rung, the justices of the peace), and a separate hierarchy of 151 military courts. In 2003, regular courts handled almost a million criminal cases, five million civil cases and three million cases involving administrative offenses. In 2004, regular courts heard some 10 million cases, including 583,000 lawsuits against the government. More importantly, these courts actively exercised judicial review powers: in 2002, they heard 5,500 challenges to regional laws and gubernatorial decrees and struck down 4,700 of them (85 %). Two years later, in 2004, the probability of winning the government in regular courts stood at 67%.³⁹ Similarly, military courts have handled about a million complaints against administrative

³⁸ See Peter H. Solomon, Jr., "Judicial Power in Russia: Through the Prism of Administrative Justice," Law and Society Review 38 (2004): 549.

³⁹ "Rabota sudov Rossiiskoi Federatsii v 2002 godu," Rossiiskaia iustitsiia 8 (2003), 71. On 2003, see Iuliia Mikhailina, "Sudi rasskazali o prestupleniakh i nakazaniakh," Gazeta, 28 January 2004, <http://www.gzt.ru>; Natalia Kucher, "Ne voevat' s chinovnikom, a suditsia," Parlamentskaia gazeta, 19 May 2005.

decisions of military officials in the past decade and consistently found in favor of complainants in 80% of cases.⁴⁰ In 2002, the Russian Supreme Court heard 213 cases against the federal government and ruled in favor of the complainants in 23% of the cases.⁴¹ This trend continued to increase in 2003. Then, in February 2004, the Russian Constitutional Court, acting on the petition of the Federal Cabinet, declared this power of the Supreme Court unconstitutional.⁴²

The 19-member Russian Constitutional Court (founded in 1991), with narrowly defined jurisdictions, stands alone and does not form a hierarchy with regional constitutional courts. Between 1992 and early 2005, this Court received over 130,000 petitions from individuals, corporations, regions, other courts and politicians, and issued some 1,300 decisions, a significant share of which reversed federal and regional policies. Between 1995 and 2003, the Russian Constitutional Court (RCC) struck down 118 laws, upheld 59 pieces of federal and regional legislation, and offered its own binding statutory interpretation in over 100 cases.

The *arbitrazh* courts, established in 1991 to hear disputes among firms and between firms and the government, exist at the trial level in 81 regions, 20 appellate circuits of three to five regions (introduced in 2003), 10 cassation circuits of eight to ten regions (added in 1995), and the Higher *Arbitrazh* Court. Their caseload is growing by 15-20 percent each year and has reached 1,2 million cases in 2004, two-thirds of the

⁴⁰ "Postupat' po zakonu i po sovesti," *Rodnaia gazeta*, 14 November 2003, p. 13; "Aktualnye problemy deiatelnosti voennykh sudov Rossiiskoi Federatsii," May 2005. For an excellent analysis of the growth of administrative justice in Russia, see Solomon, "Judicial Power in Russia."

⁴¹ "Rabota sudov Rossiiskoi Federatsii v 2002 godu," *Rossiiskaia iustitsiia* 8 (2003), 69.

⁴² Filipp Sterkin, "Pravitelstvo zabilo gol v svoi vorota," *Strana.Ru*, 27 January 2004, <http://www.strana.ru>.

cases involved disputes between businesses and the government.⁴³ Similar to their colleagues in regular courts, *arbitrazh* judges also appear to adjudicate in an impartial manner. For example, they did not hesitate to rule against federal government in economic disputes between the Federation and the regions, and in disputes over taxes they sided with taxpayers in 70 % of the cases, and tended to award larger sums to private firms as compared to tax authorities.⁴⁴

Russia's regions do not have their own separate judicial systems, although federal law empowers regions to set up their own constitutional courts and Justice of the Peace courts. As of February 2004, only fifteen out of 89 regions actually staffed their constitutional courts, emulating German *Länder* with their own constitutional courts. Contrary to theories that link democratization and vibrant "electoral market" with judicial empowerment,⁴⁵ these courts were created and persisted in the regions with authoritarian political regimes, and failed or were not created in the regions with high electoral uncertainty.⁴⁶ These tribunals determine whether regional and local laws and decrees comply with the regional constitutions through *a posteriori* abstract and concrete constitutional review procedures. Between 1992 and November 2003, these courts issued

⁴³ "Arbitrazhnye sudy Rossii v 2003 godu rassmotreli okolo odnogo mln del," RIA Novosti, 11 February 2004, <http://www.rian.ru>.

⁴⁴ See Kathryn Hendley, "Suing the State in Russia," Post-Soviet Affairs 18 (2002): 122; and Solomon, "Judicial Power in Russia."

⁴⁵ Mark J. Ramseyer, "The puzzling (in)dependence of courts: a comparative approach," Journal of Legal Studies 23 (1994): 721-47; Pedro C. Magalhães, "The Politics of Judicial Reform in Eastern Europe", Comparative Politics 32 (1999): 43-62; Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (New York: Cambridge University Press, 2003); Lee Epstein and Jack Knight, "Constitutional Borrowing and Nonborrowing," I-CON: International Journal of Constitutional Law 1 (2003): 196-223; Jodi Finkel, "Judicial Reform as an "Insurance Policy" in 1990s Mexico: A Supreme Court Willing and Able to Enter the Political Fray," Latin American Politics and Society, forthcoming.

over 330 decisions on the merits of the case, having struck down about equal proportions of executive and legislative acts in 60 % of the cases, which included numerous politically charged disputes between regional legislatures and governors over fiscal policies, electoral procedures and socio-economic rights.⁴⁷

At the same time, most Russian regions had their Justice of the Peace (JP) courts up and running by 2003, although not all regions could afford or wanted them. Between 2000 and June 2004, they hired (sometimes enthusiastically, sometimes under pressure from the federal center) about 5,600 JPs, although federal budget allocated salaries for 6,470 JPs. In 2004, JPs handled 29,6% of all criminal cases (11,2 % - in 2001), 64 % of all civil cases (24 % - in 2001), and 83 % of all administrative offenses (50 % - in 2002).⁴⁸ In short, these new local judges substantially relieve overloaded regular courts, quickly become overworked themselves and compose a quarter of Russia's judiciary.

To sum up, the Russian judiciary appears to be both active and activist in its willingness to address numerous important issues of public policy, a serious achievement for courts in a post-authoritarian state.⁴⁹ This judicial activism together with the statutory expansion of judicial authority and high rates of successful litigation against the government runs counter to the widespread cynicism about courts. Russian judges use their discretion and do not hesitate to rule against the government albeit high success rate

⁴⁶ Alexei Trochev (2004) "Less Democracy, More Courts: The Puzzle of Judicial Review in Russia," Law and Society Review 38 (2004): 513.

⁴⁷ See Alexei Trochev, "The Constitutional Courts of Russia's Regions: An Overview," EWI Russian Regional Report 44 (12 December 2001): 7; and Alexei Trochev and Peter H. Solomon, Jr. "Courts and Federalism in Putin's Russia." In The Dynamics of Russian Politics. Volume 2. Ed. Peter Reddaway and Robert W. Ortung. Lanham, MD: Rowman & Littlefield, forthcoming 2005.

⁴⁸ Peter H. Solomon, Jr. (2003) "The New Justices of the Peace in the Russian Federation: A Cornerstone of Judicial Reform?", and Peter H. Solomon, Jr., "The New Justices of the Peace in the Russian Federation: A Cornerstone of Judicial Reform?" Demokratizatsiya, 11:3 (2003): 381.

in suing the government may indicate that citizens bring strong cases to courts. However, ordinary citizens fail to appreciate these advances in judicial performance. How we could explain this gap between negative public attitudes and actual judicial behavior? As I will argue below, Russians do not feel the impact of this judicial independence in action because the federal and local governments consistently fail to implement court decisions, the major reason for this failure being the lack of *administrative* capacity of the Russian state.

“The Court Has Ruled...” What Next?

The question of carrying out court decisions constitutes the greatest test for judicial power. We can understand the role the courts play in governance only if we know how and why public officials reacted to judicial decisions. Because judges lack the “the sword and the purse,” successful judicial empowerment depends on the capacities of states to operate under court-ordered rules, like allowing the same-sex marriages, and to implement routine court decisions in the variety of cases, like transferring property or assets to the winning party in the litigation. As Justice Stephen Breyer of the US Supreme Court famously put it, “the paratroopers and the judges must cooperate.”⁵⁰

Russian transition provides sufficient evidence for studying how public officials reacted to landmark and routine judgments of top and lower courts. Here, I will focus on the areas of the litigation, which involved the transfer of monetary awards – taxation,

⁴⁹ Solomon, “Judicial Power in Russia,” 572-73.

⁵⁰ Stephen G. Breyer, “Comment: Liberty, Prosperity, and a Strong Judicial Institution,” Law & Contemporary Problems 61 (Summer 1998): 3-6.

debt-recovery, and social assistance payments because millions of Russians found themselves poor during the unprecedented collapse of Russian economy in the 1990s. Unlike protecting due process rights of criminal defendants, which is unpopular in the context of surging crime rates, protecting the right to fair taxation should be popular among voters. Consider how Russian bureaucracy responded to the set of new rights of taxpayers created by the Russian Constitutional Court. Indeed, taxation cases occupied a central place on the docket of the Constitutional Court, partly because the Court had to defend its vision of fair taxation against the rest of the government. Using the proportionality test, or more precisely, its “excessive burden” version, the Constitutional Court staunchly defended the judicial protection of property rights by ruling in a series of decisions that no property taking, including fines, is allowed without a court decision. The Court, accordingly, frequently chastised Russian Parliament for imposing “unfair” sanctions on businesses, and invalidated numerous statutes, which imposed huge fines for vaguely defined Tax Code violations and other transgressions. The RCC held that that “vaguely-defined transgressions” violated the Article 50’s ban on “trying a person twice for the same crime” and affirmed the power of the courts to reduce the amount of the fine.⁵¹ As a rule, the Court is suspicious of the same fines for self-employed individuals and corporations, as the former are presumed to have a weaker ability to pay. Also, a fiscal penalty is “unfair” and unconstitutional when it far exceeds the amount of tax payment and can result in the bankruptcy of the taxpayer.⁵² Restraining Russia’s predatory fiscal policies, the Court ruled that the ‘rule of law’ requirement in Article 1 of

⁵¹ See, e.g., RCC decisions: 20-P of December 17, 1996, Sobranie zakonodatelstva RF (hereinafter SZ RF), 1997, no. 1, item 197; 130-O of July 5, 2001, *ibid.*, 2001, no. 34, item 3512.

the 1993 Constitution banned an excessive tax burden and heavy fiscal penalties, which provoked law-abiding taxpayers to hide their income.⁵³ The RCC repeatedly ruled that fines could be imposed only on malicious perpetrators, i.e., on those who knowingly broke the law.⁵⁴ However, under the pressure of cash-strapped Yeltsin's government, the Court ruled in mid-2001 that the 1993 Constitution protected only those who behave "in good faith" and did not abuse their rights.⁵⁵ As I will discuss below, the tax authorities and the judicial branch developed their own – highly questionable from the point of view of the Constitution – understanding of what exactly constitutes "good faith behavior," thus, sabotaging the constitutionalization of taxpayers' rights in the law "on the ground."

For example, in October 1998, just a few months after a nationwide financial crisis brought down Kirienko's Cabinet, the Court boldly ruled that the obligation to pay taxes ended at the moment that the tax amount was deducted from the account of the taxpayer in good faith.⁵⁶ On paper, this legally sound judgment overruled the practice of the federal Tax Ministry and the Higher Arbitrazh Court, which believed that the tax obligation ended only after the tax amount had been deposited in the state coffers. In the context of widespread "bank runs," this unconstitutional practice meant that if, for any reason, the tax payment did not reach the state coffers on time it was OK for the revenue agency to deduct the same tax in a single tax period. The RCC disagreed and ruled that

⁵² See, e.g., RCC decisions: 14-P of May 12, 1998, Vestnik Konstitutsionnogo Suda RF (hereinafter VKS RF), 1998, no. 4, 41; 11-P of July 15, 1999, SZ RF, 1999, no. 30, item 3988.

⁵³ RCC decision 18-P of December 23, 1999, SZ RF, 2000, no. 3, item 353.

⁵⁴ See, e.g., RCC decisions: 11-P of July 15, 1999, SZ RF, 1999, no. 30, item 3988; 7-P of April 27, 2001, *ibid.*, 2001, no. 23, item 2409; 130-O of July 5, 2001, *ibid.*, 2001, no. 34, item 3512.

⁵⁵ RCC decision 138-O of July 25, 2001, SZ RF, 2001, no. 32, item 3410.

⁵⁶ RCC decision 24-P of October 12, 1998, SZ RF, 1998, no. 42, item 5211.

the taxpayers could not be punished for the illegal behavior of banks, which delayed the transfer of tax payments to the state budget. Moreover, Article 45 of the Russian Tax Code, which entered into force in January 1999, copied the wording the RCC decision: ‘the tax obligation ends when the tax amount is deducted from the account of the taxpayer.’”

On the ground, however, this RCC judgment made little difference. While the federal Pension Fund and several federal ministries reimbursed those who paid their taxes twice, the State Customs Committee in February 1999 issued a secret letter, which banned customs officers from clearing the goods unless the customs duties have been deposited in the state budget. The Russian Supreme Court approved this non-compliance by ruling that the customs clearance of goods should be done only after the “real payment of customs duties,” that is, after the payment had been deposited to the state coffers. Thus, deduction of customs duties from the account of the payer ends the obligation to pay the duties but does not bind the customs officials.⁵⁷ Moreover, in May 1999, the Russian Tax Ministry issued a secret letter, in which it banned tax officers from applying this RCC judgment retroactively. In practice, this meant that all taxpayers that were taxed twice before October 12, 1998, the date of the RCC decision, were not to be refunded. The Higher Arbitrazh Court upheld the legality of this secret letter and consistently refused all lawsuits, in which taxpayers sought to recover taxes paid twice.⁵⁸

As expected, aggrieved taxpayers flooded the RCC with complaints, trying to recover their taxes, and in July 1999, the RCC defended their right to fair taxation by

⁵⁷ Sergei Pepeliaev, “Kommentarii,” in Kommentarii k postanovleniiam Konstitutsionnogo Suda RF. T. 2, ed. Boris Ebzeev (Moskva: Iurist, 2000), 515-16.

⁵⁸ *Ibid.*, 518.

ruling that its October 1998 decision applied to all payments of taxes, fees and duties to the state budget.⁵⁹ At the same time, the Enforcement Department of the RCC contacted the legal office of the tax Ministry, but to no avail. The Procuracy also refused to act on behalf of these taxpayers. Numerous publications in the mass media about this unconstitutional behavior of the bureaucracy and the judicial branch did not help either. In May 2000, the RCC again clashed with the arbitrazh courts by ruling that its October 1998 decision was to be applied retroactively to remedy the rights of the “good faith” taxpayers.⁶⁰ All in all, by March 2001, the RCC in 23 decisions insisted on its own definition of the timing of tax payments, which, of course, the aggrieved taxpayers extensively used in trying to recover the unconstitutionally paid taxes between 1994 and 1998. The arbitrazh courts, however, launched a unified front to defend the budget against this flood of lawsuits.⁶¹ Still, the federal Tax Ministry complained that by mid-2001, the Russian budget had lost 31 billion rubles as a result of the October 1998 decision.⁶²

In July 2001, the RCC appeared to have given up its “taxpayer rights” revolution. As Justice Gadzhiev recalls, his colleagues asked the Tax Ministry to petition the Court

⁵⁹ RCC decision 97-O of July 1, 1999, SZ RF, 1999, no. 31, item 4038.

⁶⁰ RCC decision 101-O of May 4, 2000, VKS RF, 2000, no. 6, 21.

⁶¹ See Oleg Boikov, “Postanovleniia Konstitutsionnogo Suda Rossiiskoi Federatsii v deiatelnosti arbitrazhnykh sudov.” In Problemy ispolneniia federalnymi organami gosudarstvennoi vlasti i organami gosudarstvennoi vlasti subektov Rossiiskoi Federatsii reshenii Konstitutsionnogo Suda Rossiiskoi Federatsii i konstitutsionnykh (ustavnykh) sudov subektov Rossiiskoi Federatsii. Ed. Mikhail Mitiukov, Sergei Kabyshev, Vera Bobrova, and Sergei Andreev, Moskva: Formula prava, 2001, 51-54.

⁶² Ger P. van der Berg, comp., “Constitution of the Russian Federation Annotated with Summaries of Rulings and Other Decisions of Constitutional (Charter) Courts: 1990-2001,” Review of Central and East European Law 27 (2001): 471, fn. 16.

to “clarify” its October 1998 decision.⁶³ The RCC promptly issued a “clarification” ruling in which it restricted the application of its October 1998 judgment only to the taxpayers “in good faith” and essentially gave a freehand to the revenue agencies to determine the “good faith” element.⁶⁴ According to the RCC, instead of assuming that the taxpayers behave in “good faith,” revenue agencies have to check the “good faith” of the taxpayers and the banks that delay the transfer of tax payments from the payer’s account to the state budget. In a sign of clear deference to the executive, the Court held that the tax authorities had to impel the “good faith” taxpayers to pay their taxes in full and on time. Moreover, in the Court’s view, the “good faith” taxpayers ought to pay their taxes through the banks, which are “approved” by the local branches of the Tax Ministry.

It should be noted that the Russian Tax Code does not define “good faith” behavior, and, therefore, street-level tax authorities faced virtually no checks on the abuse of their authority to separate “reliable” banks from “bad” ones and “good” taxpayers from malicious ones. The Higher Arbitrazh Court developed its own test to determine “good faith” taxpayers: they had to ask tax authorities if their bank was reliable and efficient in transferring payments to the state budget.⁶⁵ The flood of complaints against the abuse of this authority, by and large protected by the arbitrazh courts, prompted the RCC to issue yet another decision in November 2003. Here, the Court changed its July 2001 decision by ruling that government agencies, including the arbitrazh courts, had to presume the “good faith” behavior of the taxpayers and could not impose on them

⁶³ “G. A. Gadzhiev: ‘U nas ogromnyi potok zhalob nalogoplatelshchikov, i on vriad li umenshtsia v obozrimom budushchem’,” Rossiiskii nalogovyi kurer, no. 24 (December 2004).

⁶⁴ RCC decision 138-O of July 25, 2001, SZ RF, 2001, no. 32, item 3410.

⁶⁵ Irina Skliarova, “Posmotri v moi chestnye glaza,” Vremia novostei, 17 May 2004.

obligations not authorized by tax statutes.⁶⁶ In essence, the RCC required the tax authorities to behave in “good faith,” thus, inserting the “good faith” principle in the Russian tax law.⁶⁷ Following this decision, the Russian Tax Ministry still resisted presuming innocent all corporations, whose tax payments did not reach the state coffers on time and, throughout 2004, attempted to change the Tax Code in its favor.⁶⁸

In sum, the judgments of the RCC created a zigzag-like revolution in Russian taxation. These judgments repeatedly surprised both tax authorities and taxpayers, as the head of the Russian Tax Ministry Legal Department delicately put it in August 2004.⁶⁹ Yet, on the ground, the defiance of the bureaucracy and the rest of the judiciary have mitigated the impact of this “taxpayer rights” revolution. Budgetary considerations also compelled the RCC to weaken the protection of taxpayers by granting the legislature up to 11 months to amend the tax statutes, which allowed the tax authorities to collect taxes even after they were declared unconstitutional as if there was no RCC judgment on the matter!⁷⁰ In a word, Russian public officials lack the capacity to operate under the judge-made rules of the fair taxation of businesses.

Similarly, the federal government under Putin increasingly disregards unfavorable decisions of other courts. By April 2004, Russia accumulated a record 6 bln roubles (\$300 mln CAD) in unpaid awards after losing 34,000 completed court cases to private

⁶⁶ RCC decision 329-O of October 16, 2003, unpublished.

⁶⁷ See “G. A. Gadzhiev: ‘U nas ogromnyi potok zhalob...’”

⁶⁸ See, e.g., Marina Gradova, “MNS vystupaet za zakonodatelnoe reshenie problemy s ‘zavisshimi platezhami’,” *RIA Novosti*, 12 February 2004; and Skliarova, “Posmotri v moi chestnye glaza.”

⁶⁹ “VAS i KS – ukaz MNS. Nalogoviki o nalogovykh sporakh,” *Dvoinaia zapis*, 3 August 2004.

⁷⁰ See, e.g., Oleg Kokorin, “Konstitutsionnyi printsip ravenstva,” *EZh-Iurist: Sudebnoe prilozhenie*, no. 26 (June 2003): 6-7.

individuals and corporations.⁷¹ Two federal departments, Internal Affairs and Defense, topped the list of the least court-friendly agencies by refusing to pay the total of some 2,2 billion roubles in unpaid awards. In 2003 alone, courts ruled against the Russian Ministry of Internal Affairs, which controls the police, in 42,000 cases involving mostly illegal detentions and confiscation of property, while the Defense Ministry failed to comply with 8,300 court judgments to pay soldiers 0.8 billion roubles in benefits and subsidies. All in all, according to the Russian Finance Minister Alexei Kudrin, citizens who successfully sue federal government have to wait at least 4 years before they receive court-ordered payments.⁷²

Regional and local governments fare no better: only in mid-2003 did they begin to define rules of complying with court judgments against them. In the Voronezh region the court bailiffs enforce less than 13 percent of court decisions in cases where citizens have successfully sued the government on social service issues.⁷³ When Voronezh bailiffs attempted to enforce court decisions against the largest debtor, a state-owned railroad that owed half-a-billion rubles in mid-2001, they were fined, reprimanded and even charged with criminal offenses.⁷⁴ No doubt, that this “administrative justice delayed” creates perception that suing public officials is not the speedy way to hold the government accountable.

⁷¹ By “completed court cases,” I mean cases that cannot be any longer appealed or re-opened.

⁷² “Minfin: Gosudarstvo zadolzhalo 6 mlrd rublei po sudebnym iskam,” [Lenta.Ru](#), 11 June 2004.

⁷³ Sergey Egorov, “Voronezh. Sostoialos’ soveshchanie sluzhby sudebnykh pristavov, posviashchennoe itogam raboty v 2000 godu,” [Regions.Ru](#), 13 February 2001.

⁷⁴ Aleksandr Iagodkin, “Sud i ego dereviannye soldaty,” [Novaya gazeta](#), 28 March 2002.

But how does the judiciary fare in enforcing judgments in the disputes between private litigants, when the government agencies are not involved? Not so good. Although in 1997, the Russian government has established a separate paramilitary Court Bailiff Agency (under the Ministry of Justice) to enforce judgments of regular and arbitrazh courts, it has increasingly failed to implement court judgments, which involve the difficult task of transferring property or assets to the winning party in the litigation. In 2002, Russia's 33,000 bailiffs, who on paper have broad powers managed to collect a mere 1 billion rubles out of 1 trillion rubles awarded by courts in the cases of non-payment of debts that they handled; that is one thousandth of what the courts awarded!⁷⁵ To alleviate this crisis, President Putin ordered the hiring of an additional 12,000 bailiffs in 2003, but to no avail. That year, as Yuri Chaika, Russian Justice Minister, openly complained, 45,000 bailiffs collected no more than 10 percent of money of all court-ordered monetary awards.⁷⁶ The first half of 2004 brought a little hope: court bailiffs managed to collect only 13 % (171 million out of 1,4 billion roubles) in court fines and awards and only one-fifth of court fees. To be sure, there is regional variation. In the Voronezh Province (Central Russia) the court bailiffs enforce less than 13 percent of court decisions in debt non-payment cases.⁷⁷ Sverdlovsk region's judges complained that the Justice Ministry court bailiffs enforced only 12 per cent of court decisions in the

⁷⁵ Vladimir Perekrest, "Dolgi nashi tyazhkie," Izvestiia, 7 June 2003, 3.

⁷⁶ Yuri Chaika, "Vystuplenie na kollegii Miniusta Rossii po itogam 2003 goda i zadachakh na 2004 god," 25 December 2003.

⁷⁷ Sergey Egorov, "Voronezh. Sostoialos' soveshchanie sluzhby sudebnykh pristavov, posviashchenoe itogam raboty v 2000 godu," Regions.Ru, 13 February 2001.

region.⁷⁸ In the Komi Region (Northwest Russia), bailiffs managed to implement only 8 % of all court-awarded sums in 2004 (27% - in 2003).⁷⁹ And bailiffs in other regions also showed declining capacity to enforce judgments in the disputes between private litigants.

However, it may be the case that court bailiffs focus their efforts on filling up the state coffers by collecting court-awarded taxes and other fiscal penalties on the taxpayers. Indeed, in the litigation won by the state, the rate of implementation of court decisions is slightly better. Thus, between January and June 2003, the court bailiffs in the northwestern regions of Russia managed to collect 54 per cent of monies in cases against insolvent taxpayers. The variation within the okrug is enormous: in Arkhangelsk region the rate of collection of court-awarded tax payments was 12 percent while in the neighboring Vologda region – 92 percent.⁸⁰ Across Russia, despite repeated calls by Russian leaders to ‘step up their efforts in this respect,’ court bailiffs declared every fifth tax collection order as “impossible to collect” in 2003. However, the amount of collected taxes through bailiffs has doubled in 2004 as a direct result of Putin’s campaigns against oligarchs.⁸¹ Thus, bailiffs acted swiftly in enforcement efforts against the YUKOS Oil Company when it was unable to pay the large tax bill submitted to it.⁸²

⁷⁸ “Petr Latyshev nameren borotsia s bezdeistviem sudebnykh pristavov,” RIA Novosti-Ural, 2 June 2003, http://ural.rian.ru/news.html?news_id=132984

⁷⁹ Alexei Lazarev, “Sudebnye pristavy narushaiut zakon,” *Zyrianskaia zhizn’*, 1 November 2004.

⁸⁰ “Podvedeny itogi deiatel’nosti Minyusta v SZFO,” *Fontanka.Ru*, 25 June, 2003, <http://www.fontanka.ru/release.thtml?mday=24&mon=6&year=2003&id=109739858>

⁸¹ Alexei Savkin, “Rekord pristavov,” *Biznes*, 29 March 2005.

⁸² Recall that in 2000, bailiffs were skillfully used to collect the debts of another disfavored “oligarch” Vladimir Gusinskii, the owner of the Media-MOST company. Media-MOST controlled the TV station, which criticized the Putin administration and owed money to state-owned Gazprom. Peter L. Kahn, “The Russian Bailiffs Service and the Enforcement of Civil Judgments,” *Post-Soviet Affairs* 18 (2002): 176-79.

Such selective enforcement of court decisions, however, does not change structure of incentives in the bailiffs service and does not improve the administrative capacity of the state. One problem with collection actions by bailiffs in arbitrazh cases is that the fee structure provides a disincentive to vigorous collection of large judgments. The bailiff service collects 7% of the judgment collected as its fee. Of that amount the individual bailiff involved is allowed to retain 2%. However, there is an 800 ruble (US\$27) cap placed on the individual bailiff's share. Thus, the individual bailiff will receive the same financial reward for all cases of 40,000 rubles or more (approximately US\$1,333). This would seem to be an open invitation to corruption for bailiffs, whose average salary remained low (between \$50 and \$200).⁸³

Contributing to corruption is the impossibility to monitor the activities of the bailiffs. On the one hand, as it should be clear by now, they exercise a large degree of discretion by selecting easy cases from their overloaded docket. On the other hand, rank-and-file bailiffs and their immediate supervisors rarely face sanctions from the top because Russian leaders deal only with the senior management.⁸⁴ Already twice, in 2000 and 2004, President Putin reshuffled the senior-level management in the bailiffs service but produced meager results, as I discussed above. Successful litigants could pressure bailiffs by suing them but judges feel little incentive to sanction bailiffs. Judges gain neither financial nor career benefits from monitoring bailiffs. Moreover, judicial sanctions apply only against the Bailiffs service and not against individual bailiffs, thus,

⁸³ Less than a half of the 45,000 bailiffs had legal training, and two out of three bailiffs were women. "Zakon ob ispolnitel'nom proizvodstve nuzhdaetsya v dorabotke," BPI, April 27, 2004, <http://www.bpi.ru/news/22675.html>.

⁸⁴ Peter L. Kahn, "The Russian Bailiffs Service and the Enforcement of Civil Judgments," *Post-Soviet Affairs* 18 (2002): 148-181.

failing to deter a bailiffs misconduct.⁸⁵ Indeed, lawsuits against bailiffs constitute less than 1 % of the arbitrazh courts caseload. Between 2002 and 2004, these tribunals annually handled some 10,000 complaints against bailiffs and upheld 3 out of 10 of these complaints.⁸⁶

Readers need to be aware that Russian judicial system is not the only victim of bureaucratic sabotage. Russian presidency also suffers from the bureaucratic non-compliance. In 2002, when President Putin was well entrenched in his office, he discovered that only 48 % of his executive orders were implemented. By 2005, the rate of implementation declined so dramatically that Putin was forced to hold weekly meetings with federal Cabinet just to track how the federal government carried out his orders!⁸⁷

Also, the lower courts in other countries face similar problems of non-compliance with their judgments. In Ukraine, less than half of judicial decisions in bankruptcy cases (46%) and disputes over wage arrears (40%) gets carried out.⁸⁸ Anecdotal evidence from China also suggests that local governments effectively veto court decisions by protecting loyal businesses that lost court battles to their competitors.⁸⁹ According to Kathryn Hendley, small claims courts in England and the US also suffer from non-compliance in debt-recovery disputes. For example, a 1990 study of debt-collection litigation between businesses in an Iowa court showed that 24% of the judgment winners collected the full

⁸⁵ Kahn, "The Russian Bailiffs Service," 171.

⁸⁶ "Svedeniia o rasмотрenii arbitrazhnymi sudami del i zaiavlenii, sviazannykh s ispolneniem sudebnykh aktov v 2002 –2004 gg." Official court statistics at <http://www.arbitr.ru>

⁸⁷ "Kontrol nad glavnyim," *Izvestia*, 15May 2003, 3; *Kommersant-vlast*, 10November 2003, 10; "Pravitelstvo RF na kazhdom zasedanii budet rassmatrivat porucheniia Putina," *NewsProm*, 12 May 2005; "Revoliutsiia dvernykh tablichek," *Gazeta.Ru*, 17 May 2005.

⁸⁸ "Sredi problem, uslozhniaiushchikh postuplenie inostrannykh investitsii, R. Zvarich nazyvaet rabotu sudebnoi vlasti," *LigaBiznesInform*, 18 May 2005, <http://www.liga.net/news/147027.html>.

amount and an additional 4% collected part of what they were owed, and 71% failed to collect anything. Along similar lines, a 1994 study of the Denver small claims courts found that more than half of all plaintiffs (55 %) collected no part of their judgments. The remainder collected, on average, only 31 % of the amounts awarded judgments.⁹⁰

In sum, Russian bureaucracy is not court-friendly. But average Russians tend to blame the judiciary for this incapacity. If they fail to collect court-awarded monies from the government, then they perceive courts as biased and dependent on the authorities. If citizens cannot collect court-awarded monies from the private defendants, it is because judges are on the take. Indeed, the talk of judicial corruption and dependence on government pervades both public perceptions and the elite discourse on judicial reform.

Conclusion

Russians deeply distrust their judicial system not because they abhor judicial independence or because they can't access it or because judges are corrupt and biased towards the government. Just like many European nations, Russians deeply value independent courts and use them in increasing numbers to settle their disputes with other citizens and the government. Judges, on the other hand, do not hesitate to rule against officials most of the time. However, public distrust in Russian courts stems from the inability of the winning party to secure court-awarded victory because federal and local governments lack capacities to operate under the rules elaborated by top courts and to implement routine judgments of lower courts.

⁸⁹ "Regional Protectionism Weakening State Capacity," China Internet Information Center, 27 March 2001.

⁹⁰ Kathryn Hendley, "Enforcing Judgments in Russian Economic Courts," Post-Soviet Affairs 20, no. 1 (2004): 75-77.

This secret sabotage of the court-ordered rules did not go unnoticed by the public. Although Russians, just as other European nations, value judicial independence, they increasingly distrust their courts, including the Constitutional Court. Having learned that a police officer or tax inspector can openly disobey the judicial decisions without being punished, Russians appear to consider litigation as an inefficacious option to defend their rights. Meanwhile, the RCC redirects the majority of individual complaints to these distrusted regular courts. Naturally, it breeds even more disappointment with the judicial system regardless of the fact that the Russian courts have been consistently ruling on behalf of individual complainants against state officials.⁹¹ Moreover, bureaucrats exploit this public distrust and further refuse to obey the judicial decisions. Breaking this vicious circle is an arduous task that should begin with informing the public about the essence of court decisions in plain language. This is an important educational responsibility of judges in those societies with thin constitutional traditions.⁹²

By drawing on the successes and failures of high and local Russian courts to have their anti-government and pro-government judgments respected by the state agencies, my paper assesses the real impact of post-communist courts on public policies and provides insights to the study of government accountability in comparative contexts. First, it contributes to the growing literature on comparative constitutionalism by bringing state capacity into the business of “rights revolutions.” Numerous studies have argued that the bills of rights and independent courts are crucial for the protection of basic rights. Recent research has also shown that the social support structure, such as human rights non-

⁹¹ Solomon, “Judicial Power in Russia.”

governmental organizations and public funding of human rights activists, is also vital for the successful entrenchment of fundamental rights.⁹³ My paper asserts that effective protection of constitutional freedoms is impossible to achieve without a usable bureaucracy. If government officials are not willing or not capable of changing public policies according to the court guidelines, then, judicial decisions and court victories remain on paper rather than on the ground. State incapacity does not allow law and courts to effectively regulate the relations between the state and an individual.

Second, my analysis adds an important dimension of the interplay between ideas (Rule of Law and judicial independence), economic interests, and institutions (courts and bureaucracies) to the literature on public policy-making during democratization processes. Many approaches to democratization recognize the importance of usable bureaucracy to successful democratic consolidation yet very few of them explore the actual functioning of post-communist governance. The novelty of my approach lies in the investigation of the complex interaction among the values and the litigation behavior of the voters, and bureaucratic behavior in response to unfavorable judicial decisions. My study provides insights of how and why the government officials from top to bottom respond the way they do to court-mandated changes in public policies in the context of democratization.

Third, my analysis of growing distrust in empowered courts contributes to the research on the legitimacy of political systems. Russian experience with distrusted yet empowered courts demonstrates that the voters must be educated about the actual

⁹² Wojciech Sadurski, "Review of *The Struggle for Constitutional Justice in Post-Communist Europe* by Herman Schwartz (Chicago: The University of Chicago Press, 2000)," I-CON: International Journal of Constitutional Law 1 (2003): 160.

performance of government institutions. Judges in post-authoritarian societies must advertise their anti-government decisions to ensure that the general public knows them. Although such ‘public relations’ campaigns by judges would be declared as illegitimate in advanced democracies, making the court decisions visible is crucial in the context of the instrumental use of courts by ever-myopic Russian elites and the ensuing decline in the reputation of courts in the eyes of the public. Judges must maintain the link between the Olympus of abstract constitutional principles and the everyday needs of broad groups of Russian society so that ordinary Russians, who hold abstract commitments to the rule of law, can learn the benefits of having a powerful and independent judiciary. If judges fail to inform the voters, nobody else will because the rest of the state apparatus will be secretly defying the court verdicts. If the voters do not know much about the practice of judicial independence, courts cannot please them and cultivate their own institutional legitimacy. Moreover, the political branches of government can easily thwart judicial empowerment in the context of widespread public cynicism towards the judiciary.

⁹³ Charles R. Epp, The Rights Revolution (Chicago: University of Chicago Press, 1998).