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## **Fake Crime and Real Punishment: How A Weak Judiciary Has Held Back Development in Russia**

Strong legal systems are all alike; every weak legal system is weak in its own way. Russia's legal system suffers from weak courts that have not developed a sufficient level of independence from the other branches of government since the collapse of the Soviet Union. These weak courts are problematic for Russia, as many scholars believe that the strength of a country's institutions, like its court system, determines its economic and social development.<sup>1</sup>

Institutions affect development by influencing the rules of how a country and its economy functions.<sup>2</sup> These rules affect the incentives people have to work, protest, invest, pray, and generally order their lives.<sup>3</sup> Many organizations and concepts can be thought of as institutions. However, an institution and how it influences a country is more easily understood through a concrete example, which is why this paper will only focus on one institution, the Russian court system.

Courts decide disputes between parties based on the laws that govern their jurisdiction. Therefore, a legal system could fail to promote development in at least two ways: the laws themselves could fail to provide the necessary protections for development or the courts could fail to enforce those protections. Even in a country where the courts

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<sup>1</sup> DARON ACEMOGLU & JAMES ROBINSON. WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY AND POVERTY 73 (2012).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

decided cases based on the law as written without outside influence, development does not necessarily follow if those laws do not, for example, protect property rights.

However, this is not the case in Russia. A common sentiment expressed by the Russian legal community is that their laws provide superior protections to both economic and civil rights. However, a disconnect exists between these protections as written and how they are applied by the courts. The issue in Russia is not that their laws fail to protect rights that facilitate development, but rather that their courts are unable to enforce these protections. The stakes of this failure are even higher in Russia than other developing countries with flawed court systems because in many ways the country is well positioned to succeed. With a well-educated populace, industrialized economy, urbanized population, and vast natural resources, Russia is primed to develop if its courts can decide disputes in an unbiased manner that allows its citizens to order their lives.<sup>4</sup> When Russians can rely on courts to consistently protect their rights, they can make the long-term investments that facilitate development.<sup>5</sup>

When the Russian Federation adopted its Constitution in 1993, the country had an opportunity to break away from the Soviet Union's many governmental shortcomings.<sup>6</sup> The constitutional drafters particularly emphasized judicial independence in order to breakaway from the Soviet practice of using the judiciary for political purposes.<sup>7</sup> In particular, the drafters were concerned about telephone justice, a practice that involves

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<sup>4</sup> Ethan S. Burger, *Corruption in the Russian Arbitrazh Courts: Will There Be Significant Progress in the Near Term*, 38 Int'l Law. 15, 34 (2004); Daniel Treisman, *Oil and Democracy in Russia*, National Bureau of Economic Research, <http://www.nber.org/papers/w15667.pdf>.

<sup>5</sup> MARIA POPOVA, *POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE* 5 (2012).

<sup>6</sup> *Id.* at 53.

<sup>7</sup> Burger, *supra* note 4, at 21.

government officials calling judges to advise them on how to decide cases in order to benefit their own political or economic interests.<sup>8</sup> Furthermore, the Russian public was accustomed to their leaders engaging in this behavior so would be unlikely to provide a check against a new regime that fell back into these old habits.<sup>9</sup> Therefore, the drafters had an uphill battle in establishing an independent judiciary.

In order to try to leave these past practices in the dustbin of history, the Constitution provides the judiciary with certain structural protections. The Constitution provides that judges shall be independent and submit only to the Constitution and federal law.<sup>10</sup> To enforce this independence, additional articles of the Constitution provide that judges shall be irremovable and receive immunity from criminal liability, subject to other federal laws.<sup>11</sup> The Constitution also requires the government to fully fund the judiciary in order to ensure the “complete and independent administration of justice.”<sup>12</sup> Additionally, Russia has federal statutes that provide further tenure protections, setup objective appointment criteria, and hand the control over judicial career paths to organizations staffed mostly by judges instead of politicians.<sup>13</sup>

While I will further detail these protections below, this broad overview suggests that Russia fully understood at its founding the importance of an independent judiciary. Some scholars assert that countries remain undeveloped because they do not know or understand the policies that promote growth.<sup>14</sup> However, that is clearly not the case with

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<sup>8</sup> *Id.*

<sup>9</sup> Popova, *supra* note 5, at 169.

<sup>10</sup> Constitution of the Russian Federation, art. 120.

<sup>11</sup> *Id.* at art. 121, 122.

<sup>12</sup> *Id.* at art. 124.

<sup>13</sup> Popova, *supra* note 5, at 56.

<sup>14</sup> Acemoglu & Robinson, *supra* note 1, at 63.

Russia. Legal experts from across the West worked with the Russian government to develop the rule of law, a key part of which is an independent judiciary.<sup>15</sup> Despite Russia's aspirations, the Constitution's and statutes' legal protections have not stopped political and business leaders from intervening in the justice system and impeding development. The Russian government is not ignorant of better policies. Instead it willfully disregards them.

In this paper, I will examine some of the protections Russia supposedly grants the judiciary: a) non-partisan appointments, b) life tenure, and c) guaranteed funding, and how the political branches have subverted them. I will then examine how the failure to insulate the judiciary has stunted the country's development because the judiciary cannot check the government from extracting firms' value through baseless civil, regulatory, and criminal actions. Finally, I conclude that hope for reform is slim because of Russia's lack of political competition and lack of internal and external pressures from powerful actors. This outlook demonstrates that enacting model laws without properly accounting for historical and cultural realities is insufficient to create strong institutions.

## **I. Creeping Intrusions on Judicial Independence**

### **a) Non-Partisan Appointments**

Ideally, judges are appointed based on objective and transparent criteria related to their professional qualifications.<sup>16</sup> This helps ensure that judges are selected based on merit and not their political alliances. Nonpartisan appointment procedures are not

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<sup>15</sup> Whitney Cale, *Through the Russian Looking Glass: The Development of a Russian Rule of Law and Democracy*, 7 Loy. U. Chi. Int'l L. Rev. 93, 108 (2010).

<sup>16</sup> *State of the Judiciary in Russia: Report of the ICJ Research Mission on Judicial Reform to the Russian Federation on 20-24 June 2010*, at 11 (2010).

necessary to having an independent judiciary (see the United States), but it does help reinforce the idea that a court system should be separated from the political branches.

In Russia, the process begins with an examination written and administered by a Qualification Commission composed of experienced judges and legal scholars.<sup>17</sup> After the examination, a candidate submits certain application materials for the Commission to consider.<sup>18</sup> The Commission can then recommend a candidate to the court president (like a chief judge or justice in the U.S.) who then must grant his or her approval.<sup>19</sup>

One issue that arises is that there is no standard for how the Commission makes these recommendations.<sup>20</sup> There is not a standardized test.<sup>21</sup> Instead each Commission writes their own exam.<sup>22</sup> Additionally, each Commission can set their own standard for how they weigh a candidate's qualifications.<sup>23</sup> This allows each Commission to inject their own possibly self-interested or partisan views into a process, which is ideally based on nonpartisan considerations.

After approval by the Commission and the court's president, a judicial candidate needs to gain an additional stamp of approval from Russia's president, which for the foreseeable future is Vladimir Putin. This additional level of scrutiny was introduced in 2001, a year after Putin became president.<sup>24</sup> The initial regulation that instituted this

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 12.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

executive check required that any presidential veto of a judicial recommendation provide reasoning.<sup>25</sup> However, since then even that minimal safeguard has been discarded.<sup>26</sup>

In addition to these formal requirements, there is an unofficial approval process where judicial candidates need to receive authorizations from the prosecutor's office, law enforcement, and intelligence services.<sup>27</sup> Poor relationships with any of these organizations can sink an appointment.<sup>28</sup> Both the president's veto power and these law enforcement agencies' unofficial vetoes turn a judicial appointment process that was originally intended to rely on nonpartisan qualifications into a regime led purity test. Subverting the process altogether, there are reports that the Qualification Commissions only vote on candidates that are on a list preapproved by the government.<sup>29</sup>

Of course, a politicized appointment process may not appear problematic as the United States allows politicians to appoint and approve federal judges. After all, the U.S. does not even usually bother with formalities like Russia's Qualification Collegiums.<sup>30</sup> However, the U.S. has built up institutional norms that protect judicial independence. While the appointment process has become more politicized in the past several decades, political involvement with the judiciary after the appointment process is still taboo. Whether it was

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 12-13.

<sup>28</sup> *Id.* at 13.

<sup>29</sup> *Id.*

<sup>30</sup> Although, it should be noted that some states form bipartisan committees that recommend judicial candidates to the President. Curiously, Judge James Robart who first struck down President Trump's travel ban was selected this way. Thomas Fuller, *'So-Called' Judge Criticized by Trump Is Known as a Mainstream Republican*, N.Y. TIMES, Feb. 4, 2017, [https://www.nytimes.com/2017/02/04/us/james-robart-judge-trump-ban-seattle.html?\\_r=0](https://www.nytimes.com/2017/02/04/us/james-robart-judge-trump-ban-seattle.html?_r=0).

Franklin Roosevelt's court packing scheme or Donald Trump's criticism of federal judges, any tampering has received bipartisan backlash.<sup>31</sup>

However, Russia does not have these institutional checks. The country has a long history of telephone justice and a generally submissive populace.<sup>32</sup> Unlike the U.S., the norm in Russia has been political intervention in the judicial system. Given that background, it was predictable that Russia would politicize the appointment process. This is especially worrisome since Russia does not have the institutional norms to protect the judiciary from continued political interference once judges take the bench. In order to move towards an independent judiciary, the Qualification Commissions should be given objective criteria for selecting judges.<sup>33</sup> Furthermore, the president should remove himself from the appointment process and insulate the Qualification Commissions from outside influences.<sup>34</sup>

#### **b) Life Tenure**

Life tenure is considered a central element in guaranteeing judicial independence. If judges do not need to worry about their job security, they will pay less attention to what politicians tell them.

In Russia, federal judges receive lifetime appointments, while Justices of the Peace (a position roughly equivalent to magistrate judges in the U.S.) receive 5-year terms.<sup>35</sup> This five-year term is problematic as working as a Justice of the Peace is seen as a test run

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<sup>31</sup> Smita Nordwall, *Trump's Attacks Against Judge Draw Bipartisan Criticism*, VOA (June 7, 2016, 8:20 AM) <http://www.voanews.com/a/donald-trump-attacks-against-judge-curiel-bipartisan-criticism/3364804.html>.

<sup>32</sup> Cale, *supra* note 15, at 106.

<sup>33</sup> *State of the Judiciary*, *supra* note 16, at 35.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 15.

before becoming a full-fledged federal judge.<sup>36</sup> Therefore, law enforcement agencies, politicians, and other elites can weed out any independent minded young jurists before they receive lifetime appointments.

However, even if a Justice of the Peace continues on to become a full-fledged judge, their lifetime appointment does not guarantee job security. The Russian government has expanded existing exceptions to life tenure in order to dismiss independent minded judges. Russian officials have enacted vague grounds for disciplinary action that they then use to pressure or dismiss non-conforming judges.

For example, judges can be ousted for "anything which can undermine the authority of the judiciary."<sup>37</sup> The government used this regulation against Judge Olga Kudeshkina who complained about the amount of pressure she received to decide a case a certain way.<sup>38</sup> She was dismissed because her statements "... undermined public confidence that the judiciary in Russia are independent and impartial."<sup>39</sup> The European Court of Human Rights reversed her dismissal, but unsurprisingly the Russian government refused to reinstate her.<sup>40</sup>

The government's retrograde attitude of ignoring the underlying problem and instead punishing the acknowledgement of that problem fosters a culture of submissiveness within the judiciary. How can a country fix their institutional flaws if the very act of acknowledging them is grounds for dismissal? In order to foster judicial independence in a country that has no history of respecting the separation of powers, any

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*; The RF Law On the Status of Judges in the Russian Federation, art. 3(2).

<sup>38</sup> *State of the Judiciary in Russia, supra* note 16, at 17.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

exceptions to judicial protections like lifetime tenure need to be narrow and specific in order to avoid abuse.

**c) Guaranteed Funding**

The Russian Constitution provides that the courts shall be financed in a way that ensures “the complete and independent administration of justice.”<sup>41</sup> Despite being initially underfunded, Russian courts have received a spike in funding from the government and the World Bank that has financed “substantial increases in judges’ salaries; renovation of judicial infrastructure; research on substantive and procedural law reform; and training.”<sup>42</sup>

However, even a seemingly positive step towards judicial independence like increased salaries comes with a caveat. The salary increases were instituted by presidential decree and can be rescinded at any moment.<sup>43</sup> Without a law that protects judges’ salaries, even strong tenure protections mean little. Without the guarantee of employment and a steady income, judges will be beholden to the officials who hold the purse strings.

Also, despite the Constitution requiring funding come from the federal budget, a common practice exists where local authorities provide supplemental funding to court presidents who then decide how to distribute the bonuses among the judges.<sup>44</sup> This practice incentivizes judges to comply with the wishes of their superiors and thus further damages judicial independence. Judges should not have financial incentives to decide cases in certain ways if they are to be truly unbiased decisionmakers. In order to fix that, salaries should be fixed and guaranteed.

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<sup>41</sup> Constitution of the Russian Federation, art. 124.

<sup>42</sup> *Project Appraisal Document on a Proposed Loan in the Amount of US \$50 Million to the Russian Federation for a Judicial Reform Support Project*, THE WORLD BANK, at 1, <http://documents.worldbank.org/curated/en/411431468143681808/pdf/36104.pdf> at 1.

<sup>43</sup> *State of the Judiciary in Russia*, *supra* note 16, at 24.

<sup>44</sup> *Id.* at 25.

## II. Consequences of A Weakened Judiciary

Discussing the importance of institutional strength can seem abstract, but in countries like Russia, the effects have very real consequences. In the 1990s post-Soviet power vacuum, Russian businesses were often forced to turn to mafias and private security firms to settle disputes.<sup>45</sup> However, in the past two decades the government has largely supplanted these outside actors.<sup>46</sup> Unfortunately though, instead of replacing their rough justice with the rule of law, they have taken up a similar business model.<sup>47</sup> The government now engages in the same rent seeking behavior the criminal organizations once did.<sup>48</sup> In modern Russia, government officials act on their own or at the behest of a business competitor to infringe on a firm's property rights. These infringements can include "the seizure of firms' assets, facilitation of illegal corporate raiding, extortion, illicit fines, and unlawful arrests of businesspeople."<sup>49</sup>

The highest profile example of the Russian state's entrance into these rackets was the dismantling of one of Russia's largest oil and gas companies, Yukos. Yukos' owner and Russia's then-wealthiest man, Mikhail Khodorkovskiy, was arrested for tax evasion and fraud in 2003.<sup>50</sup> The charges were largely seen as politically motivated and allowed the government to transfer Yukos' assets to a state-owned oil company, Rosneft, after a series

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<sup>45</sup> Jordan Gans-Morse, *Threats to Property Rights in Russia: From Private Coercion to State Aggression*, POST-SOVIET AFFAIRS, 263, (2012), [http://faculty.wcas.northwestern.edu/~jlg562/documents/Gans-Morse\\_ThreatstoPropertyRights\\_PSA.pdf](http://faculty.wcas.northwestern.edu/~jlg562/documents/Gans-Morse_ThreatstoPropertyRights_PSA.pdf).

<sup>46</sup> *Id.* at 264-265.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 265.

<sup>50</sup> *Id.* at 278.

of predetermined auctions.<sup>51</sup> Khodorkovskiy spent eight years in prison that only ended when President Putin pardoned him ahead of the Sochi Olympics.<sup>52</sup>

The Yukos saga sent a message to the larger Russian business community that no one was immune from government interference. It also signaled to government officials throughout the country that actions infringing on businesses' property rights would be tolerated. While Yukos' downfall hurt the rule of law in Russia, it was these messages and the behavior they encouraged that really chilled development in Russia.

Governmental interference has many ways of manifesting itself in Russia. One scheme involves businesses filing civil suits with corrupt judges who issue generous judgments that allow the plaintiff to acquire the firm's assets as a form of compensation.<sup>53</sup> Officials and business competitors also view regulation as an effective way to improperly harm others and benefit themselves. While in the 1990s a businessperson might pay the mafia to set a rival's shop on fire, it is now seen as cheaper and safer to just pay a fire or tax inspector to close their shop for a couple weeks.<sup>54</sup> The Russian regulatory web has allowed bureaucrats "to divert a large share of firms' profits to their own pockets by selling illegitimate licenses, collecting bribes from firms seeking to overcome red tape, and forcing firms to pay bribes to avoid inspectors' sanctions."<sup>55</sup>

The federal government responded to the problems created by these regulatory traps by reducing licensing requirements and limiting how often officials could inspect

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<sup>51</sup> *Id.*

<sup>52</sup> Isabel Gorst & Kathy Lally, *Putin Says He Will Pardon Yukos Oil Tycoon Mikhail Khodorkovskiy*, WASH. POST, Dec. 19, 2013, [https://www.washingtonpost.com/world/putin-says-he-will-pardon-yukos-oil-tycoon-mikhail-khodorkovskiy/2013/12/19/e48aca1c-68b6-11e3-8b5b-a77187b716a3\\_story.html?utm\\_term=.85b4490556fe](https://www.washingtonpost.com/world/putin-says-he-will-pardon-yukos-oil-tycoon-mikhail-khodorkovskiy/2013/12/19/e48aca1c-68b6-11e3-8b5b-a77187b716a3_story.html?utm_term=.85b4490556fe).

<sup>53</sup> Gans-Morse, *supra* note 45, at 282.

<sup>54</sup> *Id.* at 281.

<sup>55</sup> *Id.* at 284.

firms.<sup>56</sup> However, studies have found that agencies routinely ignore these limitations.<sup>57</sup> Given that fact, it is questionable how sincere the federal government's concern for these issues really is. Some posit that the central government builds loyalty not by paying high salaries, but instead by unofficially allowing lower level officials to extract rents from businesses.<sup>58</sup> Therefore, it is to their benefit to turn a blind eye towards this behavior. Without an effective judiciary to check this governmental overreach, officials are free to leach off Russia's productivity to their own benefit and to the detriment of the country's development.

An even more extreme tactic undertaken by businesses is to bribe a prosecutor to order a criminal investigation of a rival.<sup>59</sup> Owners cannot risk the threat of criminal charges since in Russia being charged is nearly equivalent to being convicted.<sup>60</sup> Only about 1% of defendants charged with crimes are fully acquitted in Russia.<sup>61</sup> This high conviction rate directly relates to the lack of judicial safeguards discussed in the previous section. The appointment process' informal requirement that candidates receive the blessing of local law enforcement and prosecutors helps ensure that pro-law enforcement candidates will be appointed. Additionally, once they hear cases, judges want to please the government in order to avoid disciplinary actions that could threaten their life tenure or cost them their supplemental local compensation. Faced with these countervailing forces, businesses are

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<sup>56</sup> *Id* at 283.

<sup>57</sup> *Id.*

<sup>58</sup> Andrei Zaostrovstev, *There's STILL No Such Thing As Private Property In Russia*, BUSINESS INSIDER (Nov. 20, 2011), <http://www.businessinsider.com/theres-still-no-such-thing-as-private-property-in-russia-2011-11>.

<sup>59</sup> Gans-Morse, *supra* note 45, at 281.

<sup>60</sup> *State of the Judiciary in Russia*, *supra* note 16, at 29.

<sup>61</sup> *Id.*

compelled to make some concession to their rival in order to avoid conviction.<sup>62</sup> The concession could be selling off some of their assets or even their entire operation at a discounted price.<sup>63</sup> At that point, the frivolous investigation will abruptly come to a halt.<sup>64</sup>

The increasing importance of these types of criminal actions to the Russian justice system can be seen numerically by examining the number of economic crimes, like fraud and money laundering Russian authorities have ‘uncovered’ in the years following Khodorkovskiy’s 2003 arrest. This table shows the number of economic crimes uncovered from 2000–2008 (in thousands).<sup>65</sup>

	2000	2001	2002	2003	2004	2005	2006	2007	2008
Fraud	47.8	46.2	45.7	45.7	54.1	58.5	66.1	69.5	75.0
Money Laundering	1.8	1.4	1.1	0.6	2.0	7.5	8.0	9.0	8.4

These increases demonstrate how the government increasingly viewed criminal investigations as a way to rent seek and pursue political motivations. While other explanations are possible, these numbers do not seem to be correlated with an increase in governmental capacity or focus on punishing economic crimes.<sup>66</sup> Additionally, only 10-15% of fraud and embezzlement charges ultimately led to prosecution and sentencing, as opposed to murder and rape charges, which led to sentencing in 90% and 75% of cases, respectively.<sup>67</sup> This large percentage of dropped charges indicates that prosecutors

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<sup>62</sup> Gans-Morse, *supra* note 45, at 282.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 281.

<sup>65</sup> *Id.* at 286.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

brought these charges with the intention of rent seeking as opposed to traditional law enforcement goals like deterrence or punishment.<sup>68</sup>

Besides offending basic notions of justice, this breakdown in the rule of law has serious consequences on Russia's economic development. The rule of law leads to economic development by allowing actors to focus on long-term investment.<sup>69</sup> Because Russia does not have a judiciary that can effectively protect property rights against interference from the government and powerful business competitors, economic actors do not feel secure making long-term investments.<sup>70</sup> A business may not want to raise its profile by expanding and investing lest they draw the attention of a competitor or the government who could use their connections and power to extract any value the investment generates.

In order to have long-term success, a business owner needs to understand how to navigate the Russian bureaucracy and who to pay off. One famous example of successful Russian entrepreneurship is Mikhail Goncharov's fast food blini restaurant, Teremok.<sup>71</sup> In order to grow his restaurant, Goncharov not only had to figure out which officials to pay off, but also understood the need to incorporate Russian power players within his business.<sup>72</sup> By bringing in oligarchs and family members of Senators as co-owners, Goncharov has

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<sup>68</sup> *Id.*

<sup>69</sup> Popova, *supra* note 5, at 5.

<sup>70</sup> *Id.*

<sup>71</sup> Talia Levin, *A Russian Fast-Food Chain Tries Its Luck in America*, THE NEW YORKER, Apr. 13, 2017, <http://www.newyorker.com/culture/on-and-off-the-avenue/a-russian-fast-food-chain-tries-its-luck-in-america>.

<sup>72</sup> *Id.*

been able to protect his business from the investigations and corporate raiding that have felled other promising businesses.<sup>73</sup>

Of course, not every Russian has access to oligarchs. The rest of Russia's citizens must forego certain opportunities or stomach increased levels of risk. This depresses investment and leads to less development. Therefore, in order to reach its full developmental potential, Russia will need to strengthen its judiciary's independence so that it can check the other governmental branches from interfering with its citizens' property rights.

### **III. What Is To Be Done? The Bleak Outlook for the Future**

Unfortunately for the future, the collateral effects stemming from the lack of rule of law make its development more difficult. That is, the oligarchs and those close to Putin who could push for change do not have the incentives to do so. Of course, their immediate incentives are not to reform the system because they benefit from controlling the bureaucracy and judiciary. But that calculus might change based on their projections of what will occur in future years. Some scholarship asserts that politicians engage in a game theory type exercise when deciding what to do with courts.<sup>74</sup> Governmental players consider (1) the probability that elections will continue indefinitely into the future and (2) the probability that their regime will continue to win those elections.<sup>75</sup> Only where the likelihood of (1) is high and (2) is low will players create an independent judiciary.<sup>76</sup> The logic is that if governmental players anticipate eventual electoral loss they will want to

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<sup>73</sup> *Id.*

<sup>74</sup> J. Mark Ramseyer, *The Puzzling (in)dependence of Courts: A Comparative Approach*, 23 J. Legal Stud. 721, 722 (1994).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

create a judiciary that will protect their legislative accomplishments and protect themselves from possible politically motivated legal action.<sup>77</sup>

Unfortunately, the prospects of an independent Russian judiciary appear grim. President Putin remains popular throughout much of Russia and his main competition in the upcoming 2018 presidential election, Alexei Navalny, has been barred from running.<sup>78</sup> In fact, many no longer consider Russia a democracy. Freedom House considers Russia to be “not free” and their government to be “authoritarian” due in part to a “subservient judiciary.”<sup>79</sup> With a tight grip on power, Putin and his web of loyalists likely see little benefit in creating an independent judiciary to protect themselves and their legislative accomplishments.

However, even if a change in government or power dynamics occurs, there may not be much hope for positive change to the Russian court system. That is because the Russian elite has taken measures to ensure they land softly in the case of upheaval. For one, they have taken advantage of the globalized financial sector. They can squirrel away their assets in jurisdictions that have the rule of law and that respect property rights.<sup>80</sup> Russian business even views other developing countries, like Kazakhstan and China as safer bets than Russia.<sup>81</sup> By setting up an offshore bank account or investing abroad, the powerful can

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<sup>77</sup> William M. Landes; Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & Econ. 875, 879 (1975).

<sup>78</sup> Neil MacFarquhar & Ivan Nechepurenko, *Aleksei Navalny, Viable Putin Rival, Is Barred From a Presidential Run*, N.Y. TIMES (Feb. 8, 2017) <https://www.nytimes.com/2017/02/08/world/europe/russia-aleksei-navalny-putin.html>.

<sup>79</sup> *Freedom in the World 2017: Russia Profile*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2017/russia>.

<sup>80</sup> Branko Milanovic, *GLOBAL INEQUALITY: A NEW APPROACH FOR THE AGE OF GLOBALIZATION* 138 (2016).

<sup>81</sup> Zaostrovtssev, *supra* note 58.

forego the much more difficult process of pushing for stronger property rights in Russia, a country which for most of the past century did not have any.<sup>82</sup>

Countries with established property rights did not have this problem. When they were developing their own rule of law, the powerful, like the Rockefellers in the U.S., had few options other than advocating for internal reform since other jurisdictions were still developing too.<sup>83</sup> However, with so many options now available there is no urgency among the elites to develop Russia's rule of law.

Unfortunately for the large majority of Russians, they do not have the same access to offshore bank accounts as Vladimir Putin and the oligarchs.<sup>84</sup> They must make do with what they have, which includes occasional governmental tampering with their property rights. Without the powerful advocating for stronger rights for all, the middle and lower classes will continue to be left behind.

If the powerful domestic players will not push for reform, one might think that outside governments or investors could. After all, they might not have the web of connections necessary to succeed in Russia. But, these outsiders can sidestep the Russian judiciary too. While Russia has largely avoided joining any new investment treaties since Putin assumed power, any large-scale investment will almost certainly include contractual provisions that require arbitration in the case of a dispute between the investor and the Russian government or domestic partner. If the parties can outsource their disputes to a more independent and sophisticated adjudicator, then they will have little incentive to

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<sup>82</sup> Milanovic, *supra* note 80, at 138.

<sup>83</sup> *Id.* at 139.

<sup>84</sup> Matt Clinch, *What the 'Panama Papers' Mean for Putin*, CNBC (Apr. 4 2016), <http://www.cnbc.com/2016/04/04/what-the-panama-papers-mean-for-putin.html>.

improve local judicial quality.<sup>85</sup> Just like alternatives in the financial sector, the availability of international alternatives in the dispute resolution market allows powerful actors to exit and domestic courts to continue in mediocrity.<sup>86</sup> The lack of powerful internal and external actors pushing for judicial reform further hampers the prospects for judicial independence in Russia.

#### **IV. Conclusion**

Russia attempted to safeguard its judiciary from political meddling. However, despite protections put in place for appointments, tenure, and salaries, governmental authorities have circumvented them in order to insert themselves into the judicial branch. This has affected the Russian economy, as there is no independent judiciary to protect firms from baseless civil, regulatory, and criminal actions undertaken by corrupt officials. Unfortunately, hope for reform appears slim due to the lack of political competition and lack of internal and external pressures from powerful actors given their ability to outsource property protections and dispute resolution.

Russia has fallen short of their post-Soviet aspirations to create an independent judiciary. The Russian experience demonstrates the danger of assuming that enshrining certain protections in the law will be sufficient to facilitate functioning institutions. Russia has a long history of political interference in their court system and it appears this practice will not change in the near future.

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<sup>85</sup> Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 Int'l Rev. L. & Econ. 107, 121 (2005).

<sup>86</sup> *Id.*