

Selective Law Enforcement in Russian Politics 2007-2011

Legal Action for Extra-Legal Purposes

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Needless to say, the content of the dissertation work and the related articles are my responsibility alone.

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1 Introduction to the Research

Russian politics is not an easy subject of research. Double bottoms, shady arrangements, and informal schemes are everywhere. Written rules and declarations arguably hold less importance than deals we can only guess at. Speculations abound. Conspiracy theories are popular, but so are conspiracies.

The phenomenon I will address under the term of selective law enforcement is part of this picture. When a legal issue of political importance is decided upon in court, few take the legal reasoning at face value and many leap to alternative explanations. If criminal procedures are initiated against a critical journalist, many will expect that he has stepped on the toes of somebody powerful within the administration.

In 2011, I was picked up at my hotel by two straight-faced men in leather jackets. Some long hours later, my visa to Russia was cancelled, and I had to leave the country within three days. According to officials of the Federal Migration Service (FMS), I had infringed upon the visa-regime.¹ It seemed my internship at a Russian university did not allow me to do research independent of my local supervisor's explicit and documented recommendation.²

The myths and realities of ulterior motives and hidden politics reproduce themselves. It may be only a matter of time before a field observer is caught within the low-trust spiral of official explanations. Being in the middle of fieldwork on selective law enforcement in Russia, it was only too tempting to interpret the situation in terms of my research. Why was I *really* asked to leave the country? Would migration officials really pick me up at my hotel for suspected violations of a law widely known to go unenforced? Why did they ask to have a look around in my hotel room before they took me out? How come they knew of my meeting with the

¹ Federal'naya Migratsionnaya Sluzhba. I use the transliteration system of the academic journal *Europe Asia Studies* (Taylor & Francis) which is an adaptation of the BGN/PCGN system. Full transcription chart may be found at Taylor and Francis' web pages: <http://www.tandf.co.uk/journals/authors/CEAS-table.pdf>, [accessed 31.07.2013]. I make exceptions for well-known persons (Alexei Navalny, not Aleksei Naval'nyi) and places (Nizhniy Novgorod, not Nizhnyi Novgorod) where other transcriptions are clearly more popular. In addition, I make exceptions for interviewees to whom I refer whose works have been published under names with Latin letters. (Alexander Verkhovsky, not Aleksandr Verkhovskii).

² I have not checked the validity of this claim.

regional Communist Party leaders the day before? Why did they inquire about my interest in the upcoming Duma elections? “You cannot just walk into our country with a sound recorder and pose difficult questions without us noticing,” one of the officials told me self-confidently. At the same time, he insisted that the only formal problem was the visa.

This is the environment in which many of the interviewees of this study live. In their meetings with state officials, the air can be thick with suggestions. As critics of the establishment, they are investigated, raided, interrogated, faced with accusations and charges, and occasionally sentenced to serve time in prison. The circumstances smell strongly of political conflict. The timing, the targets, and the media debates surrounding the cases all suggest political motivations. In unrecorded conversations, state officials may even play with open cards more or less. Yet, as one of my interviewees said with a smirk: “They don’t sign anything” (Anon. journalist 2010).

Ulterior motives behind legal acts are difficult to prove, particularly in a law enforcement system with a low degree of transparency. The political elements rarely leave prints on the official paperwork. The unwritten rules remain unwritten and are rarely articulated. The informal background is never quite clear but found in suggestions and signals. The interpretation of the conflict is based on common understanding but also on the mutual distrust between the actors. When the informal rules of the game are indeed uttered, they can only be articulated in the form of subjective interpretation.

If we are to understand how Russian politics work, the double bottoms cannot simply be ignored. The intricate informal schemes behind the scenes complicate our inquiries, limit the certainty of our knowledge, and impede our ability to foresee the future. Our knowledge of selective law enforcement is correspondingly fuzzy, based on qualified guesswork, circumstantial evidence, analysis of incentives, and conversations with those with personal knowledge of the informal games.

The interviewees of this study tell us about how they are subjected to selective harassment by state agencies: sometimes a raid, sometimes a formal warning, and sometimes criminal proceedings. All the various legal acts, they claim, are just another means of putting pressure on them, keeping them preoccupied or scaring them away from oppositional activities. Behind the scenes, they identify powerful individuals who are pulling strings, making telephone calls, and issuing verbal commands and informal directives.

Outside observers from states where legal institutions are in general trusted by their population may at times be caught off guard by selective law enforcement. The politically correct answer is refreshingly undecided. We may be tempted to ask: Is it better with selective law enforcement than no law enforcement at all?

After the unfortunate meeting with the FMS, I dropped by my office in St. Petersburg to collect my belongings for the trip back to Norway. I had a brief conversation with two Norwegian colleagues, both with extensive knowledge of Russia and studying for Ph.D. degrees in Law. Their immediate reactions are telling. The first one asked me in disbelief why I had been so stupid as to go on a research trip without the correct visa. If I did not follow the regulations, it was only fair that I should face the consequences. The second student replied that he had never cared much himself for his travel documents in Russia; it is common knowledge that nobody cares and that violations are everywhere. There had to be something about my interviews, he contended.

A similar ambiguity of arguments also surrounded the first of the two trials against ex-oligarch Mikhail Khodorkovsky, a standard point of reference for anyone interested in selective law enforcement in Russia. The argument has been voiced repeatedly that “every successful businessman” who made his fortune in the 1990s violated the legal framework in some way or another. Strikingly, however, discussants would not always agree whether or not this worked in favor of Khodorkovsky. On the one hand, it seemed unreasonable that a few should be punished for crimes committed by thousands. Also, if the motivation was indeed to block Khodorkovsky’s political ambitions (as many claimed), things were not looking better. On the other hand, if every successful businessman violated law, and Khodorkovsky indeed was a successful businessman, would that not also imply the guilt of Khodorkovsky? Should not an example be made? Should he walk away just because others do? ³

The official ruling of the European Courts of Human Rights on the case reflects the ambiguity, stating that the charges against Khodorkovsky caused “reasonable suspicion” but

³ The media discourse on the Khodorkovsky trials (a.k.a. the Yukos-trials) has later turned towards stressing procedural violations and the presumed innocence of Khodorkovsky, rather than simply his political selection. This trend became particularly visible after he was sentenced a second time in 2010. The above simplified argument based on my personal impressions from the debates in Norway at the time does not really concern whether Khodorkovsky was guilty as charged, but whether he was guilty of some white collar crime or another.

no “uncontestable proof” of political motivations. Furthermore, the court states that “Khodorkovsky’s political opponents or business competitors might have benefited from his detention”, but that this “should not have been an obstacle for the authorities to prosecute him if there were serious charges against him” (*Guardian* 2011).

Alleged selective law enforcement provides us rich opportunities to talk past each other. A clear conceptualization is a first step in making sure we agree on what we are talking about when discussing selective law enforcement. The question of legal guilt and the issue of selective enforcement are *separate* issues and should thus be discussed separately. A claim that somebody has fallen victim to selective law enforcement implies neither that he or she is guilty of legal violations nor the opposite. In other words, if political and legally irrelevant criteria *de facto* caused the enforcement of law, no amount of legal guilt may hinder the fact that the case was being selectively imposed. Likewise, no extralegal motivations for law enforcement will change the facts regarding a possible legal violation.

In examining the practice of selective law enforcement, Russian politics provide a rich source of information. While similar practices take place in many if not most countries (Levitsky and Way 2010), they are possibly most strongly associated with the post-Soviet world and with Russia in particular. That law in Russia is routinely used as an instrument for ulterior purposes has turned into conventional wisdom. Leonard and Popescu (2007, 3) write that “Russia’s selective application of the law affects businesses who worry about respect of contracts, diplomats who fear breaches of international treaties, human rights activists concerned about authoritarianism, and defense establishments who want to avoid military tensions.” The legal procedures against the so-called oligarchs in the first years of Putin’s presidency (particularly Vladimir Gusinsky, Boris Berezovsky, and Mikhail Khodorkovsky) increased the negative international attention to politicized justice and connected the practice to Russia. In particular, the asset-stripping of the oil company Yukos and imprisonment of Khodorkovsky attracted much attention for a decade. Even today, the cases against the oligarchs remain important symbols of Putin’s early years as president and the recentralization of power he headed in the first decade of the century.

In Putin’s third term of presidency (from 2012), selective law enforcement in Russia is still a hot topic internationally. The proceedings against three members of the punk group Pussy Riot in 2012 caused international outrage, not least after two of the group members (Nadezhda Tolokonnikova and Maria Alyokhina) were sentenced to prison. At the time of

writing the prominent opposition leader and anti-corruption blogger Alexander Navalny risk several years in prison. As a consequence of the sustained attention to alleged legal abuse and politicized justice in Russia, laypeople nod in recognition when I tell them the topic of this research project – even though many have never heard of the term “selective law enforcement” as such. A typical response would be “Oh, in Russia! I am sure you have heaps of material to work with then!”

1.1.1 Why Research Selective Law Enforcement?

Researching the workings of selective law enforcement in Russian politics is important for three reasons at least. First, selective law enforcement is important in itself. Informal politics is vital to the governance of Russia, and selective law enforcement is an important aspect of today’s repression. Within Russia, the selective application of law for extralegal purposes is taken for granted. The cynical instrumentalization of law is a part of the common understanding of how things work. It is one of Russia’s *open secrets*; everybody knows about this deviance from the official rules, yet only an exclusive minority is aware of the details (Ledeneva 2011b). How the practice has received so little focused attention in academic discourse amounts to a small mystery.

Secondly, selective law enforcement highlights a more fundamental issue of Russian politics today – namely how the formal and informal elements of politics interact. These interactions have been addressed in many terms – as hybridity, duality, contradictions or tensions – between the democratic form and authoritarian content, between statism and informal networks, between the rule by law and the rule of men. In few practices are these tensions more starkly evident than in selective law enforcement

On a third level, some of the findings and concepts may also be useful in the study of other authoritarian regimes marked by many of the same tensions as Russia. As Y.L. Morse (2012, 189), contended the study of today’s authoritarian regimes needs research “with the explicit goal of midrange theory building and concept formation.” Research indicates that the authoritarian drift of political regimes reduces research on them in general, and field work in particular (Goode 2010). The need to approach the dynamics of these regimes by means of qualitative inquiry only grows. I hope this study will make a modest contribution to answering this challenge.

1.2 The Research Question – Some Introductory Remarks

Selective law enforcement takes place in countless variations. It can be used to block unwanted actions, such as hindering the opposition in registering parties, or hindering independent candidates in registering for elections. Alternatively, selective law enforcement may take the form of aggressive legalistic attacks, be it selective investigations, administrative sanctions, or criminal proceedings. The legal pretext for the acts may be well-founded, poorly-founded or more or less unfounded, and the consequences for the victims may vary from long prison sentences to the minor irritations brought about by repeated state inspections or additional red tape. Correspondingly, selective law enforcement may scare journalists away from investigative journalism for good or it may have a softer impact – slowly draining their energy, motivation, and available resources. Whatever motivations may be behind the various legal acts are complex and diverse. In short, selective law enforcement is inherently chaotic, varied, and based on improvisation. No two cases of legal abuse are completely alike.

True as that may be, I will argue that selective law enforcement exists as a tangible object of research, that it takes on specific and observable patterns, and that it fits certain definitions that make the concept meaningful. There is a need for an academic concept that provides us with a language to discuss selective law enforcement in explicit terms, to uncover how it works and ultimately how it may be countered. If its impact is different in every case, there are reasons to believe that selective law enforcement in sum contributes to keeping the Russian population politically inactive by reinforcing the common conception that activity will only bring about troubles.

This study of selective law enforcement is exploratory. Instead of squeezing additional drops of knowledge out of already well-established fields, I try to open a new one. Clearing the ground for research to come, I attempt to close in on what selective law enforcement in Russia is all about. How can we conceptualize its hybrid existence on the margins of both formal and informal politics? How exactly is law enforcement selective? In what arenas does it take place? Who does it favor, and who is it directed against? How does it impact Russian politics? Can it tell us something about the governance of Russia in general? To approach the long list of yet unanswered questions, I ask:

How does selective law enforcement work in contemporary Russian politics?

A broad approach, notwithstanding, I tend to this question with a range of assumptions and qualifiers. First of all, selective law enforcement is investigated as *a mechanism of repression aimed at enforcing informal rules of political conduct through selective legal acts*. The study investigates this phenomenon primarily as *perceived* by a number of prosecuted critics in Russia. The interviewees' interpretations of both specific events and the practice in general are digested through a theoretically-informed view and synthesized in a comprehensive concept that explains how the practice functions in the contemporary Russian context.

Because motivations and intentions are crucial to *what* selective law enforcement is, the study of it also concerns the question of *why*. This dissertation grapples with both the *purposes* of selective law enforcement for individual actors, the structural *incentives* that make this strategy seemingly popular in Russia and its ultimate *impact* in terms of institutionalized repression and the reproduction of the authoritarian system.

The wording of the research question is in need of some further clarifications.

Firstly, as hinted at by the term *selective*, the research is concerned with (perceptions of) volatile action. In other words, I rule out unconscious bias in the prosecutors' minds, a topic better discussed within social psychology or behavioral science.⁴

Secondly, I apply the term *law enforcement* in the broadest sense, in relation to both criminal and administrative proceedings, including all investigative actions that are seen by targets as selectively imposed and *de facto* punitive, such as selective inspections and raids. The research concerns any *legal acts* that (are perceived to) have been initiated informally for purposes of political repression. I apply the term *broader legal system* to encompass all the official entities involved in the process.

Thirdly, while the term selective law enforcement often is used in cases of manipulation for economic gain, I am only interested in the enforcement mechanism's *political* potential: that is, selective law enforcement employed for purposes of enforcing informal rules of political

⁴ As we know predominantly from U.S. research on social psychology, prosecutors and not least jurors tend to routinely discriminate on a range of extra-legal criteria such as race (e.g. Lynch and Haney 2011), social status (e.g. Phillips 2009), defendant's attractiveness (e.g. Stewart 1980; Gunnell and Ceci 2010), or behavior the court room (e.g. Antonio 2006).

conduct. That being said, it is sometimes hard to draw a line between politics and big business in Russia, especially when we talk of fights over political office.

1.2.1 Other Uses of the Term “Selective Law Enforcement”

Readers should be aware that some scholars use the term “selective law enforcement” with the meaning of policing or prosecution strategies under strained resources (e.g. Kleinig 1998). Within such a conception, selective law enforcement may for instance include giving priority to the more serious violations (within a legal category) before the less serious ones. A related form of selective law *non*-enforcement is known to take place where the small fish in a criminal network may be released on the premise that they become police informants.

In these accounts, selectivity is a neutral term and does not itself indicate abuse. In a positive sense, overly harsh laws may even be compensated for through selective law enforcement: “Though theoretically such laws are a trap for the innocent, it is only the real villains who are pursued in practice” (Fuller 1958/1977, 78).⁵ With regard to non-enforcement, it is pertinent to note that the police are not only responsible for enforcing law but also for maintaining order. These two tasks do not always call for the same actions. For instance, an informal warning may on some occasions serve the *purpose* of law better than the prescribed legal procedures. These strategies of policing and prosecution are *not* selective law enforcement as examined in this study, though the background mechanics are not *entirely* different.

1.3 Existing Approaches and Academic Context

Selective law enforcement is a well-known phenomenon. It is commented upon in human rights discourse, mass media, and academic research with roughly the same meaning. Commentators implicitly condemn the practice on the grounds that the legal reasoning in these cases differs sharply from what they see as the *real* motive for prosecution. The moral indignation may presumably stem from a feeling of being lied to, from the illegitimacy of what is seen as the real goals, or from a combination of these two aspects.

Professional researchers on Russian state and society seem to agree that informal or quasi-formal arrangements are important aspects of Russian politics. Studies of repression and

⁵ Lon L. Fuller asserted this claim polemically and hardly supported this point of view himself.

coercive capabilities confirm that such arrangements are also important for suppressing dissenting voices (e.g. Robertson 2011; Taylor 2011; Horvath 2013). In this context, a number of works also mention selective law enforcement explicitly (e.g. Gel'man 2004; Karklins 2005; Barnes 2006; Leonard and Popescu 2007; Azarova 2008; Burger and Holland 2008; Meyer 2008; Robertson 2011; Popova 2012). In addition to area-specific approaches, comparativists seem to share a similar understanding of selective law enforcement, most explicitly Levitsky and Way (2010). A step to the side of political repression, there is also a literature on selective instrumentalization of legal tools in the post-Communist Russian economy (e.g. Grzymala-Busse 2004; Volkov 2004; Ledeneva 2006b; Yakovlev and Zhuravskaya 2009; Firestone 2010).

Despite a certain degree of acknowledgement, however, selective law enforcement has mostly figured in the background of analysis. In this neglected position, the phenomenon is not articulated in any uniform way, though the terms “selective enforcement” and “selective law enforcement” are both commonly used. The illegitimacy of the practice is often suggested implicitly, but the foundation for this condemnation is seldom clarified. The few studies that do address selective law enforcement in Russia at some length tend to take recourse to circumstantial evidence and journalistic (often English-language) sources. Maybe most important for our purposes, these studies lack theoretical ambitions (e.g. Burger and Holland 2008) for the most part. For this reason, the moderate attention fails to accumulate any significant knowledge as to how selective law enforcement works.

On the one hand, it is hard to see how the underlying ideas in the mentioned literature differ from the concept of selective law enforcement that I suggest in this study. On the other hand, the existing literature rarely fleshes out the concept to such a degree that conclusions regarding its meaning can be firmly established. By using specific idioms in specific contexts, commentators obviously intend to bring about certain associations. Yet, readers are often left to their own interpretations and have to make inferences from the idioms’ semantics and the referential environment. In short, the authors make little attempt to fix the fluid associations into a harder scientific concept that can be used in systematic research. As it seems, most authors have been content with using the “elephant definition” when discussing selective law enforcement: something which is hard to describe, but becomes instantly recognizable when spotted. However, as some credit Bertrand Russell for saying: “Everything is vague to a degree you do not realize till you have tried to make it precise.”

1.3.1 Selective Prosecution in the U.S. Tradition

Selective law enforcement should be differentiated from the U.S. legal concept of selective prosecution, on which there is a considerable literature. While the origin and legal focus of selective prosecution are very different from selective law enforcement as employed to describe a phenomenon in Russian politics, the two terms share some important characteristics that will be discussed below.

Selective prosecution is, in the U.S. legal context, defined by three traits, namely “arbitrary classification,” “disproportionate impact,” and “discriminatory purpose” (Gershman 2008, 25). Its legal history began in 1886, when the Supreme Court of the U.S. ruled that “discriminatory enforcement of the law can violate the Equal Protection Clause” (Kvurt 2007, 142, fn. 74). In 1962 it was established that conscious selectivity in enforcement is not in itself a violation as long as the selection is not based upon “an unjustifiable standard such as race, religion, or other arbitrary classifications” (Gershman 2008, 25). Unless legally relevant, political views also qualifies as an “unjustifiable standard,” and some studies on selective prosecution deal with political profiling specifically (e.g. Lawson-Remer 2009). Secondly, to qualify as selective prosecution, the law in question must not in general be enforced against “other persons who are similarly situated or equally culpable” (Gershman 2008, 25). There must, in other words, be a double standard of enforcement involved. Finally, the selection must be “consciously and deliberately made.” Not least for this reason, selective prosecution is usually hard to prove in a court of law.

Robert H. Jackson’s⁶ (1940, 19) warning about the potential abuse of prosecutorial discretion in the United States is strikingly relevant for selective law enforcement in today’s Russia:

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted ... It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

⁶ Jackson was Attorney General of the United States (1940-1941) and later Associate Justice of the Supreme Court (1941-1954). He is also well known for his role as Chief Prosecutor at the Nurnberg Trials following the Second World War.

Inspired by Jackson (“the most able lawyer and writer ever to have served on the Supreme Court”), Bennett L. Gershman (2008, 2) has written extensively on prosecutorial misconduct over the last decades. In 2008 he directed sharp criticism against the George W. Bush administration (2000-2008). Not only does Gershman criticize the extra-constitutional treatment of supposed suspects in the war against terror, but he also observes a trend of selective prosecution against “prominent, strategically placed, or outspoken Democrats.” The quantitative studies of Donald Shields (2010) found this apparent bias under the Bush regime to be significant and systematic, though the quantitative analysis could certainly not tell much about any conscious motivations in this regard. The parallel to legal abuse in Russia will become clear in the course of this dissertation.

The Russian constitution guarantees equality before the law (article 19), but Russian law has no legal concepts to deal specifically with political prosecution. One researcher who has attempted to directly apply the legal concept of selective prosecution to Russian realities is Yelina Kvurt (2007). Kvurt uses the first case against Mikhail Khodorkovsky in particular as a point of departure to discuss the possibility of introducing a similar legal concept to Russia. She concludes that there are no formal barriers to hinder the introduction of such a legal concept and also that Khodorkovsky would possibly have been “saved” if Russia indeed had one.⁷ There are however serious problems with Kvurt’s article.⁸ With regard to the approach itself, one may question whether her analysis based on a form of “hypothetical adjudication” (*if Khodorkovsky had been an American citizen, then...*) is meaningful, not least granted the

⁷ According to Kvurt (2007), Russians that claim to have been selected tend to contest the substantive claims or legal procedure instead of referring to their Constitutional Rights. Appeals to Constitutional Rights and claims of political persecution are in actual adjudication most often ignored. This point is also observed by Peter H. Solomon Jr. (2008b, 227).

⁸ Kvurt’s (2007) sources on Russian events are few and seem somewhat arbitrary. The only cases mentioned are the famous cases against Khodorkovsky, Gusinsky, and Berezovsky, and Kvurt is obviously unaware of how common claims to selectivity are in Russia. Furthermore, she mixes the question of selectivity in enforcement with the presumed innocence of Khodorkovsky (2007, 149) and arguably also the issue of repression of political dissent with a poor protection of property rights (2007, 167). Kvurt concludes that Russia should adopt a “totality of the circumstances standard” in reviewing cases of possible selective prosecution (*ibid*). For reasons of formalistic traditions and a massive problem with informal influence upon politicized cases, however, such an approach is hardly plausible. Finally, seemingly based on the prosecution of the three oligarchs mentioned, Kvurt (2007, 133) leaps to the conclusion that “almost all those targeted by Putin’s regime have been Jewish.” In addition to being plainly wrong, this also obfuscates selective law enforcement’s role in political repression.

huge differences between both the legal systems and the societies they are supposed to regulate. Also, a hypothetical adjudication would in most cases be practically impossible, considering the lack of firm information available to the “hypothetical judges.” Kvurt’s analysis of the possibilities of introducing the concept of selective prosecution to Russian law also becomes rather irrelevant when not taking into account the lack of incentives for Russian authorities to remove one of their own favorite tools of repression.

A significant weakness of any legal approach to selective law enforcement is arguably its self-imposed disciplinarian boundaries. My own study of selective law enforcement is concerned with its social and political significance – a significance that greatly exceeds its legal relevance. If we take the strict demand of the U.S. legal concept as a point of departure, only a small proportion of cases could presumably be legally proved in court. As a part of the social reality of Russians, however, the question is much more important than these few cases would indicate. In addition, a legal approach to selective law enforcement may presumably fail to see how the practice by definition is native to the twilight zone between legal and illegal practices. Selective law enforcement indeed illustrates some of the problems with making law the ultimate concept of what is right or important. Being aware of how ambiguities created by the legal system may be exploited provides a first step to understanding what selective law enforcement *is* and thus also *why it is*.

That being said, the U.S. legal concept is relevant to the conceptualization of selective law enforcement in Russia. Notably, Gershman’s three defining traits of selective prosecution bear resemblance to my own conceptual components of selective law enforcement. Like selective law enforcement, selective prosecution concerns the *instrumental* aspect of the abuse, namely the conscious selection (“discriminatory purpose”). Selective prosecution also heeds the *relative* aspect of selective legal abuse – it is defined in part by the corresponding *non-enforcement* of legally similar cases (“disproportionate impact”). Finally, selective prosecution and selective law enforcement both imply that the selection is made on a *legally irrelevant basis* (“arbitrary classification”). With regard to the research of Gershman (2008, 18) and Shield (2010, 36), the focus on indirect outcomes (prosecution for “shame and blame” purposes) instead of legal sanctions also bears an interesting similarity to my own research.

The nature of this “indirect punishment,” however, seems to be qualitatively different in the U.S. and Russia.⁹

Gershman’s research is part of a rich tradition of studies critical of doctrinal understandings of law and legality, not least in the United States, where the movement of *Legal Realism* already set a radical agenda in the 1930s (introduction in Schauer 2011).¹⁰ Relevant background literature with regard to this critical tradition includes works related to the school of Critical Legal Studies (CLS) (review in Ward 2004) as well as less dramatic socio-legal approaches (see Macaulay et al. 2007). Few if any have emphasized so strongly the irrelevance of legal texts and the importance of external criteria in law enforcement as did writers like Jerome Frank and Karl Llewellyn, important figures within the movement of Legal Realism.

Most critical approaches to law and legality mentioned above fixate on the problems of legality in democracies in order to criticize orthodox concepts of legality *as such*. By investigating the strongest link of democratic legality, they question its supposed insulation from moral and political discourse. Indeed, the generality of their critical claims is arguably why the approaches are considered radical in the first place.

My interest is on the side of this tradition. First, I am interested in selective law enforcement in its relation to informal governance and modern authoritarianism. As noted by Moustafa and Ginsburg (2008a), the mainstream assumption in the study of authoritarian regimes is not that the legal system is independent of politics. On the contrary, many (wrongfully) assume that courts under authoritarian regimes in every way are fully subordinate to the political regime in power. Second, I do not seek to deconstruct legality as such but to explore notions of its abuse in a few select cases. Indeed, because selective law enforcement is in part defined relatively to non-enforcement, we need to examine what separates the two.

⁹ In short, the obvious selectivity in enforcement combined with the Russians’ nihilism reduces any function of “shame and blame.” Russians rather complain about how much time and resources they spend on dealing with all the formalities associated with legal charges. In addition, society may shun the prosecuted individual or organization, not because of their supposed legal violations but because the prosecution signals that they are in a problematic relationship with the authorities. See section 8.1.3 for a discussion.

¹⁰ The legal realists were not “realists” in the typical sense of the word, but a group of radical critics that tried to challenge the doctrines of classical legal thought. The “realism” in legal realism may connect to the movement’s strong emphasis on empirical studies to (in)validate the presumptions of how legal systems work.

Crucial aspects of selective law enforcement as a social and political phenomenon will not necessarily be revealed through legal analysis. Yet, I will also argue that we need to take law into greater consideration than a fixation on power and repression alone. In this regard, my research is integrationist, at times drawing on literature and perspectives from the study of law in my analysis.

1.3.2 Darden's Blackmail State

A perspective on selective law enforcement that varies greatly from the legal approach is found in a study by Keith Darden (2001) and related works by the same (Darden 2008) and the Ukrainian researcher Mykola Riabchuk (2004; 2009a; 2009b). Together these works make for a rare example of theorizing legal abuse in its post-Soviet political setting.

Darden's analysis is based on very specific material: the so-called *Melnychenko-tapes* – recordings taken in secret from the office of former President in Ukraine, Leonid Kuchma (1994-2005).¹¹ The tapes reveal how president Kuchma actively exploited the pervasive corruption in the country to keep his administration loyal. Instead of cracking down on corrupt deals, Kuchma's administration stored compromising material and used the threat of selective enforcement to blackmail subordinates into obedience. Actual prosecution, notes Darden (2008, 47), "appears to have been rare and selective – limited to cases of disobedience or political disloyalty." While similar phenomena exist in many places, Darden (2001, 70) contends that post-Soviet states are different because of the "extent to which blackmail and the collection of *kompromat* is widespread, systematic, and conducted by the state itself."¹² What I perhaps find most striking with the examples Darden draws upon, however, is how straightforward, personal, and explicit Kuchma was at times in his blackmailing. For my

¹¹ The recordings were taped and smuggled out of the country by a bodyguard-turned-dissident after whom the tapes are named.

¹² *Kompromat* can at the same time designate both compromising material and the informal practice of using it in various schemes. After this material has been collected, it can be "stored, traded, or used strategically" (Ledeneva 2006b, 58). *Kompromat* is usually personalized, destroying or weakening the target it is directed against. As the threat of punishment tends to suffice, *kompromat* is most often stored and used for blackmailing. While Darden (2001) uses the term with legal connotations, the term usually refers to non-compliance with *social norms*. These norms may or may not be reflected in legal rules, but the compromising material is often too speculative and unsubstantiated to be suited for court. Thus the main threat posed by *kompromat* is usually social ostracism. See esp. Chapter 3 in Ledeneva 2006b.

purposes, the material most importantly constitutes a rare piece of hard evidence that selective law enforcement is not just an academic construct or a speculative narrative used by critics.

While the similarities are evident, the differences between Darden's study and my own concept of selective law enforcement in Russia are considerable. Where Darden focuses primarily on non-enforcement as seen from above, I focus on actual enforcement seen from below. Second, Darden focuses on building *cohesion* within the state administration, while I focus on *coercion* against outsiders. Darden (2001, 68) concludes that the "blackmail state" is founded on "the troika of corruption, surveillance, and blackmail." My study, however, indicates that a regime of surveillance is not necessary for such a mechanism to work. Rather, I show how unclear or overly burdensome laws in themselves provide a *catch all* mechanism in which everyone is in danger of prosecution. Also, my study suggests that Kuchma's explicit blackmailing may not be representative of today's Russia. While political blackmail *does* take place under Putinism, the threat of selective law enforcement is just as importantly communicated by political signals lubricated by a general expectation of politicized law enforcement among the potential targets.

1.3.3 Ledeneva – Informal Practices and *Sistema*

The works of Alena Ledeneva deserve a separate review due to their topic, impact, and special cross-disciplinary approach. With her area-oriented approaches and insider perspectives, Ledeneva is widely recognized as the foremost academic expert on informal practices in Russia. By an approach that may be called socio-ethnographical, she uses Russian colloquial terms as a point of departure for interpreting and elaborating on her own interview material from repeated field trips. The focus, especially in her early works (1998; 2001; 2006b), is oriented towards the informal economy as a product of the players' strategies to cope with the incoherent rules of the game. From this position, Ledeneva rarely touches upon the issue of political repression.

Ledeneva shows little interest in selective law enforcement as an independent phenomenon. She (2006a, 47-48) mentions the term briefly as one way of using administrative resources (see section 3.3.1), but only through an example. In a later survey she (2011c) suggests that selective law enforcement takes place when the "opening and closing of cases" – or alternatively "court decisions" – are "influenced by the status of the opponent."

Unfortunately, this tentative definition leaves us little the wiser.¹³ Neither the degree nor the form of influence is addressed, and the concious *selection* is not made explicit except in the term itself. Also, we do not get to know what may hide behind the vague phrase “status of the opponent.”

Although she does not deal extensively with selective law enforcement as a separate practice, Ledeneva remains highly relevant to our understanding of these issues. In her account, the instrumentalization and selective use of formal rules are important for most or all of the practices she investigates (see esp. 2006b). For Ledeneva, the informal practices are largely a coping strategy for players to bridge the contradictory demands of formal rules and informal norms. She would possibly contend that selective law enforcement is an *element* of most or all of these practices, and I would not deny her that point.

A reader of Ledeneva should be aware that her conceptualization of “unwritten rules” differs from my own “informal rules.” For her, unwritten rules are not rules in a conventional sense, but rather another word for “informal practices” – a “know-how needed to ‘navigate’ between formal and informal sets of constraints” (2011b, 722).¹⁴ In this she differs from my more conventional notion of informal rules as analogous to formal rules with corresponding attributes of being enforceable, promulgated, and (not) complied with in a similar sense as formal rules. While Ledeneva operates with a down-up perspective in all her research, I approach the informal rules as enforced top-down by an authoritarian regime.

Ledeneva agrees with Darden that informal practices exist everywhere, but that they are especially prominent in the post-Soviet world. She does not address extended surveillance as a factor (as does Darden), but links the prevalence of informal practices in Russia to two fundamental “sets of factors”: legacies of informal norms and practices, on the one hand, and a consistently weak legal framework on the other (2006b, 22-27). My own findings largely

¹³ Ledeneva does not attempt to provide a firm definition, but rather sketches out the rough meaning of the term for use in a survey.

¹⁴ Ledeneva’s use of the term informal or unwritten rules may be confusing. While she uses the term actively in 2001 (*Unwritten Rules. How Russia Really Works*), she reconsiders its applicability in 2006 (14-22) and explicitly abandons it as a “trap conceptually and a dead end empirically.” Instead, she skillfully develops a concept of *informal practices*. Later, however, Ledeneva (e.g 2011b) again turns to an idea of unwritten rules in the same “navigational” sense as she termed informal practices in 2006.

support this interpretation, and I also adopt parts of Ledeneva's (2006b, 12-13) conceptualization of how weak legal rules are related to informal practices.

Though informal practices are a coping strategy when formal solutions fail, the incoherent rules of the game also create possibilities for short-term exploitation. Ledeneva (2011b, 722) notes how skilled and powerful actors may play upon the "enabling aspects" of both formal and informal constraints. On a few occasions, she (e.g. 2006b, 193) touches upon their repressive potential, for instance when she notes that the "informal practices also serve the needs of the political regime by undermining the principles of free and fair elections, independent media, and the rule of law."

Since Ledeneva did the fieldwork to her 2006 book, the consolidation of power under Putin has increased the repressive potential of the practice. The consolidation of power under Putin's two first terms as president involved a centralization of influence over legal actors (Petrov 2011), and the control over the enabling aspects of incoherent rules was consolidated accordingly. In a system in which "inequality before the law is taken for granted" (Ledeneva 2013, 31), the power networks that influence legal implementation now have much room for maneuvering. I agree with Ledeneva's (2013, 15) point that Russia in all its vastness and complexities cannot be "managed" to more than a limited degree, especially not by its current quasi-modern form of organization. Yet, that fact does not exclude the reality that the informal rules and political agendas are being gradually stabilized and internalized by relevant actors. Putin's *sistema* – the sum of formal and informal rules and practices – has gradually "matured." Whereas it was earlier marked by manual control, it is now more of "an anonymous and seemingly automatic regime" (Ledeneva 2013, 31). The political guidelines for selective law enforcement have gradually become more internalized by regime insiders, law enforcement officials, and other social actors in Russia, something well documented in Ledeneva's later works (e.g. 2011a, 2013).

1.3.4 Levitsky and Way – The Interactionist Approach

Finally, there also exists an approach to selective law enforcement focused on hybridity and repression. In a mixed methods comparative political science project concerned with identifying and delimitating "competitive authoritarian regimes," Steven Levitsky and Lucan Way (2010, 26-28) describe selective law enforcement with regard to its coercive and hybrid (in terms of formal/informal) qualities:

Competitive authoritarian governments also employ informal mechanisms of repression. For example, many of them use “legal” repression, or the discretionary use of legal instruments – such as tax authorities and libel laws – to target opposition and the media. Although such repression is formal in the sense that it entails the (often technically correct) application of the law, it is an informal institution in that enforcement is widely known to be selective.

Few readers of Levitsky and Way will linger for long on these sentences. Yet, this short account seems to constitute perhaps the most condensed and explicit academic conceptualization of selective law enforcement as an independent phenomenon in authoritarian context to date.¹⁵ Levitsky and Way point to several essential characteristics of the phenomenon missed out by the approaches reviewed above.

First, Levitsky and Way approach selective law enforcement as a form of institutionalized repression and link it to regime politics. This approach is similar to the one I advance and contrasts for instance with works by Alena Ledeneva (esp. 1998; 2001; 2006b) which focus less on repression and more on social relations, reciprocity, and the “economy of favors.”

Levitsky and Way also open the door to discussions of selective law enforcement in relation to regime hybridity in general. The two comparativists are concerned with how the international environment after the Cold War created incentives to maintain formal democracy and employ “hidden” forms of repression: “The coexistence of meaningful democratic institutions and authoritarian incumbents creates distinctive opportunities and constraints for actors, which – in important areas of political life – generate distinct patterns of political behaviour” (Levitsky and Way 2010, 27). Undeniably, selective law enforcement is a part of this pattern.

Levitsky and Way link the practice of selective law enforcement directly to incentives created by the international situation. Selective law enforcement, they claim, “can be presented to the world as enforcement of the rule of law rather than repression.”¹⁶ While nobody can deny that authoritarian leaders present the repression in any way they want, it is worth noting that neither Western nor Russian actors seem to believe in such representations (see e.g. Levada 2010; 2012). While the importance to the international environment for Russia to end up with

¹⁵ Excluding my own pilot project (Bækken 2009).

¹⁶ At different levels of explicitness, this is a common claim, see for example, Furman (2007) or Riabchuk (2009b). For a more comprehensive analysis of “façade” elements in Russian politics, see Wilson (2005).

formally democratic institutions after the Cold War hardly can be exaggerated, my research finds that its impact upon selective law enforcement is more complex and indirect than Levitsky and Way suggest.

Levitsky and Way show some willingness to approach the peculiar hybrid characteristics of the phenomenon – holding it to be formal and informal in different “senses.” Their concept also hints at a two-phase structure in which the initial selection is informal, while the resulting legal procedures may still be correct from a formal point of view. Considering Levitsky’s interests in institutional interactions, however, it is somewhat surprising that this issue is largely left untouched beyond this point. Instead of confronting the interesting implications for Helmke and Levitsky’s (2004) model of institutional interaction, they do not discuss the hybridity of the phenomenon any further. Instead, they dump it in a large conceptual sack together with all sorts of extralegal practices used by authoritarian incumbents.

My own approach to selective law enforcement is in some respects close to the one suggested by Levitsky and Way, though at a very different level of detail. In contrast to them, I actively challenge the reduction of selective law enforcement to a façade. I also take the hybrid characteristics of selective law enforcement into more consistent consideration and grapple with the conceptual problems this hybridity stirs up. My most important novelty in this regard is possibly the integration with a *rule enforcement* perspective that not least brings *deterrence theory* into the discussion.

1.3.5 Hybridity and Interactions in Authoritarian Politics

While the practice of selective law enforcement has received limited theoretical attention, the hybridity and tensions of modern authoritarianism that it reflects have been discussed at length. A significant literature discusses modern authoritarianism in terms of *interactions of opposites* – be it between the formal and the informal, democracy and authoritarianism, state and regime, clientelism and statism, patrimonial or rational-legal legitimacy or between the rule of law and the rule of men. These debates are directly relevant to my discussion of selective law enforcement. Conversely, selective law enforcement is directly relevant to these debates.

Many of the works are comparative macro-scale analyses of interactions on regime level, looking at interactions of formal and informal elements as a *key* element of contemporary

authoritarian politics. An emphasis on political hybridity in contemporary authoritarian regimes has been especially common in the classification of regime types, not least as reflected in the discussion of various “democracies with adjectives” (Collier and Levitsky 1997), “grey-zone” (Carothers 2002) or “hybrid” regimes (e.g. Diamond 2002) and also in studies of informal networks within the state structures (Wedel 2005, Kononenko and Moshes 2011) or neopatrimonial forms of governance (see below). Since the end of the optimistic focus on democratization of the post-Soviet area in the 1990s (Carothers 2002),¹⁷ many writers on Russia and other contemporary authoritarian regimes have turned to “authoritarianism with adjectives” (such as “electoral authoritarianism” in Schedler 2006, and “competitive authoritarianism” in Levitsky and Way 2002), extending the tradition of Juan J. Linz (see Linz 2000). In addition, works focused on contemporary Russia deal extensively with how informal elements of governance relate to the formal rules and institutions (e.g. Sakwa 2008; 2011, Kononenko and Moshes 2011; Mendras 2012; Robinson 2012).

Neopatrimonialism

As it seems, contemporary authoritarian rule has spurred researchers to seek new terms to help them extend or renew the discussions on authoritarianism by trying to account for the blurring between the state and its rulers and between the private and public sphere. *Neopatrimonialism*, a neo-Weberian term often associated with Guenther Roth (1968), became part of the solution. The rhetorical emphasis under Putin on the “strong state” and a “strong leader” may have contributed to an increasing popularity in also applying the term to

¹⁷ The so-called transition-debates provided a short, but hefty interim in the studies of Communist and post-Communist countries (though the debates also concerned other areas). When the Cold War world order collapsed, policy-makers were eager to fill the vacuum left not least by Soviet power. Following seminal works by among others, Guillermo O'Donnell and Philippe C. Schmitter (1986) and Samuel Huntington (1991), academics, too, became part of these efforts to make the “democratization” of new and old states as smooth as possible. In retrospect, the political efforts were characterized by Levitsky and Way (2010, 19) as superficial, selective, and inconsistent. After Thomas Carothers (2002) declared a death sentence on the “transition paradigm,” the academic relevance of the concept has diminished. That said, it is still not uncommon to measure authoritarian regimes in terms of what they are *not* and keep democracy as an implicit or explicit yardstick for their performance, which in a way reproduces one of the fallacies of transitology. However, an increasing number of scholars underscore the need to look beyond normative categories to see how these regimes “really work,” a phrase which has become a new mantra in the research on authoritarianism (e.g. Ledeneva 2001; 2006; Moustafa and Ginsburg 2008; Kononenko and Moshes 2008; Magloni 2008; Gandhi and Lust-Okar 2009).

Russian realities (Whitmore 2010; Hanson 2011; review in Robinson 2012). There seems to be a general consensus that neopatrimonialism as a concept attempts to deal with political systems that mix a rational-legal bureaucratization with some elements of informal (traditional, personal) rule. The consensus, however, ends there (reviews in Erdmann and Engel 2007; Pitcher et al. 2009; Guliyev 2011). In particular, it is unclear how the term relates to Weber's original concept of *herrschaft*.

An interesting contribution to the debate on neopatrimonialism as a concept is Farid Guliyev's 2011 article in *Democratization*. Guliyev finds it valuable to contrast a Weberian dimension of governance, what he calls *state authority structure*, with the Dahlian dimension of *access to power* – what we often discuss in the dichotomous terms of democracy and autocracy. While selective law enforcement to some degree relates to the access to power, it is primarily concerned with the *exercise of power*. In other words, it concerns the Weberian dimension of governance more than the Dahlian. In Guliyev's typology, Russia's form of structure would arguably qualify as “institutional patronage” with an “institutional ruler” and a “neopatrimonial administration.”

Guliyev's exploration of political hybridity with regard to its state authority structure provides an interesting supplement to the common regime type typologies with strong focus on the Dahlian dimension of access to power. For purposes of understanding Putinism, however, his approach remains insufficiently sensitive to the selectivity and *exceptionalism* in Putinism – the state bureaucracy is in a sense switched to “paternal mode” only on political demand. It is the control over this switch that provides for a deterrence-based reinforcement of the informal rules of political conduct that we can see in today's Russia. Furthermore, while some reviews (Erdmann and Engel 2007; Robinson 2012) claim that neopatrimonialism takes the form of conflictive modes of organization, they do not account in full for the apparent element of mockery in the formal institutional setup. In Russia and elsewhere, the difference between the formal setup and its actual practices is known to be vast.

Façade Politics

Other scholars do take the mock elements of these institutions seriously. In fact, some have gone as far as suggesting that formal institutions, not least in post-Soviet Ukraine and Russia, were mere fakes to please or fool observers

Already in the 1990s, Ken Jowitt (1996) pointed to the emerging *mimic democracies* in the former Soviet Union. Some years later, several others followed the same conceptual path (e.g. Wilson 2001; 2005; Furman 2007; Meyer 2008; Riabchuk 2009a). In Dmitri Furman's (2007) terms, Russia became a "counterfeit" or "imitation democracy," and its constitution a "fig-leaf." Mykola Riabchuk (2009a) called the system a Potemkin democracy – referring to the fake villages that according to popular myth were constructed at the request of the legendary Russian statesman Grigorii Potemkin to impress Empress Catherine the Great. Andrew Wilson (2005) has called democracy in Russia "fake," often instrumentalized for private gain. Rather dramatically, he suggests that a major part of post-Soviet politics is put on stage by a professional class of "political technologists," experts in "faking democracy." In Wilson's (2005, 47) words: "Politics is 'virtual' or 'theatrical' in the sense that so many aspects of public performance are purely epiphenomenal or instrumental, existing only for effect or to disguise the real substance of 'inner politics.'"

Many of these interpretations suggest that there is a strong element of deception in Russian politics. Furman (2007, 14) is less compromising than most: "Were it not for the self-deceit on the part of society and the deception practiced by those in power," he states, "such systems could provide no justification for their own existence." Scholars often link these elements of deception in Russian politics to the international context and in particular to the post-Cold War environment (Meyer 2008; Riabchuk 2009a). Through a formalistic and superficial approach to democratization, "the international environment created incentives for incumbents to employ informal mechanisms of coercion and control while maintaining the formal architecture of democracy" (Levitsky and Way 2010, 27).

The practice of selective law enforcement found in Russia may be seen to fit well within such an understanding of Russian conduct: If you look closer, it shows all the nastiness of a cynical power struggle, but on the outside it is glossed with legal coating to dazzle observers. Selective law enforcement must in this line of thought be understood primarily as a *legal façade*, more so than a particularity democratic one. Internationally, the "rule of law" is a slogan in the same league as "democracy," "good governance," and "free election." It has been an important part of the *Zeitgeist* of the post-Cold War international environment, and a key phrase for opening diplomatic doors. The argument would imply that the rationale of using quasi-legal form of repression instead of others would be its "legal veneer," as Levitsky and Way (2010, 28) call it.

However conceptually intriguing the façade interpretation of Russian politics and selective law enforcement may be, my research strongly indicates that quasi-legality in Russia has *not* been primarily about deceptions. Instead of sticking to a mode of explanation that only takes half the story into account, we should develop more sophisticated analyses.

Legality and Authoritarianism

In addition to the various approaches to political hybridity, one should mention some interesting studies of law and courts in authoritarian regimes (a collection is published in Moustafa and Ginsburg 2008b). These studies provide a welcome correction to the simplification that legal autonomy is possible only in democracies. In principle, legal institutions in any regime type may be *empowered* to extract the benefits of their autonomy, such as increased foreign investments and better control with corrupt state agents. In the words of Moustafa and Ginsburg (2008a, 8), limited legal autonomy makes sense “in an astonishing array of circumstances.” At the same time, the authoritarian regimes in various ways attempt to minimize the loss of political control this may imply (Moustafa and Ginsburg 2008a).

I attempt to link this legal dualism with the political dualism (or hybridity) noted above. In doing this, I relate to Fraenkel’s (1941) theory of the *Dual State* and to adaptations of this model made by Robert Sharlet (1977), Kathryn Hendley (e.g. 2007) and Richard Sakwa (2011).

Institutional Interactions

The hybridity and interactions between informal and formal elements are also found on the theoretical level of *institutional interactions*. Many authors writing on these issues are largely concerned with typologies (e.g. Pejovich 1999; Grzymala-Busse 2004; Helmke and Levitsky 2004; Lauth 2004b; Stefes 2006). The hybridity of selective law enforcement, however, poses a problem to the existing typologies of institutional interaction and also to the mainstream conceptualization of formal and informal institutions as being separate. In short, these conceptualizations seem unable to incorporate a notion of enforcing *informal* rules by means of *formal* enforcement procedures.

Kerstin Zimmer (2008) observed some of the same problems in her studies of Ukraine. After criticizing normative concepts and existing typologies, she concludes that the boundaries between formal and informal rules in Ukraine were “blurred.” This is reminiscent of Thomas Carothers’ (2002) aforementioned “grey zone” between democracy and autocracy. The critique of existing dichotomies and typologies is meaningful and important. Yet, to identify a “blur” does not provide us with any useful basis for building academic concepts to be used in systematic inquiry. To conceptualize a complex phenomenon as essentially “foggy” would make it impossible to break it down into its conceptual components. By the same token, it would be meaningful and true to say that the Russian press is “partially free.” An interactionist approach, however, would try to examine *how* it is free and *how* it is not free and look at how these two elements interrelate. Instead of jettisoning the dichotomy of formal and informal, I use it explicitly to highlight and disentangle the apparent dissonance it creates in analyses of Russia.

In sum, the broad category of interactionist literature has had an important impact on the present work. An area expert’s first commandment, however, is to be sensitive to area-specific peculiarities. The interview material is therefore interpreted with reference to area-specific literature on legal and political culture as well. This literature provides a counterweight to the integrationist approaches and anchors them to local realities. In this regard, I relate most closely to works by Hendley (2007; 2009; 2010; 2012c), Ledeneva (2006b; 2013) and Marina Kurkchian (2003; 2005; 2011).

1.4 Structure

I present my research in nine chapters and a conclusion. This first chapter introduces the readers to the study and the most directly relevant literature. The second chapter discusses the methods and premises of the study. Here, I present my qualitative and interview-based research project and my ambitions to build an academic concept of selective law enforcement. I present the case-selection process and discuss the status of the interview data. Not least I consider how and to what degree obviously subjective and one-sided perceptions of a phenomenon may lay the basis for sound research. I address the process of theorizing upon these data, relating them to a specific idea of an academic concept and to a methodology of concept development.

In the third chapter, I deal with some central aspects of the country of inquiry. In this part I briefly present some key elements of Russian legal culture and their impact on governance and repression in Putinist Russia. In the final part of this chapter, I also present some Russian colloquial terms to illustrate the relations between power and legality in the country. While this chapter may not contain many novel perspectives for experts on Russian society, the extraordinary role of law in Russia is a crucial backdrop to selective law enforcement. At the end of the day, it will be hard to fully understand quasi-legal practices in Russia without this backdrop in mind.

The fourth chapter is at the heart of the analysis and presents what I call the analytical level of my concept of selective law enforcement. In this chapter, I come up with a suggestion regarding how selective law enforcement can be understood as a hybrid mechanism of rule enforcement. This perspective has a relatively bad fit with some of the more common understandings of separated formal and informal institutions, but I will argue that it has much to be said for itself. Indeed, the resistance of selective law enforcement to be grasped within common dichotomies should be paid extra attention because it may very well be an important part of why the practice has become a popular means of repression in the first place.

Chapters 5-8 present evidence for the claims I make in Chapter 4. Chapter 5 introduces the three examined legal issue areas to present cases of alleged selective law enforcement with particular stress on how the legal rules have been utilized. Chapter 6 continues this discussion by synthesizing the findings to explore what exactly the role of law is in selective law enforcement, and what characterizes the laws most frequently used in the mechanism.

Chapter 7 has a stronger focus on the stories of the interviewees. In this chapter, I present their perceptions of the quasi-legal schemes they see themselves as subjected to. The chapter explores the non-official circumstances of selective law enforcement by lending an ear to players who have found themselves in the middle of them.

Chapter 8 ends this part of the dissertation by dealing with the impact and consequences of selective law enforcement. The first part of the chapter deals directly with the statements of the interviewees on how the selective use of law impacts their work and their environment. Towards the end of the chapter, I again move up on the ladder of abstraction to explore how selective law enforcement become institutionalized and serve to reinforce the current regime.

Chapter 9, and the last of the ordinary chapters, adds another level of analysis to the research. In this chapter, I attempt to integrate my findings about selective law enforcement with a perspective on Russian politics in general. As a point of departure for this analysis I use the model of the *Dual State*, originally formulated by Fraenkel (1941) but more recently associated with Hendley (e.g. 2007) and Sakwa (2011). Extending on their work, I propose an instrumental model to how contradictory formal and informal rules may serve to a political regime's benefit. I also suggest that selective law enforcement in Russia has become a way to *organize political and legal exceptionalism in a state of institutional tension*.

Towards the end of the dissertation, I conclude my research and restate some of my more fundamental findings about what selective law enforcement *is* and how it *works* in Russia.

2 Researching Selective Law Enforcement – On Methodology

2.1 Data and Case Selection

The principal source of data for my study of selective law enforcement is qualitative interviews with actors in the field. While patterns of politicized enforcement can be uncovered by quantitative means, as Donald Shields (2010) in the U.S. did for instance, such research tells us little about the processes leading up to these patterns. In my research on selective law enforcement, I have chosen to focus primarily on the subjective experiences of individuals who perceive themselves to have been subjected to such practice.

The collected interview material includes roughly 50 interviews, about 40 of which are explicitly referred to in the presented research. During the course of two years (2010-2011), I conducted interviews in the cities of Moscow, St. Petersburg, Nizhniy Novgorod, Samara, Kazan, Ufa, Kaliningrad, Vladimir, and Perm, all of which are capitals of one of Russia's regions.¹⁸ I also visited Tuimazy and Sterlitamak in Bashkortostan and Khimki in the Moscow region (*Moskovskaya oblast*). In addition, I conducted several interviews in Moscow, relating to conflicts elsewhere, most importantly Novorossiysk in Krasnodar *krai*. Most interviews were conducted in Russian, the rest in English. A list of the interviewees that I specifically refer to in the text is provided in the appendix.

After my field trips to Russia, colleagues have asked me about how I made the interviewees open up and tell their stories on such sensitive and possibly dangerous topics. When I first managed to get in contact, however, getting the interviewees to talk was never a problem. On the contrary, they were eager to present their point of view. Although a number of them had faced rather serious threats and even been hospitalized after violent attacks, few interviewees wanted to be completely anonymized. A few more asked for names and particular statements not to be publicized. Due to the character of the issues and the possible risk involved for the interviewees, the material should nevertheless almost in its entirety be considered sensitive. Some interviewees have also been rendered anonymous at the author's discretion.

¹⁸ No interviews from Kaliningrad are explicitly referred to in the dissertation. The Kaliningrad interviewees concerned electoral manipulation, a topic sufficiently covered by references to Perm and Vladimir.

Readers should note that I have *not* checked upon the facticity of any of the accusations the interviewees made against third-party actors. Furthermore, these third-party actors have not been given any chance to reply to the accusations. This is of course unfortunate. Confronting these actors with the statements in question, however, would possibly involve a risk to my own research project and, more important, a security hazard for my interviewees. In order not to discredit the third-party actors unnecessarily, I have removed all names of individuals accused of immoral or illegal actions from the dissertation. I did, however, not take further steps in order to make it impossible to identify who they are. Firstly, the individuals are office holders and public persons accustomed to public criticism. Secondly, removing clues about their locality and official roles would negatively impact on the quality of my presentation. In the final product, then, the identity of some accused third-party individuals may be traceable.

2.1.1 The Period of Inquiry, 2007-2011

Following the so-called color revolutions in Georgia, Ukraine, and Kyrgyzstan, a period of intensified crackdown took place against non-systemic opposition in Russia, particularly in the years 2005-2007. The focus was directed not least against civil society actors who cooperated with partners abroad, especially on topics such as democratization or human rights. Simultaneously, the protest movement associated with the umbrella coalition and later political party “The other Russia” (*Drugaya Rossiya*) was suppressed through various means. According to Robert Horvath’s in-depth analysis of this wave of crackdown (2013, 6), the “ideological, repressive, and mobilizational” campaign in Russia at the time was a direct response to the tangible, albeit possibly exaggerated, domestic threat of another color revolution.

Some years later, observers reported that the election protests in late 2011 spurred another Kremlin offensive against critics and activists. A number of protesters faced trials in St. Petersburg (“the case of the twelve”), and the well-known corruption hunter and opposition leader Aleksei Navalny was charged with embezzlement on evidence that Navalny himself rejects as fabricated (Navalny.ru). In Putin’s third term as president (from 2012), a number of new legal initiatives, including bans on “homosexual propaganda”¹⁹ and the branding of

¹⁹ *Ryazan oblast* introduced a law against “homosexual propaganda” already in 2006, but regional bans became more frequent in the spring and summer of 2012. The Federal Law 135-FZ “*O vnesenii izmenenii v stat’yu 5 Federal’nogo zakona ‘o zashchite detei ot informatsii, prichinyayushchei vred ikh zdorov’yu i razvitiyu’ i ot del’nye*”

NGOs funded from the West as “foreign agents” (*inostrannye agenty*).²⁰ have put renewed focus on the deterioration of civil and human rights in Russia. The period of increased political tension also saw a significant increase in the use of anti-extremist legislation against non-violent activists (Kravchenko 2013). In some accounts, then, the election protests spurred a new wave of repression in Russia.

My research is focused on the interim between 2007 and 2011, roughly corresponding to Dmitry Medvedev’s term as president but excluding the major protests in late 2011. This period should have been a rather quiet period for Russian liberal critics, or so it might have looked from the outside. After Medvedev was elected Russia’s new President in March 2008, many domestic and international observers nurtured some hopes that he could lead Russian politics in a more liberal direction. Some of Medvedev’s first acts were welcomed by a number of human rights organizations. Certain bureaucratic requirements from the previous years were relaxed and among the Western-oriented NGO staff I talked with in 2008 the atmosphere was one of cautious optimism, though some of them also reported on increased activity by the Federal Security Service (FSB) against these NGOs (see Bækken 2009).

While the world was fixating on the war with Georgia in August 2008, the Russian regime was consolidating domestically after the Putin-Medvedev succession had been secured. New amendments and additions to the federal law on extremist activities gave authoritarian leaders in the regions a new tool to fight old adversaries. A new anti-extremist unit was also established within the Ministry of Interior by presidential decree in 2008. By some it was interpreted as a new political police, though this interpretation would be simplistic at best. At the same time, the election monitoring group GOLOS reported throughout the period on consistent manipulation of elections. The election laws were steadily tightened and new restrictions on registration were adopted.

The period of inquiry naturally adds its particular flavor to the research. The research for instance suggests that the quasi-legal attacks in this period were not part of any large-scale federal initiatives, but rather reflected independent regional initiatives to hit back at their

zakonodatel'nye akty Rossiiskoi Federatsii v tselyakh zashchity detei ot informatsii, propagandiruyushchei otritsanie traditsionnykh semeinykh tsennostei” was passed in on this issue was passed in June 2013.

²⁰ Federal Law 121-FZ of 20 June 2012 “*O vnesenii izmenenii v otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii v chasti regulirovaniya deyatel'nosti nekommercheskikh organizatsii, vypolnyayushchikh funktsii inostannogo agenta*”.

critics in a period when the conflict between the federal authorities and the opposition movement played out in relative calm. While the political landscape in Russia is quickly changing, however, many of the underlying mechanisms are presumably of more permanent character.

2.1.2 The Case Selection Process

My choice to explore selective law enforcement particularly in Russia is a direct consequence of my educational background within area studies, in which I have been trained in the language, history, culture, and contemporary development of this country. Inherent in the very idea of meaningful area studies is the assumption that case and context is of great importance. Only through an extensive knowledge of the interviewees' referential environment may an interviewer fully recognize what is actually communicated. As will be clear, I will draw upon different aspects of Russia's culture and society in order to understand the complexities of the practice. I hope that my concept of selective law enforcement will be to some degree transferable to other cases in other countries, but any truth claims in that direction would be premature.

Besides a few borderline concepts and approaches noted in the introduction, I am not aware of any well-developed scholarly concept of selective law enforcement. My own MA thesis "Selective Law Enforcement against Russian NGOs: Pursuing Informal Interests through Formal Means," which was later published as a report for the Norwegian Institute of International Affairs, NUPI (Bækken 2009), provides a possible exception. The findings of this pilot in many ways provide the point of departure for this more comprehensive inquiry and analysis. Most importantly, the pilot provided me with a "skeleton" (Morse 2004) or a "skeletal framework" – "characteristics identified from previous inquiry that provide an internal structure" (Morse et al. 2002, 1) and a starting point for my research.

With my loose concept from the pilot project in mind, I started to collect reports of relevant legal cases in a temporary database. My sources included reports, newspaper articles, and press releases. One set of reports that proved particularly useful in this initial search was the annual U.S. Department of State Human Rights Reports on Russia (2007-2012), especially on the crackdown on the liberal opposition and non-governmental organizations (NGOs). While lacking in detail, these reports provide a decent collection of cases that are well-known regionally but never received much international attention. Human rights organizations such

as the Helsinki Committee, the Human Right Watch, Human Rights First, and Amnesty International also do useful reporting on related issues. The reports do not, however, operate with a classification along the line of my concept. Allegations of political motivations, for instance, are sporadically addressed in many individual reports, but not systematically dealt with by any of the above-mentioned organizations. Typically, the issues of political selectivity, grave procedural violations, and presumed innocence are not kept clearly separate.

In the process of identifying about one hundred and fifty cases falling within my initial loose definition and taking place within the relevant timeframe, it became clear that some areas of legal issues were mentioned more often than others. For purposes of sound concept development (see below) and for attaining knowledge about the formal issues of the conflicts, I selected some of these legal issue areas for further studies, namely anti-extremism, election registration procedures, and intellectual property rights. These legal issue areas are all characterized by frequent allegations of politicized enforcement. Also, I (correctly as it turned out) expected the three fields to show a considerable variation of data within my conceptual delimitations. As such, they seemed ideal for purposes of theoretical replication – strengthening the durability of the initial theory while at the same time developing it with regard to variance (Yin 2009). While the research focused on these three issue areas, I also sporadically digressed into other fields to test ideas and look for new ones.

To narrow the scope of inquiry further, I started to read more specific reports, legal documents, and analyses. I also made use of local expertise in order to identify more cases and get more information on already identified ones. For the study of controversial anti-extremism in Russia, the Moscow-based research center SOVA provides a solid point of departure, with its frequently-issued reports and sound analysis. In addition to its material on “real” extremism, SOVA also provides monthly newsletters and annual reports in both English and Russian on what they call wrongful anti-extremism (*nepravomernyi antièkstreimizm*) by the Russian state.²¹

²¹ Note that the SOVA reports including those under the names of the accredited authors (Verkhovsky; Kozhevnikova; Rozalskaya; Kravchenko; Yudina; Aplerovich) are not page-referenced. The same is true for several other sources in Russian that would otherwise be expected to be page-referenced, e.g. the Ombudsman for Human Rights in Russia’s reports.

“Wrongful anti-extremism” is by itself an interesting term for my purposes, at least in theory. SOVA understands “wrongful anti-extremism” as “actions by the state and public groups, imposed within the framework for combating aggressive nationalism or other forms of unacceptable radicalism, but actually directed (*napravlennye*) mostly at wrongful restriction of civil liberties.”²² SOVA’s definition may suggest an active and willful act of selection in order to undermine constitutional freedoms, which would set selective law enforcement apart from unconscious or personally motivated bias in the legal system. The definition is also explicit about the suppressing role of selective law enforcement, linking it to the suppression of civil liberties. That said, SOVA does not adhere to a strict interpretation of their own definition when picking cases for discussion.²³

On election registration procedures, the election monitoring organization GOLOS is the most important source for both the identification and analysis of cases. In the period, GOLOS covered most regional elections in Russia in special reports that contain listings of controversial registration cases and brief analysis of the controversies. The GOLOS website (<http://www.golos.org/>) provided material ranging from short commentaries to analysis, and the organization housed several prominent experts on Russian election law. Furthermore, the GOLOS network had representatives in many Russian cities, making the organization a useful contact point for inquiry into electoral issues.

In connection with the State Duma elections 2011, GOLOS was involved in serious controversies and subjected to massive criticism in the state-controlled media. Based on my own experience with the organization and my reading of their published material, however, I have no reason to question their professionalism. In the summer 2013, GOLOS was liquidated after repeatedly being targeted by highly dubious quasi-legal attacks. At the time of writing, the future of the organization is uncertain and the web-page [accessed 18.07.2013] only contains a short explanation of the situation

²² Definition at <http://www.sova-center.ru/misuse> [accessed 27.08.2013]

²³ SOVA in practice reports on many different cases of anti-extremism that their analytics for varying reasons find unfair, uncalled for, ineffective, or unnecessarily harsh. The cases examined are not exclusively those actively “directed” (*napravlennye*) to curb civil liberties, but also cases initiated for purposes of building statistics, cases in which the procedural errors are grave, and some cases in which SOVA simply finds the legal interpretation to be dubious.

There has to my knowledge been no organized reporting on the misuse of intellectual property rights in Russia. Yet, as a consequence of the controversial enforcement I write about below (section 5.3), human rights lawyers and clients joined forces and built up a network involving Human Rights Watch and the Kazan-based human rights organization AGORA. The latter defended several of the targets and has also provided me with some information on the topic

In the final stage of case selection, when the interviewees were approached in person, practical considerations also played a role, not least due to Russia's vast geography. I did not make any field trips to either Asian Russia or to the North Caucasus, where practical barriers to research are greater. To reduce the number of field trips, I made most of my trips to regions where I could identify several relevant cases. That said, I examined only a few select cases in any given region. On two occasions, my research was hindered by bureaucratic barriers with possible political undertones. My research in Vladimir was interrupted in the fashion mentioned in the introduction. In late 2012, the Russian consulate in Oslo denied me a research visa for a field trip to Yaroslavl, with no reasons given. The Russian embassy has not followed up on my request to clarify the situation, and I have not been to Russia since.

2.1.3 Who Are the Interviewees?

The caseload I use for my study is dominated by cases well-known in the regional opposition networks, though unknown to most foreigners without special interest in politicized (in)justice. Many of them have been discussed in local and regional press, not least on the Internet. The interviewees can roughly be divided into a group of *self-defined targets* on the one hand and *experts* on the other. The group of experts consists of political scientists, lawyers, and others who work professionally on civil rights issues in Russia, in addition to experts on the legal issue areas and their politicization. Readers should be aware that a number of experts may possibly and probably be biased. It should be mentioned that some who have experienced selective law enforcement engage in extensive information retrieval to accumulate knowledge on the topic. Also, experts speaking frankly on these issues tend to be subjected to similar practices themselves. For these two reasons, the two groups of self-defined targets of the practice and experts on the topic overlap to some degree. In addition, one should be aware of the fact that political scientists in Russia may also be involved in election campaigns as consultants or may also have party affiliations of their own.

I conducted interviews with representatives of targeted organizations and with individuals who had been prosecuted in person. Among the interviewees are also “representatives” for two men who served prison sentences at the time of inquiry. As one interviewee correctly pointed out, it would be wrong to see all the people I interviewed as univocally in opposition to Putin’s regime. As she insisted, it is part of the mission of civil society watchdogs, regardless of their political orientation, to keep a critical attitude towards the ones in power (Denisova 17.12.2010). That being said, it would be fair to expect a political orientation among these people *against* the current regime, not least considering this regime’s largely anti-liberal political development. At the time of my interviews in 2010 and 2011, the moderate optimism that followed the election of Dmitry Medvedev had already long faded.

A subgroup of the liberal regime critics can be classified as human rights defenders, among whom some are professional lawyers. Also other Russian NGO representatives, who worked on topics ranging from environmental protection to election monitoring, were interviewed. Yet other interviewees were independent activists. Several journalists and editors were interviewed, representing newspapers known for their critical attitude towards the government. On the issue of selective election registration denials, the group of self-perceived targets for the most part consisted of politicians active in the political opposition on the regional or local level. On this topic, I also interviewed what may be called a regime insider – a member of the United Russia party and a permanent member of the Central Election Committee (CEC) in one of Russia’s regions.

2.2 A Study of Perceptions

While my research relates critically to the interview material, it remains completely dependent upon data from one side of a socio-political conflict.²⁴ In a way, the conflict is also a conceptual struggle and a fight between narratives – the putative antagonists in selective law enforcement would certainly not accept the other part’s framing of the issues. To lend an ear to predominantly one side in a conflict is not a problem in itself, but the ambitions of the researcher should surely be adjusted accordingly – perceptions of other people’s political motivations (or rather statements regarding perceptions) should not be confused with the

²⁴ For a discussion on the challenges in doing research on contemporary Russia and authoritarian regimes in general, see J. Paul Goode (2010).

political motivations themselves. In qualitative interview research, all an observer can do is to interpret the already interpreted reality (Giddens 1976). The study is first and foremost an account of how critics and self-perceived targets of selective law enforcement experience this practice.

Perceptions of social phenomena are important. First, human beliefs about the world constitute an important part of our social and psychological reality and are worthy of attention in their own right. Secondly, our beliefs bear direct impact upon the “real” world of politics and society. After W.I. Thomas and Dorothy Swaine Thomas formulated this key insight in 1928, it struck Robert K. Merton as so powerful that he called it “probably the single most consequential sentence ever put in print by an American sociologist” and coined it the *Thomas Theorem*.²⁵

The impact of beliefs upon the tangible world is particularly evident when considering selective law enforcement as a mechanism to enforce informal rules. A central argument of my thesis is built upon the theory of deterrence, which is “first and foremost a perceptual theory. Whether a punishment threat deters depends not on the certainty, celerity, or severity of punishment in any objective sense but on the potential offender’s perception” (Gibbs 2007, 371). As the argument goes, if you don’t know why you have been punished, you cannot be expected to change your behavior accordingly. In short, it is up to the punished to interpret which rule is *actually* enforced and whether it is a formal or an informal one. In addition, if targets of prosecution *experience* that they are being punished, the rule enforcement mechanism will function regardless of whether this punishment is officially recognized as such or not. In short, the “perceptive” aspects of selective law enforcement are arguably as important for the outcome of the practice as are the “substantive” aspects.

Giving self-perceived targets of selective law enforcement a chance to speak of such enforcement is therefore more than a second best option. These targets possess information about their cases that we cannot expect regime insiders or law enforcement officials to have. While insiders have a powerful hand in manipulating outcomes, it remains up to the prosecuted and observers to interpret these outcomes politically. The targets also have the best

²⁵ For an introduction to the curious history of the origin and naming of the *Thomas Theorem*, see Merton (1995).

overview regarding indirect consequences, such as effects of shaming, scaring away employees and partners, and so on. Finally, in order to understand how the informal rules are transmitted to society, we should ask those who are receiving the message where they got the idea from (see Gibbs 2007, 371).

Like so much other interview (and other) research, my project is subjected to one major limitation: we can never be sure about the truthfulness of statements. Indeed, skewed narratives are natural and to be expected. In this particular study, one bias struck me as consistent enough to be mentioned separately at this point. The collected stories were often marked by what is probably an exaggerated *passivity* of the interviewees once the legal case has been initiated. More often than not, the interviewees were very capable people: skilled lawyers, active journalists, or experienced politicians. Even though they face even more powerful adversaries when clashing with the ruling elite and the state coercive apparatus, one should also expect the targets of selective law enforcement to engage actively in mobilizing support for their cases and in informal bargaining with their antagonists. The Russian legal and political culture has a strong personal aspect, and it would be naïve to expect that the targets of selective law enforcement would not also partake in informal bargaining. Some interviewees also make suggestions in this direction, but I did not follow up to explore these issues in detail. In addition, in my work, the interviewees predominantly play passive roles. It should be understood that this way of (re)presentation is the outcome of methodological choices and the theoretical focus of my research. It is not an exclusive claim to truth.

2.3 Developing Qualitatively Derived Concepts

Legal abuse is highly particularistic, based on improvisation and evolving over time. As is the case with all informal practices, the actors master their environment by what Pierre Bourdieu (quoted in Ledeneva 2006b, 15) calls *sense pratique*, a “feel for the game” – a mastery “which works outside conscious control and discourse.” This is true not only for the authorities who are using and developing quasi-legal schemes, but also for the entire field of informal politics. This feel for the game can never be perfectly translated into academic analysis, and unwritten rules will not be the same once they are written down. This research nonetheless seeks to provide a concept that can give external actors some insight into this intricate reality by providing generic descriptions of the phenomenon as it unfolds in Russia (see Morse et al. 1996).

Approaching a largely unexplored phenomenon by stuffing the little we know into more or less arbitrary mainframes will provide us with little understanding of what we are dealing with. On the assumption that explicit and clear concepts are needed both in order to structure academic discourse and to achieve better understanding of a phenomenon, I seek to develop a novel concept of selective law enforcement. I largely share the idea of Janice M. Morse and her colleagues (Morse and Mitcham 2002; Morse et al. 1996; 2002) of what an academic concept is and how it may be evaluated. As Morse states, “Concepts play an integral role in research. They have been described as the ‘building blocks’ of theory, they are the substance of which constructs are composed, they may be linked together to form the framework of the body of the theory, and they are the link between abstraction and data” (Morse et al. 1996, 386). The development of academic concepts is part of the process of developing theory. The concept “provides not a causal/analytical setting but, rather, an interpretable approach to social reality” (Jabareen 2009). None-the-less, the development of qualitatively derived concepts and the careful building of theory are founded upon the same basic principles and share much of the same methodology.

As noted by John Gerring (1999), an academic concept may fulfill different roles. The various purposes to some degree influence how the concept should be constructed and thus also the criteria of what should be regarded as a worthwhile concept. The quality of a concept would in this way ultimately be determined by how well it stands in comparison with other concepts that “might be employed in that particular empirical and theoretical context” (Gerring 1999, 393).

“Concept formation lies at the heart of all social science endeavor,” (Gerring 1999, 359), yet there is to date no well-developed concept of selective law enforcement. My attempt to develop a concept is therefore modest and extremely ambitious at the same time. I first and foremost attempt to answer what selective law enforcement *is*. On one level, the concept lays the foundation for synthesis; recognition of patterns, comparison or recognition of variation, and recognition of new instances in other contexts (Morse 2004, 1391). At the next level of theory development, my research also explores certain theoretical *implications* of the concept and develops insights of a more general character. When we are developing academic concepts, contextualization is not a barrier to (limited) generalization, but rather a prerequisite: “A concept is technically a label, but that label represents or signifies something,

so we must always be able to define it and give examples to illustrate its meaning in a particular context” (Morse 2004, 1390).

2.3.1 Building upon An Immature Concept

In the introduction I argued that while the term of selective law enforcement may be relatively well-established and used in several societal discourses, its actual *meaning* has so far been largely undecided. Put differently, the concept’s “distinguishing characteristics” are “still not fully articulated” (Morse et al. 1996, 388). Selective law enforcement is therefore what Janice M. Morse and her colleagues call an “immature concept” – its definition, conceptual borders, preconditions, and outcomes are by no means set in stone (ibid).

If we seek to develop concepts or more wide-reaching theory grounded in empirical observations, an immature concept provides a very useful point of departure. A loose initial theory is beneficial because it pays heed to context and qualitative data. By using loose and flexible concepts in the initial phase of an inquiry, the researcher is arguably able to “suck up” more and better empirical data in the early stages of research. As Herbert Blumer contended, the qualitative researcher wants a “sensitizing concept” – a concept that “gives the user a general sense of reference and guidance in approaching empirical instances” (quoted in Hammersley 1989, 140). When a concept is underdeveloped academically, a good way to start developing it is to inquire into its meaning in the field (Morse and Mitcham 2002).

A precise concept is then not a prerequisite for qualitative research but a desired *outcome* of it (Hammersley 1989, 153). Based on my empirical material, I seek to articulate and expand on the practice of selective law enforcement so as to reap the above-mentioned benefits of a clear concept. I thus contend that the “concept must be mature before it can be operationalized and definable in measurable units” (Morse et al. 1996, 387). As advocates of the influential methodological package of Grounded Theory (e.g. Glaser and Strauss 1967, Strauss and Corbin 1994) have stressed, the job of developing theory should be done in small steps. If we rush the process of formalizing a theory on insufficient empirical grounds, we risk overlooking important aspects of what we are studying. A mature concept cannot be achieved in one day, but through “processes of saturation, replication and verification” (Morse and Mitcham 2002, 30). In terms of Grounded Theory, sound theory development must involve several case studies and move back and forth between the empirical world and the emerging

theory in a gradual process of theory formalization. The same holds true for the development of complex concepts like that of selective law enforcement.

Empirical Instances, Generalization, Transferability

In my opinion, critics of the Russian regime present their stories in very similar terms when criticizing the practices I call selective law enforcement. Not only are the stories similar with regard to their focus on repression and harassment, but also in stressing the political motivations, legal instrumentalism, and powerful manipulators related to the political regime. They also speak of the purpose of the legal acts in ways that reflect an implicit, albeit possibly not conscious, concept of rule enforcement. Yet, for all the similarities, the critics do not utilize any particular explicit concept to encompass all these traits and their interrelations. My interviewees will likely and hopefully accept and agree with much of my interpretation, but I can certainly not make any claims that my perspectives simply “emerge” from the data (cf Glaser in Radulescu 2011, 4).

The concept of selective law enforcement is therefore my own elaboration upon the interviewees’ experiences – a tool I use for synthesizing their stories and promoting theory development. Following Janice C. Morse and Peggy Anna Field, I contend that worthwhile concepts may be “indicated in data rather than concrete entities directly described by participants” (quoted in Bowen 2006, 13). While knowledge of native concepts and points of reference is important in order to *understand* a practice, this does not imply that the best way to develop an academic concept is simply to adopt the native perspectives.

While a qualitative study cannot tell us much about how common a practice is, it can tell us much about how formal and informal institutions work in a few select cases, and chances are good that the investigated cases are not unique. As David L. Morgan (2008, 72) puts it: “I do not believe it is possible for research results to be either so unique that they have no implications whatsoever for other actors in other settings or so generalized that they apply in every possible historical and cultural setting.” All case studies produce both context-specific and more general insights. This is why I hope that the core content of the concept can be *transferable* to other cases (Morgan 2008). It is exactly this transferability of case studies that make them excellent material for theory building (Yin 2009).

Focusing on one particular context when building a concept, therefore, does not mean that theorization and aggregation beyond the case are not meaningful. On the contrary, the development of more generic insights is an explicit purpose of my research. If we define a concept as “a complex mental representation of empirical experience” (Morse et al. 1996, 385), the purpose of academic concept development would be to coordinate the different mental representations over time in order to achieve a greater degree of intersubjectivity. What I seek is a concept that “enables the communication of ... complex behaviours to others, enables their measurement and eventually their manipulation and application” (ibid).

My findings make selective law enforcement a far more developed and explicit concept than what it has been earlier. For all my findings, sub-concepts, and labels, however, I will not claim that selective law enforcement at the outcome of my research is yet a “mature” concept. For a higher degree of maturity to be achieved, more focused attention is needed. In this regard, my efforts are but a first step.

The Analytical and Operational Levels

A good concept is marked by its *endo-consistency* – meaning that the conceptual components “are distinct, heterogeneous and, yet, not separable” (Deleuze and Guattari 1994, 19). The components also interact in specific ways that lie at the core of the practice. In other words, the *endo-consistency* makes the concept more than the sum of its components.

To unravel its complexity, I operate with a differentiation between the concept’s *basic*, *analytical*, and *operational* levels (see Goertz 2006). The relationship between the levels are non-causal: “they are not causes but *constitute* what the phenomenon is”(Goertz 2006, 15). Selective law enforcement, according to my definition, presupposes (or is constituted by) the components of selectivity, law enforcement, and a link between them. This basic claim makes for the analytical level in the chart (figure 1). Selectivity (in law enforcement) in turn presupposes the more basic building blocks such as *selectors* and *criteria* for selection, and law enforcement presupposes *laws*, *legal actors*, and *legal acts*. The idea of a link between the selection and the law enforcement would rationally presuppose some reason for such a belief, a topic which is also a category open for examination. Once the basic outline of the map was laid out in this fashion, however, the development of the concept has been derived from empirical observations. In principle, all the levels of the concept are open for empirical input.

The conceptual levels are intimately connected. This fact is especially evident in the case of the analytical and operational levels that should be researched more or less simultaneously, using insights from one level to develop further insights on the other. To be more specific, it is only through the identification of the interactions on the analytical level that we may point out the components on the operative level. At the same time, it is only through a closer examination of the components that we are able to expand our knowledge of the core functions of the practice, identify variance, and expand the complexity of analysis. Without an examination of the conceptual components, qualitative inquiry will be limited to analyzing relatively superficial notions on the analytical level instead of constructing theory upon the building blocks underneath them. In other words, it is observations on the operational level that move the concept from the world of speculation into systematic research on an empirically observable phenomenon. Variation within the conceptual components on the operational level is also a primary source for identifying subtypes within the conceptual borders.

Selective law enforcement both highlights and reflects central political tendencies in both Russia and other political systems that combine authoritarian rule with formal rule of law and democratic elections. Thus I also discuss the phenomenon of selective law enforcement on a *contextual* level, looking at its function within the Russian political system. This analysis utilizes some core insights from the other conceptual levels in order to criticize and expand on existing literature on Russian politics and authoritarian regime design.

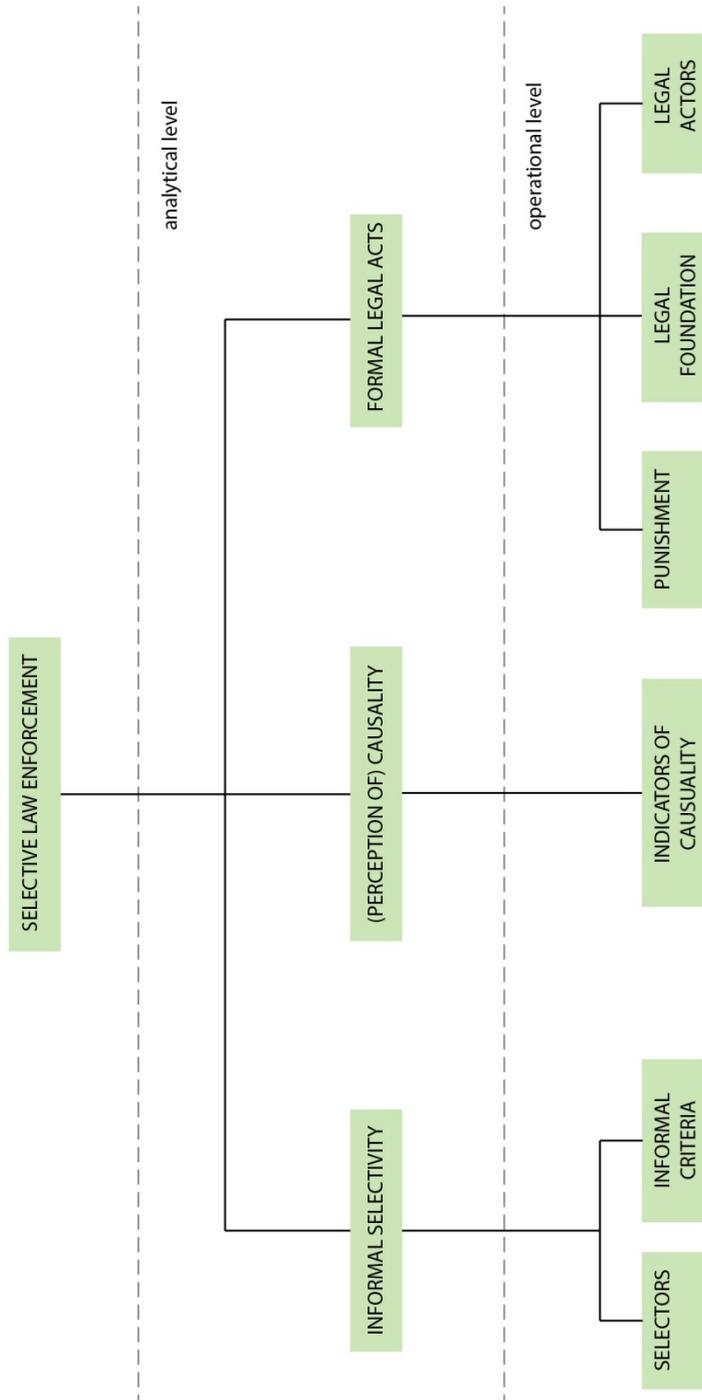


Figure 1: A three level concept of selective law enforcement

3 Legality and Power in Russia

3.1 Instrumentalism, Power and Legality in Russian Legal Culture

In order to comprehend and evaluate the impact of the political and legal context upon the research, readers should be aware of certain features in the Russian political and cultural landscape that may promote and shape selective law enforcement. It is my ambition in this chapter to provide the reader with some means to independently consider the area-specific context in which the interviewees' statements have been formulated. As will be hinted at in this brief analysis of the cultural predispositions, today's popularity of selective law enforcement in Russia is not a product of chance. In many ways, it is the result of a specific historical trajectory and path dependencies that produced a system with an exceptionally low respect for legal institutions.

Shaped by centuries of authoritarian rule, law in Russia is associated with the prerogatives of the powerful, typically political authorities. The elites are well known to wield the law for particularistic purposes. Even today, Marina Kurkchian (2011, 9) claims, "there is no sign of either a popular demand that law must be just or a universal expectation that lawyers must be seen to be ethical and fair." In part, society fails to call its ruling elite to account because malpractice is so common. In a legal culture marked by pervasive rule violation and mutual distrust, who is to throw the first stone?

Kurkchian (2011, 4) identifies three "component tiles in the mosaic of Russian legal culture." They are:

(a) an extreme formalism in the perception of what law is; (b) the reduction of law's social value to that of a mere instrumental role; and (c) a conflict between the formal and informal rules of Russian social institutions that continually undermines institutional performance (ibid).

Although the exact impact of this tradition is hard to measure, the cultural aspects of the legal sphere provide some explanation for several aspects of selective law enforcement today.

According to one definition, an instrumental use of law is present when the law is "consciously viewed by people and groups as a *tool* or *means* with which to achieve *ends*"

(Tamanaha 2006, 6, emphasis in original). In the Russian tradition, the law was not imbued with value in itself but seen as an instrument of governance (Solomon 2008b). Because law has been seen as an instrument of political engineering, the notion that it should stand *above* the hierarchy of men (or classes) has been alien. With an instrumental concept of law as a fundament, a rule of law is therefore hard to imagine; a tractor cannot steer the farmer.

It was not until Perestroika in the late 1980s that a concept similar to “rule of law” (*pravovoe gosudarstvo*) gained attention in the Soviet Union (Hendley 2010). As late as 2009, Kathryn Hendley (259-260) argued that assessing Russia in terms of rule of law is still “like trying to fit a square peg into a round hole.” According to Kurkchiyan, the impact of a rule of law conception largely remains to be seen. She (2011, 12) finds that law still plays a “merely instrumental role” in Russia. Though others find reasons for cautious optimism regarding the governing role of law in Russia (e.g. Smith 2010), Kurkchiyan (2011, 12) asserts that “its value as a principle upon which to organize society is not increasing.”

The instrumentality in Russian legal tradition goes hand in hand with a strong formalism. Legal formalism finds its rationale in the empowerment of rules to limit discretion, a rationale which in Russia may be traced back to a tsarist legal doctrine with little room for independent judicial power. Tsarina Catherine the Great, for instance, feared that any interpretation or judgment beyond a mere “identification of facts and appliance of law to these facts” would develop into *de facto* legislative power that could undermine autocratic rule (Wortman 1976). The Tsarina’s *nakaz* of 1767, an instruction to the country’s Legislative Commission, indicated a strong belief in legal formalism: “Where the laws are precise and clear, the office of a judge consists only in ascertaining the Fact” (article 178). The *nakaz* even specified how the consideration of “the spirit of the law” should be avoided at all costs: “Nothing is as dangerous as this general Axiom” (article 153) (quoted in Wortman 1976, 11).

The formalism advocated by Catherine the Great presupposed rules that are as clear and directly applicable as possible. The complexity of social life, however, is not always easily regulated by clear-cut rules. Indeed, rules will by definition leave doubtful cases (Schauer 1991, esp. 218-219). To make matters worse, today’s Russia does not fit the Tsarina’s ideal. Like other modern legal systems, Russia’s legal order is founded on a set of more general principles. In addition, directly applicable laws are frequently criticized for containing vague or unspecified legal terms. As indicated by this study, Russian formalism seems particularly unable to deal adequately with laws that are notoriously unclear to begin with.

Within the Russian formalistic paradigm, the exercise of discretion in legal decision-making is still frowned upon as a stepbrother of corruption (Henderson 2011; Hendley 2011). Russian judges have to deal with the ambiguities outside the legal sphere exactly because there is no space for officially exercising discretion within the legal institutions. In this highly non-transparent setting, the formalist system is vulnerable to extra-legal penetration. The high level of corruption in the legal system fuels the fear of discretion in court rulings, which again forces discretionary justice into less controllable forms. In Hendley's (2011, 17) account, the result is a vicious circle "motivated by the false assumption that the written law can account for every possible circumstance." For these reasons, there is, from a critical point of view, no contradiction between an extra-ordinarily formalistic approach to law and a predominance of informal solutions. On the contrary, an overly formalistic state seems to encourage informal solutions because it is not itself flexible enough to tackle the complexities of everyday life (see also Ledeneva 2006b).

My research confirms a willingness to apply a highly formalistic conception of law in individual cases. For the legal actors it may arguably be easier to instrumentalize the rules within a paradigm of legal formalism because this paradigm stresses broader legal principles and the originally intended purpose of law to a lesser degree. Any public "propaganda or dissemination" of swastikas, for instance, is a legal offense in Russia. This restriction was utilized in one illustrative case in which an activist was arrested for handing out crossed-out swastikas in protests against a nationalist march (Verkhovsky 2012). While a formalistic approach to the law would (possibly) show the officials to be right, the priority would make little sense from a substantial perspective.

Skepticism against discretion also arguably gives more priority to *local rules* – rules with the narrowest range of applicability (Schauer 1991). Formalism may thus strengthen a system's tendency to enforce various sub-laws and regulations, rather than vaguer legal principles higher up in the legal hierarchy (see Henderson 2012). This tendency may in extreme cases threaten to turn the hierarchy of laws upside down, with the consequence that infringements against specified standards may trump constitutional rights. Election registration procedures provide an example of how this preference for local rules may be instrumentalized for political purposes. In several cases, candidates have been denied registration due to purely

technical, completely minor, and substantively irrelevant mistakes (see section 5.1). Again, any “spirit” or “purpose” of the law is neglected.²⁶

The traits identified by Kurkchiyan provide the backbone for what is commonly referred to as “legal nihilism” in Russia, a well-known phenomenon in both Tsarist and Soviet Russia (see e.g. Tumanov 1989). According to Hendley (2012c, 150), legal nihilism in Russia “reflects a more particularistic view of law, under which citizens obey laws that strike them as fair and/or convenient” and otherwise ignore them. One may, however, claim that this form of obedience would indicate that the citizen is not influenced by law at all (Schauer 1991, 113). From my perspective, Hendley’s characterization of legal nihilism misses an important point. While simple non-compliance is certainly a consequence of the same disregard for the law, legal nihilism also takes the form of quasi-obeying cynicism marked by the willingness to *instrumentalize, manipulate, and circumvent* the law with full disregard for any notion of the *spirit or purpose* of law (see e.g. Firestone 2010).

In this conception, the legal nihilist is not immune to incentives provided by the legal institutions. However, the legal nihilist does nothing to support the law in cases in which the incentives are not immediately present. It is at least my understanding that while pervasive non-compliance constitutes a major problem, legal nihilism in Russia also concerns a cynical and unrestrained instrumentalism. In its ultimate consequence, the combination of instrumentalism and particularism may create a situation in which “the law does not apply; it is applied.”²⁷

This legal nihilism is also reflected in a persistently low trust in legal institutions. The “Russian Public Opinion”, an English language annual published by the Levada Center confirms the semi-permanent feature of low trust in legal institutions stable throughout the whole of Putin’s presidency. With regard to polls directly relevant to selective law enforcement, only 8% believe that Russian authorities do *not* use law enforcement agencies against political opponents, while 40% believe it is a “quite common” or “common” practice (Levada 2012, 142), and 64% of the respondents believe that it is most likely or completely certain that courts are used “for political purposes in order to get rid of political rivals or

²⁶ For reasons I will discuss elsewhere (esp. section 4.3), any such “purposes” would anyway be very hard to pinpoint.

²⁷ Derived from the Russian phrase “*zakon ne deistvuyet, a primenyaetsa*”, see also Paneyakh (2002).

persecute the dissidents” (Levada 2012, 167).²⁸ The low trust in legal institutions is constantly reproduced by continued manipulation and circumvention of law on many levels and on many arenas.²⁹

3.2 Quasi-Legality, Repression and Putinism

Today’s Russia is formally a democratic and “law-based state” (*pravovoe gosudarstvo*), as codified in the first paragraph of the Russian Constitution.³⁰ There is, however, a general consensus among academics that Russia can no longer (if ever) be considered among the democracies of the world. In some accounts, Russia falls short even of qualifying as a “competitive authoritarian” (Levitsky and Way 2010) or “partly free” regime (Puddington 2012). Not least during Putin’s second term as president (2004-2008), the political leadership consolidated its grip on power in part by hunting down opposition and bolstering its own repressive capabilities (Taylor 2011, Horvath 2013).

Yet the picture is not all that bleak. While the closeness in both time and space has made observers eager to compare Putinism with Soviet rule, the parallel is not entirely fair. On a day-to-day basis, the Russian state and legal system function rather well, if admittedly far

²⁸ With regard to the specific cases of probable selective law enforcement mentioned in the Levada reports, the majority of the Russian population has little knowledge or interest in the cases. At the same time, the low trust in the neutrality of state institutions is evident. In one poll, only 10% of the respondents believed that the 2010 sentences against Khodorkovsky and Lebedev were decided “in accordance with the evidence,” whereas almost three times as many believed it was due to an “order from the government.” Another 10% believed that both of these factors were important for the verdict, while the rest of the respondents were undecided or did not follow the trial (Levada 2012, 172). Among those who had heard of the case against Alexei Navalny by April 1010, 20% found the case to be caused by his possible criminal activities and 54% found his actions to “expose corruption among government officials and large corporations” to be the main foundation. The rest (26%) were undecided, a proportion of whom presumably found both reasons equally relevant (Levada 2012, 166).

²⁹ Yet, a survey by Hendley (2012) calls for a moderate optimism. It indicates that negative attitudes to law in Russia today are strongly correlated to formative experiences in the 1990s and possibly on the retreat.

³⁰ The exact meaning of *pravovoe gosudarstvo* is admittedly a complicated issue. Mainstream Russian constitutional legal theory connects the term to a substantial and “thick” interpretation in line with the constitutional context in which it is used. Importantly, however, the phrase *pravovoe gosudarstvo* is often interpreted not as a description of what Russia *is* and is bound to adhere to, but rather as a normative declaration for what it should aspire to become (Skrylnikov 2009).

from perfectly. As in most modern authoritarian states, there are elements of “softness” to Russian politics. These soft elements also shape how dissent is suppressed. Russia exhibits a rich variety of *low intensity coercion* – indirect ways to keep potential threats under control that also limit the need for *high intensity* coercion (Levitsky and Way 2010, 58). That said, old-fashioned blunt violence is not alien to Russian authoritarian rule today. Just as important, a political prisoner would hardly agree that a selectively imposed imprisonment is particularly “soft” after all. More common than taking political prisoners, however, is making oppositional activities unattractive and inconvenient by a less intensive but consistent harassment by legal, quasi-legal, and illegal means (see section 7.5.3 and 8.1)

Whether we interpret it as the outcome of sophisticated authoritarian design or of genuine limitations upon the rulers’ capacity to employ coercive capabilities, Putin’s administration has increasingly employed a broader and more sophisticated mixture of means to control popular opinion. The efforts include various strategies of propaganda and mobilization, such as the arrangement of large pro-Putin demonstrations, the support of formally independent organizations, and the co-optation of popular nationalists (Horvath 2013; Robertson 2011). Various techniques to control the opposition and contain criticism should also be seen as part of this strategy. To Graeme B. Robertson (2011, 199), the creativity and experimentation in containing opposition have put Putin’s Russia “at the cutting edge of contemporary authoritarian regime design and have made it a model for other authoritarians.”

In line with such arguments, several researchers have noted how the political elite in Russia seemingly prefer fluid rules of the game (Riabchuk 2004; Wilson 2005; Mendras 2012). When the principle of power tends to trump the principle of equality before the law, powerful groups and individuals have beyond a doubt many incentives to preserve the status quo. The ruling elite in Russia have a more or less free hand to enjoy its political influence over the economy, something which provides extraordinary opportunities for amassment of wealth. Selective law enforcement also makes it easier for them to curb critics and limit the development of a strong opposition.

While the ineffectiveness of the law makes the ruling elite less vulnerable to legal constraints, a system of governance built on legal nihilism does not come without costs. First, legal nihilism severely impairs the government’s ability to rule Russia by legal means. And while informal solutions may be effective for coping with problems in the short term, they also undermine the efficiency of governance. Surely, it is not by chance that all modern societies

have established formal institutions and law as means of control, regardless of their political orientation.³¹ For Russia's announced plans to modernize the economy, reliance upon informal solutions is highly detrimental (Ledeneva 2013).

It is also extremely difficult for the rulers to opt out of this system of legal nihilism (Ledeneva 2013). The country is highly resistant to legal reform because, as Ledeneva (2011a, 40) notes, "changes in the formal rules are simply interpreted as yet another constraint to be dealt with informally." Not only will the bureaucracy be hesitant to implement rules that threaten their own position in a corrupt economy, but also other legal subjects may, partly as a matter of habit, develop new schemes and techniques to counter legal initiatives that challenge their way of social navigation.

The best or only way to fight corruption effectively may paradoxically be by informal means. Legal initiatives to root out corruption may not only be ignored and left unenforced but also even be used selectively for corrupt purposes. In this way, fighting corruption by increasing scopes of punishment becomes sort of like fighting a snowman with snowballs, every ball adding to the snowman's body.

Individuals on the inside of a regime based on selective law enforcement will not only face the problem of ineffective governance and lack of control beyond their personal sphere of influence. In addition, they are also subjected to a more direct threat. Selective law enforcement can be used not only against old enemies of the regime; it is also employed to deter opt-outs. Individuals that fall from grace in authoritarian systems tend to fall hard, and this tendency is not restricted to heads of state. Insiders may be above the law, but the tables may be turned against them at any moment. The ruling elites, then, also have the sword of Damocles hanging over their heads in the same way as the opposition. The only real difference in this regard is that, as long as they are on the inside of the regime, the insiders *do* comply with its informal rules and are more or less safe from crackdown for that reason.

Ledeneva's (2011a; 2013) interview research shows how these dynamics are actively played out in Russian politics. Individual actors must compromise themselves in order to get promotions within the regime. In this way, they are "hooked" (na *kryuchke*) and dependent on the continuing goodwill of their superiors. Darden's (2001) above-mentioned work on

³¹ For a number of interesting examples, see the edited volume Moustafa and Ginsburg (2008).

Ukraine under Leonid Kuchma shows how information of legal violation was collected and stored to be used for blackmailing regime insiders as well. In today's Russia, we repeatedly see how individuals fall out of the establishment only to become quickly trapped in the legal system in ways they had earlier been protected from.

3.3 Native Approaches to Quasi-Legality

As an important and persistent practice in Russia, the informal subversion of law for particularistic purposes is, unsurprisingly, reflected in the Russian language. This final section of the chapter will briefly review a number of the most relevant and frequently used colloquial terms and identify their relevance for our understanding of selective law enforcement. Most directly relevant for my study is the Russian terminology surrounding manipulative tactics. This review serves as an illustration of some of the points I make in the above parts of this chapter. Simultaneously, it also picks up on and concludes the review of existing approaches from the first chapter, adding relevant Russian terms to that discussion. Finally, it points forward to the presentation of my own concept of selective law enforcement.

The term selective law enforcement may be directly translated into Russian as *izbiratel'noe pravoprimerenie* or *izbiratel'noe primerenie zakona*. Also the more artificial *selektivnoe pravoprimerenie* is recognizable in Russian. At the very least, these terms are usually understood among my interviewees and their colleagues. Yet, the idioms are not native to the language in which Russians commonly frame their experiences with legal abuse. Reflecting the cultural tendencies discussed above, the most popular colloquial terms surrounding quasi-legal practices do not stress the element of legality. Instead they focus on power and manipulative skills.

3.3.1 Administrative Resources and Political Technologies

Possibly the most commonly-used term that reflects the blur between public and private spheres in Russia is *administrativnye resursy* (administrative resources). It is also frequently adopted in Western discourse on post-Soviet countries.

The use of the term varies considerably, but administrative resources are often understood broadly as the diverse means that office holders control and are willing to use in their own interests. They include “money, personnel, organizational know-how and communication

channels, the control of media and other facilities, as well as powerful networks” (Meyer 2008, 98-99). Administrative resources can be used to describe the power of various individuals, informal networks, or formal organizations. In Ledeneva’s (2006, 221 fn. 39) conception, the term concerns an ability to “control areas beyond the administrative system, such as courts, media, electorate etc.” Most often it refers to the prerogatives enjoyed by *vlast*, an abstract Russian term that denotes both *authority* and *the authorities*, *power* and *the powerful*. In Russia today, *vlast* often points to the president, governors, and the state administration, and to United Russia (*Edinaya Rossiya*), the current party of power. It may also correspond to the powerful informal networks that surround and link to these institutions.

Often, observers use the term administrative resources specifically about the means incumbents use in order to win elections. Some definitions are restricted to the electoral field exclusively (e.g. Mendras 2012, 171). On other occasions, definitions of administrative resources explicitly mention selective law enforcement as an example of their use (e.g. Meyer 2008, 99; Ledeneva 2006b, 48-49).

Western literature tends to associate administrative resources with illegal and immoral acts. Gerd Meyer (2008, 99) stresses how they are “often used illegally.” Ledeneva (2013, 72, my emphasis) finds the term “widely used to denote the *abuse* of administrative power.” Gordon M. Hahn (2004) suggests that administrative resources are *illegal* measures used to consolidate authoritarian power. According to Aleksei Levchenko’s (2009) review of the concept as used by Russian scholars, however, administrative resources are not illegitimate in themselves, but may take legal or illegal form. Any person of power will necessarily use the position to strengthen his or her electoral chances in one way or another, Levchenko (2009, 3) argues. Administrative resources “emanate from legitimate empowered individuals of authority, and are thus legitimate and as a rule ‘honest’ (*chestnye*).”

Levchenko and a number of other Russian analysts (eg. Panfilova and Sherverdyayev 2005) therefore distinguish administrative resources from the abuse (*zloupotreblenie*) of such resources. Levchenko (2009, 4) even provides a separate definition of this abuse, though unfortunately an inadequate one. According to him, the abuse of administrative (electoral) resources is “the use of vested authority in legal or illegal (*legal’no ili nelegal’no*) ways that directly or indirectly obstruct political opponents and violate (*narushayut*) the voters’ rights.” The term “abuse” suggests that Levchenko takes the (lack of) moral qualities into account in his definition. He also evidently seeks a definition which is external to the legal-illegal

dichotomy. Yet he is not successful in finding any good alternatives and ends up linking it to the violation of electoral rights. Exactly how the violation of voters' rights may be "legal or illegal" is unclear. At the end of the day, Levchenko's definition leaves us unsure of whether the abuse of administrative resources is a legal or moral concern.

Political technologies (*politicheskie tekhnologii*) is another Russian term with connotations similar to administrative resources. Indeed, political technology is in many ways the science (or art) of putting administrative resources into effective use.³² In the same way as administrative resources are often used to denote *electoral* resources, political technology is used in the narrower sense of *electoral* technology. The 1990s saw a great increase in the use of such technologies when free elections combined with huge stakes to be won in the privatization and with an untested legal framework full of loopholes. In the early 1990s, the skill and knowledge of how to manipulate elections and election laws turned into big business. The professional "political technologists" in Russia perform a number of tasks for their clients: "The manipulation of the media is central to their work, but by definition it extends beyond this – to the construction of parties, the destruction of others, the framing of campaign mechanics and the manipulation of results" (Wilson 2005, 49). Included in their work is also the exploitation of every possibility provided by the legal framework to win elections (see e.g. Poluektov 2002; Matveichev and Novikov 2003; Buzin 2006; 2007; Buzin and Lyubarev 2008).

In the same way as administrative resources, "political technology" is, according to Levchenko (2009, 4), a neutral term – there are white, grey, or black technologies. Both political technologies and administrative resources exist in various forms and defy any clear-cut separation along the legal-illegal dichotomy. Though the practices they denote are not plainly illegal, they have a strong stench of unrestrained cynicism that is difficult to justify within an ideological framework of rule of law.

The above quotation on "legal or illegal ways that ... violate voter's rights" may sound like nonsense. Yet, it illustrates the ambivalence of administrative resources and their relationship to commonly applied dichotomies; the example from Levchenko is also not unique. Various actors use the term across a wide range of cases, and it is interpreted differently and not

³² Note that Ledeneva (2006, 22, fn 39) contends that administrative resources are not to be understood as resources as such. Neither should they be understood as administrative, she adds (*ibid*).

always consistently with regard to legality and legitimacy. The ambivalence in Levchenko's analysis reflects the term's existence in the grey zone between, or outside, the dichotomies we usually employ. As a term, administrative resources highlights the blur of a neopatrimonial system in which the boundaries between the public and the private sphere are not clearly drawn. It originates in a political culture in which, contrary to the mainstream Western model, the state has never been assumed to be separate from the networks it consists of (Zimmer 2008). With my concept of selective law enforcement, I hope to capture these ambiguities without sacrificing the use of terms of universal appliance. As noted in the introduction, the dichotomous terms of formal and informal provide me with a useful tool to unravel the confusion our use of such dichotomies often leads to.

3.3.2 Telephone Justice and *Basmannoe Pravosudie*

The terms administrative resources and political technology are useful to understand the instrumentalism of formal rules and the blur between their uses for public or private interests. Neither of them, however, pays any specific attention to the utilization of the *punitive* capabilities of formal rules to promote these interests.

A popular Soviet-era term that directly concerns political interference in judicial matters is “telephone justice” (*telefonnoe pravo*), according to some coined by Arkadii Vaksberg in 1986 (e.g. Popova 2012, 131). The term is relatively popular today in academic writing and has a central position in works of among others Hendley (2009) and Ledeneva (2008; 2011c). As is the case with the two other terms mentioned above, telephone law relates to the prerogatives of the powerful. It originated with the ability of the Communist Party elite to “pick up the telephone and call prosecutors and judges and tell them what outcome the Party expected in specific cases” (Karklins 2005, 13). As such, it not only encompasses selective law enforcement but also pressure to exert leniency or drop charges.

Ledeneva (2011c) suggests that the “basic meaning” of telephone justice was originally “court decisions made on orders from above (*sverkhu*).” Her survey research, however, indicates that this meaning has now been significantly extended in everyday use in Russia (ibid).³³ In a later work, Ledeneva (2013, 150) therefore defines telephone justice broadly as “a colloquial

³³ Interestingly, 15% of the respondents equate telephone justice to “selective law enforcement” as defined by Ledeneva (see section 1.3.3).

phrase to denote inequality before the law, selectivity in law enforcement and the consequent gap between law and justice.” To the degree that my interviewees use the idiom, they seem to understand it more narrowly as the direct interference in legal processes by verbal commands. While Maria Popova (2012, 131) defines telephone justice as “a channel of politicians to communicate their preferences about the outcome of individual cases to the judges who hear them,” it is worth noting that this channel of influence is not exclusive to politicians as such. In my own study at least, the individuals who are mentioned as the most active “callers” are frequently leaders within the state bureaucracy.

A terminological novelty that also deals specifically with politicized justice is *basmannoe pravosudie*, assumed to have been first introduced by radio host Aleksei Venediktov (2003). *Basmannoe pravosudie* has become a rather popular phrase in Russia and was officially commented upon by then President Dmitry Medvedev in 2009 (Vzglyad' 2009). Compared to telephone justice, it may carry stronger connotations of a centralized regime rather than independent individual manipulators. *Basmannoe pravosudie* arguably focuses less on the initiation of the case than does telephone justice and more on the legal process itself. *Basmannoe pravosudie* simultaneously refers to *Basmanniy sud*, the local Moscow court where the first procedures against Mikhail Khodorkovsky were held in 2003, and to the father and son Aleksei and Fyodor Basmanov, leaders of the *oprichniki* – the notorious secret police set up by Ivan the Terrible in the 16th century. The term’s resistance to translation and its esoteric references make it obviously ill-suited for comparative studies beyond Russia.

3.3.3 Selective Law Enforcement between Politics and Legality

The obvious strength of the native Russian terms lies in how they reflect the Russian attitudes towards law, power, and the relation between the two. Common to the reviewed terms is how they transcend the dichotomies of legal-illegal and public-private, reminding us that these dichotomies are not after all absolute. In Russia there is a “much less pronounced moral predominance of formality than in ‘western’ social conduct” (Böröcz 2000, 375; see also Zimmer 2008). Knowledge about the referential environment and cultural background of the observed phenomenon should be heeded in my discussion to make analysis better attuned to the interviewees’ own experiences. Taking the local concepts into account provides an important check point so as not to let artificial and rigid models from outside impede our understanding of a phenomenon examined in a cultural context.

That said, the examined terms are in themselves not a good foundation for academic concept development, especially not for a concept useful beyond the analysis of Russia. As Emile Durkheim (quoted in Gerring 1999, 362) pointed out:

It is not our aim simply to discover a method for identifying with sufficient accuracy the facts to which the words of ordinary language refer and the ideas they convey. We need, rather, to formulate entirely new concepts, appropriate to the requirements of science and expressed in an appropriate terminology.

In contrast to the Russian terms mentioned above, “selective law enforcement” is constructed especially for the purposes of academic development, research transparency, and cross-case transferability.

My concept of selective law enforcement pays specific attention to law, which the above-mentioned Russian concepts do not. My analysis does not take recourse to a *legal* approach to selective law enforcement, however, as this would miss out on its much broader political significance. Rather, the analysis is based on a middle position that allows for a more than skeptical attitude towards legal idealism while at the same time acknowledging both the normative and descriptive usefulness of separating formal and informal institutions. My approach fully incorporates the perspective of legal instrumentality, which is so crucial to quasi-legal repression in Russia.

The focus on specifically *legal* tools allows us to ask several important questions: Why exactly is law such a popular tool of repression? In what ways is law related to power? What legal documents are utilized in the process? Which legal issue areas are most relevant? The notions of telephone justice and *basmannoe pravosudie* do not provide a path for exploring such questions. Instead, they simply assert that the law is subordinated to power and the powerful. A closer examination of what role law plays in selective law enforcement helps us understand how the practice functions, how it relates to legal affairs, and why Western observers are so upset about it.

Selective law enforcement is also useful in the way it relates closely to other analytical perspectives on politics on different levels of aggregation. As argued in the introductory chapter, much of the recent literature on authoritarian and neopatrimonial rule concerns exactly the same tensions that characterize selective law enforcement. Selective law enforcement thus provides a subject of research in which these tensions may be explored in a

richness of detail. Not least, it shows how the ambiguity that results from quasi-formality and political dualism may be actively played upon by actors seeking legitimacy.

Finally, compared to esoteric concepts that refer to history, folklore, and wordplay, selective law enforcement is semantically intuitive and does not presuppose area-specific knowledge. Hopefully, this makes the concept less susceptible to an unfruitful proliferation of ever new meanings. I also suggest how selective law enforcement as a concept may be disassembled and investigated in detail on an operative level, something which makes it easy to elaborate on, improve, or contest in area-specific or comparative studies.

4 The Mechanics of Selective Law Enforcement

4.1 What is Selective Law Enforcement?

Simply put, I suggest that selective law enforcement is selectivity, law enforcement, and a specific relation between the two. As mentioned in the introduction, “selectivity” and “law enforcement” are used with specific meanings. First, “law enforcement” must here be understood broadly, like *de-facto punitive* or restrictive *legal acts*. This is important, because according to a *substantial* understanding of law enforcement, selective law enforcement is not law enforcement at all (see below). “Selectivity,” on the other hand, is understood narrowly and only encompasses (the perception of) conscious selection based on goals of political suppression of dissent.

The two linguistic components juxtapose, as suggested by Levitsky and Way (2010, 26-28), the *informal* (selectivity) and the *formal* (law enforcement). The conceptual integrity of the term “law enforcement” is thwarted by the qualifier because the informal basis of selection negates some essential quality that we normally associate with law enforcement. In my theoretical conception, selective law enforcement is not law enforcement at all. On the contrary, I will claim it is a mechanism to enforce *informal* rules that are politically or legally implausible to formalize. The notion of “law enforcement” in this term simply relates to the fact that the enforcement of informal rule is achieved by the use of state resources and with the pretext of reference to law and formal state institutions.

Selective law enforcement is thus primarily the realization of a link between informal rules of political conduct and formalized law enforcement, pointing back to a formal rule set for “justification.” The two linguistic components of “selectivity” and “law enforcement” are separate and “phased” as a selection precedes law enforcement (although continued interference with the case may also take place). When selective law enforcement takes place,

informal criteria constitute the only or *primary* reason for a selection – and thus also the main reason for legal procedures to be initiated.³⁴

Individual actors make use of their influence over law enforcement for various reasons. Presumably, they are in the majority of cases not directly concerned with the interests of the political regime as such. Rather, they take care of their own problems and their own opponents and critics. They are not necessarily consciously motivated in each and every case by the long-term enforcement of informal rules but rather by a wish to clear up a specific situation there and then.

In Russia, access to state power under Putin's first two terms of presidency was concentrated among an increasingly uniform group of regime insiders. To a larger degree than before, the interests of regional leaders were realigned with the interests of the central regime in Moscow (Petrov 2011). When mayors, local party leaders, or governors arrange for selective law enforcement they may be primarily concerned with personal matters. Yet, they also tend to reinforce the authoritarian rules of political conduct that benefit the authoritarian regime at large. Not least because the access to extralegal influence over the broader legal system is concentrated among regime insiders, the informal criteria for law enforcement seem to take on patterns that benefit this regime. This study does not indicate that the practice is coordinated by a central authority in all cases. Rather, structural incentives replicate the

³⁴ Whether the link is one of causality is a complicated question, also beyond the philosophical disagreements on the relationship between *intention* and *cause*. A perception of causality in a broad sense is evident in counterfactual statements among critics: Law enforcement would *not* have been initiated if an informal selection had *not* been made. At face value, this would indicate that an informal selection is a necessary condition for law enforcement, a claim that is clearly unreasonable except in a probabilistic sense. It would be fair to say that observers can never identify more than the *primary* antecedents of selective law enforcement, and even these they usually base on qualified guesswork rather than hard proof. Whether the informal selection may be seen as a sufficient condition for law enforcement is also unclear, but here also any use of causality must in any case be in its broadest sense. The targets' perceptions suggest that the practice is often built directly upon incoherent legal rules – rules that are easily manipulated. As will be seen in the discussion below (chapter 6), the legal system may thus be seen as an important part of the practice, even in the extreme interpretation of it being *purely* contextual. In short, the pretext is important. Because the claim to causality is also conditioned upon other contextual factors and structural incentives that back up the practice, even a “probabilistic causality” must be in the sense of political motivations being part of the “conditions of existence which do not *cause* something to appear but which create the space for its existence and which interact with a multiplicity of other processes” (Benton and Craib 2011, 90)

pattern of selective law enforcement in different regional contexts. Surely, this fact does not rule out that more coordinated campaigns may also take place.

Frequently, selective law enforcement seems to be a simple reflection of power relations. The core rule that underlies all cases of selective law enforcement is that threatening the interests of those in power (*vlast*) may ricochet on you, also in quasi-legal form. It is the *institutionalization* of selective law enforcement that justifies a concept that involves a notion of informal rules. By definition, a rule is a generalization valid for all cases that are encompassed by the rule's formulation, while a command only concerns one specific case (Schauer 1991). For this reason, a command cannot shape incentives beyond a specific case in the same way as a rule does. While this is true, direct commands almost by necessity carry with them signals of a more general nature, which function as informal directions or rules to be applied in future situations.

4.2 Selective Law Enforcement as a Mechanism Enforcing Informal Rules

I propose that selective law enforcement works just like other rule enforcement mechanisms in many respects. The practice is directed towards punishing or restricting actual and potential violators of rules. In the context investigated here, the politically motivated prosecution may enforce general obedience and suppress dissenting views. It seeks to keep political adversaries, civil society watchdogs, and other critics silent. By selective, but systematic and more or less predictable distribution of punishment, the practice also provides incentives for the rest of society to stay away from oppositional activities. The key message delivered by consistent politicized enforcement is that being in conflict with political authorities is a risky affair. In short, selective law enforcement reinforces existing political power relations by keeping insiders on the inside and outsiders out.

4.2.1 The Logics of Rule Enforcement

In the context of selective law enforcement, there are basically two ways in which the directed appliance of violence may help to enforce rules. First, a punitive act may *deter* further non-compliance with any given rule. According to the theory of deterrence, the punishment will “affect the calculus used by rational actors to assess their potential strategies and to select

their rational choice of action” (Knight 1992, 17). In short, the punishment reinforces the belief that non-compliance will result in unpleasant consequences, and it thus makes the subjects more likely to comply. The punishment also reinforces the perception of threat for others that are (made) aware of the punishment – when they realize that violations are punished they have an incentive not to violate the rules themselves (Golding 1975). The implications and consequence of this mechanism are discussed at some length below.

Second, a rule may be enforced by impeding the subjects’ ability to violate it. Restricting entrance into a strictly forbidden area, for instance, is not just enforced by punishing trespassers, but also by setting up some sort of physical barriers. These preventive barriers help to keep persons outside, thus making sure the rule of denied access will not be violated. The physical restriction of imprisonment blocks the ability of a subject to commit a host of unwanted acts. When deterrence is dependent upon rational reasoning or psychological fear, acts of a preventative nature work in a more straightforward fashion and are directed against the “physical aspect” of rule violation. As is the case with punishment, the legal acts or sanctions may vary greatly in severity and be absolute or partial. Common to all forms of preventive acts is the ability to *constrain* potential non-compliers from committing unwanted acts, usually for a limited period of time (Friedman 1975, 67-75).

Preventive acts do not have the same broad impact as deterrence does. At the same time, prevention is a less complex mechanism and is effective in its own way. First, in contrast with deterring punishment, someone whose non-compliance has been simply blocked need not *understand* the motivations behind law enforcement to be prevented from non-compliance. Second, while deterrence is dependent upon providing incentives, a method which is known to be a gamble, preventive acts do not face these limits. The differences between these two aspects of rule enforcement carry implications for how selective law enforcement may be imposed effectively. Deterring and preventing constitute different strategies with different outcomes and scopes. Deterrence has a broader impact and is therefore less demanding on resources in general. In selective law enforcement, preventive acts carry the greatest significance when efficiently imposed to block the actions of consistent violators, those who will not be deterred. Keeping someone *preoccupied* works as a soft or partial prevention, restraining the target’s ability to concentrate his efforts on unwanted acts. Needless to say, preventive acts function only when a rule is prohibitive and not where it constitutes an imposition to perform a specific action. In this they differ from deterrence, which in theory may impose incentives for any act.

In reality, many if not most legal sanctions have both punitive and restrictive elements. Imprisonment, for instance, impairs the prisoner's ability to commit serious violations for that period of time. At the same time, it is traditionally also seen as a form of punishment (leaving out restoration/rehabilitation). The prospect of potential imprisonment is believed to shape the incentives of both former prisoners and the outside world. Similarly, a fine is both a punishment and a financial restriction, and an execution is certainly the ultimate preventive act against the person in question but also greatly deterring for others.

We need to approach punishment broadly in order to understand the impact of selective law enforcement upon society. The deterring effect is not dependent upon whether or not the punishment is officially recognized as such. The same holds true for restrictions. Repeated and prolonged court cases, for instance, may be interpreted as both punitive and restrictive even when they are won. Formally neutral acts, like inspections or interrogations, may have similar consequences. The litmus test of punishment is whether or not non-compliers are put in a (subjectively) worse situation than those who comply (Macrory 2008, 37).

Finally, to the degree that investigative acts are initiated selectively for the ulterior purpose of later punishment (or further restrictions), they may also be encompassed by the term selective law enforcement. An example may be searches allegedly for unlicensed software but in reality more for internal documents and correspondence that can be useful in future suppression of (legal) activities.

4.2.2 Selective Law Enforcement's Chain of Purpose

Like all regulative rules, the informal rules that are enforced by selective law enforcement are composite. First, all regulative rules contain what Schauer (1991, 23) calls a *factual predicate*, a description of its scope.³⁵ The factual predicate defines the conditions to be met for sanctions to be imposed (or rewards given). It may be translated into a "if p " where p is a necessary and sufficient condition for punishment or reward. Secondly, the rule contains a *consequent*, "then q ," specifying what will supposedly happen if p is fulfilled (Schauer 1991).

³⁵ I refer frequently to Frederick Schauer in my conceptualization of rules. I do not intend to contribute to any legal philosophical debates in my adaptation of Schauer but find his (1991) thorough conceptualization of rules useful for my purposes. In particular, I lean on his clear-cut separation of predicates and consequents that is key to my concept and on his conceptualization of rules as separate from law.

In deterrence-based enforcement, the rule is enforced by realizing this link between p and q . In the case of preventive acts, the rule is enforced simply by making p difficult or impossible to realize.

In this understanding, the prescriptive rule thus includes a threat or warning that something might happen if the rule is violated (I will not discuss rewards). While this threat need not be explicit, it needs to be recognized for the rule to qualify as regulative. When we identify a regulative rule, we intuitively also accept that it has a consequent. A restaurant sign saying “no dogs allowed” (example used in Schauer 1991) has no explicit consequent, yet it is understood that “if you bring a dog, it will not be allowed into the restaurant” or “if you bring a dog into the restaurant, you will be kicked out.”

In the logic of deterrence, to impose punishment against non-compliers will sustain the rule’s integrity by it reinforcing the link between predicate and consequent. In other words, punishment is primarily a means to an end, although the enforced rule is usually itself also a means to achieve some form of goods. Importantly, the punished must understand the significance of the punishment if they are to take the rule into account. If those stopped from entering the restaurant do not understand that the denial or because of their dogs, they might come back another day accompanied by the same dogs and expect to get in with a more fashionable clothing. For this reason, all rules that have ambitions to regulate behavior beyond a single instance must be *promulgated* to have the desired deterring effect. In the above case, the sign “no dogs allowed” does the trick.

In the case of selective law enforcement, however, the main goal is not to enforce law. Legal rules are used as an instrument against a *predefined* target, and the legal steps are initiated based on external and legally irrelevant criteria. The doorkeeper of a bar may for instance deny entry to a person that fails to produce a valid ID, while the decision is actually motivated by racist discrimination. At this bar, IDs are only checked on occasion.

Selective law enforcement implies that the law enforcers in that instance do *not* act upon the legal rules that are instrumentalized. The doorkeeper is motivated by the *informal* rules as hinted at by the bar owners and influenced by its clientele; he or she uses the lack of ID as a pretext for racial profiling. At the same time, the pretext may fend off accusations of racism, which the bar owners’ fear may lead to all sorts of trouble. In such a case, the stated rule is purely pretextual; its enforcement takes no regard to the issue of ID. Had the person in

question actually produced a valid ID, the doorkeeper may have simply changed pretext and referred to the strict dress code. The motivations would remain the same and be unrelated to the pretextual rules. Whether or not the guest complied with the instrumentalized rule is theoretically speaking irrelevant to the claim that it has been selectively enforced.

Political quasi-legal repression may take place according to a similar logic. After a series of peaceful but vocal street protests, a hypothetical mayor and an equally hypothetical political advisor find the prolonged protests to be detrimental to their position. They decide to contain the protests, but do not want to create a scandal. They know that an illegal crackdown with a strong hand may very well turn out to be counterproductive. For the same reason, the town council does not dare to deny the requests to arrange more rallies. The political advisor makes a phone call to the local chief of police, and during the ensuing days several lead activists are detained and charged with taking bribes, using illegal substances, or distributing unlicensed software.

The initiators of the investigation hope and expect that several other activist leaders will fear such legal scrutiny and stay home on the next day of the protests, finding that the risk is not worth the trouble. In this case, the concern of the police was not to enforce law as such, but rather to dig up any possible violation on the part of some predefined targets. This case does not necessarily mean that the charges were entirely off the mark; the approach may have been partly designed on what the police already had collected about their targets. Next week the protestors lack several of their leaders, and the rank and file have been drastically reduced, paradoxically with good help from activist websites spreading the word about the selective crackdown. In a relatively silent fashion, and with no obvious legal violations, the mechanism of selective law enforcement has reinforced the authoritarian rules of conduct.

Above, I held punishment to be a means to enforce a rule. By punishing criminals, for instance, the integrity of the criminal code is strengthened. In the case of selective law enforcement, this logic may at first seem to be turned upside down. In the above example, the legal rules become a means to the goal of punishing a predefined target and not the other way around. Selective law enforcement is what U.S. federal prosecutor Robert H. Jackson (1940, 19) warned against when he stated that the most dangerous power of a prosecutor is the discretion to “pick people that he thinks he should get, rather than pick cases that need to be prosecuted.”

While it is true that a legal rule in selective law enforcement is a means to pursue punishment, this punishment again enforces *another*, informal, set of rules. It is this “secondary” enforcement that is the primary purpose of selective law enforcement. In selective law enforcement, legal rules are not in any way to be confused with the rules that are actually enforced. A chain of purpose can thus be identified: The legal rule is a means to punishment is a means to sustaining the integrity of *informal* rules. To understand selective law enforcement as rule enforcement, we should not be disturbed by the legal rules thrown at the scene to confuse us. By employing legal rules and enforcing them selectively, influential individuals can instrumentalize the state monopoly on legitimate violence to pursue the informal interests of themselves and their patrons.

4.2.3 Legal Acts Are the Tip of the Iceberg

Punishment may deter in two main ways. First it may deter the punished individual herself from further non-compliance, after the old principle “once bitten, twice shy.” It is, however, not the target alone who may be deterred by rule enforcement. We must also take into account the general deterrence – the so-called chilling effect. Not only may some of the detained activists in the above example fail to show up on the next rally for fear of further investigations or frame-ups. Other activists as well will consider the risk, as will in theory every potential non-complier that understands the political link. Every time a target is punished, an unknown number of bystanders are considering the experience, and adjusting their future behavior accordingly.

From an outcome perspective of rule enforcement, then, the prosecution itself is just the tip of the iceberg. While we can observe selective law enforcement, or at least subjective representations of it, the subjects of general deterrence are out of our radar’s reach. We can never count the number of statements and opinions that are never expressed publicly due partly to the threat of selective law enforcement. Even the deterred individuals themselves are hardly able to recognize all the factors driving their decisions. The general danger associated with criticizing authorities leads journalists and others to self-censorship. I contend, however, that the term “self-censorship” only clouds the repressive origin of the practice. What is self-censorship here but another word for successful enforcement of informal rules by means of deterrence? While it is well worth examining cases of individual prosecution, it should be underscored that most of the iceberg remains submerged and out of view.

4.2.4 Why Informal Rules Must Be Promulgated

As already stressed, selective law enforcement is characterized by a link between the informal selection process and the formal legal procedures. Legal subjects may certainly misinterpret the political context, attributing a legal case with political meaning that the law enforcers never had in mind. Alternatively, prosecuted individuals may consciously lead others into believing in a political link that they have no belief in themselves. If a *perception* of a political link is established, the logic of informal rule enforcement will be partly valid even without the actual existence of ulterior motives on the officials' part. As Austin T. Turk (1976, 287, emphasis in original) noted, "Law *believed* to be biased may be just as ineffective, or worse, as law that *is* biased."

According to Schauer (1991, 113), a subject of a rule can be said to *follow* the rule if and only if the rule constitutes a *reason for action*. If no consideration of rules is involved in the subject's mind (the rule might for instance be unknown), the subject may of course happen to comply with it entirely by chance.³⁶ The rule would, however, not constitute a reason for action; thus the law will not be *followed*. If somebody does not comprehend the reason a punishment takes place, no mental link is established between precedent and consequent in the minds of the would-be-deterred. In other words, no rule is enforced (except for restriction effects). For the relevant subjects to change behavior in the way law enforcers seek, the reason for prosecution must be known to them (for the sake of argument, I will not discuss the possible effects upon unconscious behavior).

Because of this important subjective aspect of rule enforcement, initiators of selective law enforcement must promulgate what trait or action they consider unwanted. Not only do they need to deliver this message to the law enforcers to be sure they take the necessary actions, but they also need to transmit the political message to the punished and other relevant subjects. Importantly, it is the *perceived reason* for punishment that will determine what rule is essentially enforced, regardless of the intentions behind the prosecution. What is perceived

³⁶ Schauer (1991, 113) stipulates that "to be *guided* by a rule requires only that the agent take the existence of a rule as a not-necessarily-conclusive reason for action, but that to *follow* a rule requires both *being* guided by the rule and acting consistent with (complying with) its indications. Compliance with a rule is therefore different from following a rule precisely because of the way in which only the latter requires guidance by the rule. Conversely, non-compliance with a rule does not presuppose non-guidance, for non-compliance may be the conclusion of a reasoning process in which a guiding reason was outweighed by other guiding reasons."

as a completely random display of force might certainly scare the targets but will hardly deter them from anything.³⁷ Methodologically speaking, this is good news for a researcher. If insiders want to deter their critics, they necessarily need to leave some tracks that can be traced.

Let us imagine another scenario of selective law enforcement to illustrate the point. The governor of the fictional region Primerskaya *oblast* is fed up with a journalist repeatedly looking into the regional leadership's shady involvement with the construction business. The governor fears for his reputation, but even more so he³⁸ fears that sustained pressure may result in prosecution and his own eventual downfall. As it happens, the accusations have more than a grain of truth to them, and even a governor is only above law up to a point. The governor decides that action must be taken, but subtly enough to not trigger scandal around the sensitive issues. The governor therefore arranges for the fire security agency to make a "routine" inspection at the newspaper's premises. Knowing that the newspaper is located in an old building, he expects that no offices there will actually comply with the strict formal demands of fire security in Russia. The governor hopes that the agency can issue a fine to add pressure to the newspaper or better shut it down to buy himself time. More than anything, however, he wants to show that this line of investigation is unacceptable and needs to stop, and that he is willing to go to coercive measures to see it done.

When the agency has fulfilled its part of the deal, the future behavior of the newspaper is entirely up to how its staff, editors, or owners perceive what has happened. If the newspaper's staff does not understand the governor's intentions or role in initiating the fire security inspection, there will be no incentives for it to change attitudes regarding the regional government. Instead the newspaper may consider the fire security issue, perhaps buying new extinguishers or installing fire doors. Ironically then, the formal rules are by mishap enforced instead of the informal. The governor's scheme fails and the newspaper will pick up the same topic once reopened if not before. For the legal acts to deter future criticism of the regional government, therefore, the *de facto* reason for crackdown must be communicated.

³⁷ This is why I favor speaking of selective rather than arbitrary law enforcement. "Arbitrary" is used in a contradictory fashion, in the meanings of both "selective" and "random or unpredictable."

³⁸ Governors in Russia are, with very few exceptions, male. The few exceptions include Valentina Matvienko in St. Petersburg (2003-2011) and Natalya Komarova in Khanty-Mansiisk autonomous okrug (from 2010) and Marina Kovtun in Murmansk oblast' (from 2012).

To approach selective law enforcement as the enforcement of informal rules –partly by means of deterrence– has wide implications. Importantly, it provides theoretical backing to the claim that this quasi-legal practice is oriented towards demarcating the borders of what is politically permissible. The argument is built upon the assumption that consistent distribution of punishment can provide structural incentives for relevant actors to act upon. Crucially, actors cannot act upon incentives they do not know of. In this way, my concept of selective law enforcement provides theoretical backing to criticize theories suggesting that selective law enforcement is primarily intended to camouflage repression behind a legal façade (section 1.3.5).

4.3 Selective Law Enforcement in Terms of Institutional Interactions

We have seen how selective law enforcement may be described in terms of how it connects informal rules with legally-imposed sanctions. As such, the practice is aimed at reinforcing the informal rules of political conduct by restraining or punishing those who challenge these rules. This next section will extend the discussion by incorporating some perspectives on institutional interactions, in particular on how selective law enforcement combines informal and formal elements.

There is a considerable literature discussing the interpretation, conceptualization, and systematization of our knowledge about how formal and “other” institutions interact. The relations between formal political institutions and important informal institutions are crucial to politics in Russia – a country well-known for its formalist bureaucracy and strong state ideology, yet also for its informal networks, clientelism, and corruption

There are challenges associated with the use of a formal-informal dichotomy. Some scholars even reject it in full. Yaroslav Startsev (2005), for instance, argues that the formal-informal distinction is inherently biased and claims that the dichotomy presupposes the predominance of the formal. To describe a world of grey-scales in terms of black and white arguably tends to lead us into residual categories with unclear meanings. Instead of explaining what a practice is, we may be tempted to call it quasi-formal or semi-legal for lack of better terms. For the sake of exploring a phenomenon with a distinct hybrid character such as selective law enforcement, however, I contend that dichotomies may still be useful. Properly used, quasi-

formality may be more than a residual category. In positively defined terms, quasi-formality may underscore rather than obscure the essence of what selective law enforcement is and how it works. Yet, selective law enforcement is not easy to align with existent typologies of institutional interactions. In the following discussion, I will not conclude on any preferred typology but provide a criticism of existing typologies with the peculiar practice of selective law enforcement in mind. For purposes of concept development, I also utilize the debate on institutional interaction to shed further light on the hybrid character of selective law enforcement.

4.3.1 Separate Institutional Chains And Their Interaction

In a simplified model of rule enforcement, violations of legal rules lead to formal sanctions, and non-compliance with informal rules correspondingly leads to informal sanctions. Legal rules are enforced by agencies authorized by the government, while informal rules are enforced by society.

This paradigm is arguably how we often think, and definitions that build on this understanding of separated institutional chains are many. Hans Joachim Lauth (2004a, 70) holds that while formal institutions “are guaranteed by state agencies and their violation is sanctioned by the state, most of the informal institutions are based solely on their existence and effectiveness.” Another scholar defines informal institutions as those that are “not sanctioned or codified via legal recognition, legal enforcement, or official access to power/policymaking” (Grzymala-Busse 2004, 5). The enforcement of informal rules, then, may be seen as enforced “by means of sanctions such as expulsion from the community, ostracism by friends and neighbors, or loss of reputation” (Pejovich 1999, 166). In the interpretation of Gretchen Helmke and Steven Levitsky (2004, 727), informal rules are “shared rules, usually unwritten, that are created, communicated, and enforced outside of officially sanctioned channels.” In a slightly different formulation, “state agencies and courts are not (officially) involved in the process” of enforcing informal rules (Stefes 2006, 18). Along these lines of thought, we may envision a model of two parallel rule sets with corresponding sanctioning mechanisms (figure 2).

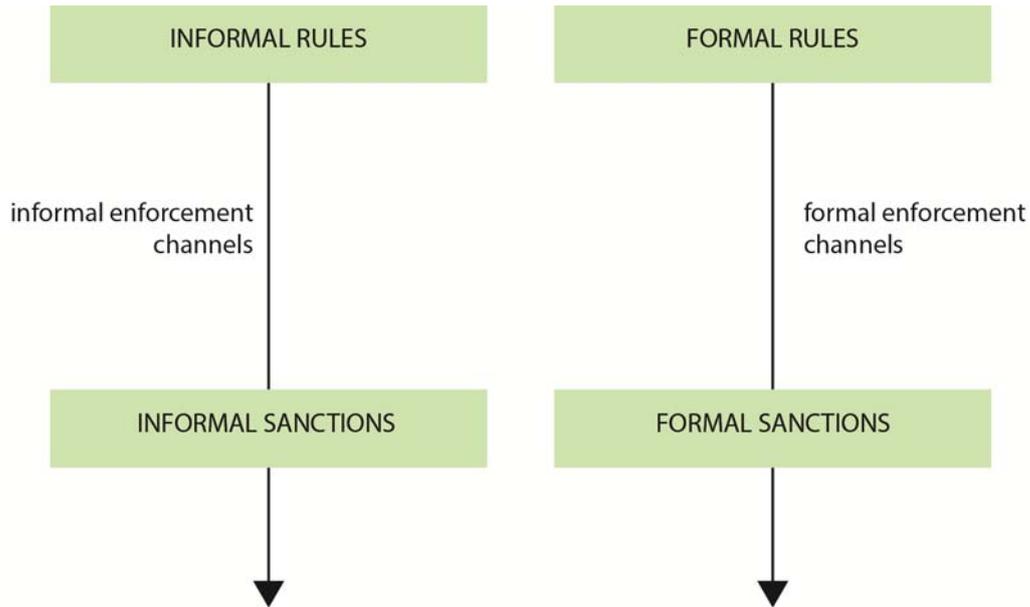


Figure 2: Separate institutional chains

The conceptual separation of informal and formal institutions is nothing out of the ordinary. Moreover, informality must necessarily be opposed to formality to make sense at all. Selective law enforcement, however, challenges the model of separate formal and informal institutions because the concept also suggests that informal rules may be enforced by formal means. The conceptual integrity of a separation model can possibly be salvaged, for instance by seeing the *initiation* of selective law enforcement as an informal sanction. Yet, a characterization that circumvents the hybridity so essential to the practice is in my view not satisfactory. In the case of selective law enforcement, the informal rules are certainly not “enforced outside of officially sanctioned channels” (above). Likewise, state agencies and courts are definitely “involved in the process” (above) even though the rules are informal.

The tight relationship between informal rules and formal institutions is widely acknowledged. While many definitions see informal and formal institutions as separate, they are still seen as interacting. Lauth (2004a, 73) even identifies *informal political institutions* by “their reference to binding decisions, guaranteed by the legally-constituted exclusive authority of the state.” According to him, this reference is exactly what separates informal political institutions from other informal phenomena. Following Guillermo O’ Donnell’s (1996) lead in engaging the topic of informal institutions, a number of works present models of institutional interaction on

a similar platform. Within these works, the informal institution types are defined exactly by their relations to formal institutions in one way or another.

Like O'Donnell, Lauth primarily focuses on Latin America in his research. According to his (2004b, 24) typology of institutional interactions, the relationship between informal and formal institutions can be divided into the following categories: *complementary* – in which the institutions support each other; *substitutive* – in which the informal institution does what the formal fails to do; and *conflictive* – “when the two systems of rules are incompatible.” Based on her studies of Eastern Europe and Eurasia, Anna Grzymala-Busse (2004, 7) asserts a very similar categorization, discussing the different types of institutional interaction in terms of “substitution, undermining, and reinforcement.” In a different article, however, Lauth adds a subcategory to his model of interaction that draws it closer to my area of interest. Conflictive institutions, he (2004a, 74) states, may either “displace each other” or the informal may penetrate the formal to the extent that the latter becomes “occupied” and its functionality subverted. Selective law enforcement is typically used exactly for undermining constitutional rights from within the legal system.

Victor Nee (1998) provides another typology from the perspective of institutional economics. Nee identifies three distinct types of informal norms –*congruent, decoupled, and oppositional*– based on how they relate to formal institutions. Like Lauth or Grzymala-Busse, Nee stresses the division between institutions in conflict or harmony with each other. The reference to *decoupled norms*, however, is a reintroduction of an idea earlier discussed by John Meyer and Brian Rowan (1977). Meyer and Rowan (1977, 345) found that formal institutions lend legitimacy to an organization because they are considered “proper, adequate, rational, and necessary.” Yet, they also found that the activity of many organizations consistently deviated from the formal blueprint, to the degree that it seemed more or less independent. Formal rules are often created as vague or otherwise flexible, Meyer and Rowan contend, so as to provide legitimacy without restricting efficiency.

In a declared attempt to set a “research agenda” on the issues of institutional interaction, Helmke and Levitsky (2004) extend Lauth’s and Grzymala-Busse’s typologies from the same year (table 1). Building on the same logic, they restructure the typology to encompass four types of informal institutions along two defining dimensions. The first dimension concerns the effectiveness of the *formal* institutions that the informal ones interact with. The second regards whether the outcomes of the informal institutions are seen as convergent or divergent

with the formal. Three of the table fields are filled with institutional types we are now familiar with: complementary, substitutive, and competing (conflictive). In addition, Helmke and Levitsky (2004, 729) include in their four-field matrix the notion of *accommodating* informal institutions. These institutions “create incentives to behave in ways that alter the substantive effects of formal rules, but without directly violating them; they contradict the spirit, but not the letter, of the formal rules” (ibid).

outcomes	effective formal institutions	ineffective formal institutions
convergent	complementary	substitutive
divergent	accommodating	competing

Table 1: Typology of informal institutions in Helmke and Levitsky (2004, 728)

Helmke and Levitsky’s discussion of “accommodating” institutions seems to build on the above-mentioned subtype that Lauth (2004a, 74) proposes and indicates that the authors do not neglect the widespread phenomenon of selective law enforcement. Yet, the matrix they present is by no means unproblematic from the perspective of selective law enforcement. Indeed, selective law enforcement highlights difficulties with regard to both the vertical and the horizontal axis of the model.

The distinction that makes up the vertical axis in Helmke and Levitsky is also implicated in the other typologies discussed, all of which operate with an idea that institutions may be in harmony or in conflict. While there is a degree of intuitiveness about such a distinction, and something may certainly be said for it, it seems impossible to either foresee or measure any isolated *outcomes* of formal and informal institutions. In empirical studies, the impacts of theoretically separated formal and informal institutions seem impossible to disentangle. The problem of precisely identifying institutional causes for effects is obvious, but the trouble extends beyond this general problem.

The other key problem with the distinction stems from its institutional origins. As Douglass North (1990) observed, institutions are purposefully shaped within the existent opportunity structures; they are the creations of men and women operating in context. This fact means that legislators tailor new rules in accordance with existing institutions. New rules may be created for the purpose of fighting old habits (informal institutions) or for the purpose of complementing them. But the *impact* of the rules cannot be understood independently of each other. This situation makes any notion of “independent” institutional outcomes implausible. We may mend the problem of identifying causality by replacing “outcomes” in the above typology with a notion that includes *intentions* of agents, such as “intended outcomes” or “institutional purposes.” This conceptual adjustment will not, however, resolve the deeper issue of institutional interdependence and contextuality unless we choose to artificially isolate legal interpretation from its context.

The problem of measuring outcomes and intention in empirical studies is probably most obvious in the study of heavily corrupted and authoritarian regimes. As Keith Darden’s (2001) study of Ukraine shows, anti-corruption laws were deliberately used for corrupt purposes, not only for individual benefit but also to keep the regime intact. Darden writes: “Where graft is essential to the functioning of the state hierarchy ... it is useful to think of hierarchy-reinforcing graft” (Darden 2008, 41). Also basing herself on studies of Ukraine, Kerstin Zimmer (2008, 268) contends that laws “are often purposefully designed in such a way, that informal patron-client relationship must be used in order to act successfully.” This manipulation is not only a legacy of the past. While there are important elements of improvisation to the legal manipulation (Ledeneva 2006b), the structural incentives for manipulation may also be part of active institution building and authoritarian regime design (Gel’man 2004; Robertson 2011).

In many ways, this thesis adds to the circumstantial evidence in this regard, though an actual *intent* will always be hard to prove. When the legislators belong to the same elite group as do the most powerful manipulators –and sometimes even are the same individuals– it would be counter-intuitive to find the intention behind laws to be in conflict with implementation practices. At the same time, it is no more intuitive to contend that the laws are in harmony with their abuse. In conclusion, the separation between convergent or divergent institutional outcomes or even intended outcomes may be suboptimal.

To make Helmke and Levitsky's vertical axis work properly after this critique, we can address the "outcomes" of formal rules only in terms of their *formal purpose*. This formal purpose should not be addressed as the actual intentions of agents, but rather a theoretical construct to denote a rational-legal "promise" that a legal text supposedly gives its subjects. It is not impossible that Helmke and Levitsky had something like this in mind when they made practices that "contradict the spirit, but not the letter" of law an example of an accommodating informal institution (above). With my above discussion (section 3.1) on instrumentality in Russian legal culture in mind, however, the "spirit of the law" is not necessarily a fruitful point of departure for discussing selective law enforcement. To the degree legislators can imbue "spirit" in a law, we would reasonably expect some degree of consistency between the legislators' motives and that spirit. Then again, we can only guess regarding their motives. If the motives of individuals are an epistemologically problematic subject of research, the motives behind group decisions are even worse. The only thing that remains certain is that these motives are diverse and complicated. As pointed out above, from the very creation of formal rules, the legislators take into account the existing world, including informal practices.

The horizontal axis of Helmke and Levitsky's model separates informal institutions, depending on the effectiveness or ineffectiveness of the interacting formal institution. Also along this axis we encounter challenges. As I will argue, selective law enforcement stands in a seemingly paradoxical relation to the formal legal system; it is at the same time dependent upon both the legal system's effectiveness and its weakness.

The informal criteria that are enforced by means of selective law enforcement are in direct conflict with the constitutional rights and thus the "formal purpose" of the legal system. To allow for such extralegal criteria to consistently influence law enforcement, the broader legal system must by definition be weak in the common conception of the word. Selective law enforcement also makes the legal system weaker by undermining it. First, selective law enforcement preys upon its financial resources. Second, pervasive abuse also weakens the popular belief in the legal system, an attitude which again hurts the ability of formal rules to be a regulative force in society.

Lauth (2004a, 74) introduces the concept of *parasitic* institutions. According to him (ibid), parasitic informal institutions live at the expense of formal institutions either by "partially occupying or penetrating them." Being a parasite, however, is an act of balancing. Parasitic institutions are dependent upon the formal institutions they undermine (Lauth 2004a, 74).

Selective law enforcement is dependent upon the continued existence of the legal system, its allocated resources, and its basis for legitimacy. As in biology, no parasite can survive without a host, though the host can easily survive without the parasite. The more the legal system is abused, the less legitimacy it retains for rational-legal regulation and the less legitimacy it can lend back to selective law enforcement. With regard to physical resources, selective law enforcement is entirely dependent upon the state coercive apparatus. Because the scheme would be nothing without the muscles of the state, the parasite attaches itself to the formal institutions and preys upon its monopoly of legitimate violence.³⁹ The typology of Helmke and Levitsky does not account for such complex interactions.

4.3.2 Breaking the Conceptual Chains

We have seen how many definitions find common grounds in a model in which formal and informal institutional “chains” constituted by rules, enforcement channels, and sanctions are kept separated. We have also seen that an approach to selective law enforcement as the enforcement of informal rules by means of formally imposed punishment has certain advantages. Yet, this concept’s bad fit with a traditional model of separated institutions is obvious. It is pertinent to ask, then, whether it is possible to break these institutional chains in order to reorganize them in a way that adequately addresses our subject of interest. As I argue below, the hybridity of the practice and the neopatrimonial setting again complicate our task considerably.

Stefan Voigt and Hella Engerer (2001) are among those who acknowledge the composite nature of institutions and the centrality of enforcement mechanisms to their functions. With background from law and economics, the two researchers define institutions as “commonly known rules to structure repetitive interaction situations plus an enforcement mechanism that ensures that non-compliance with the rule-component is sanctioned” (Voigt and Engerer 2001, 132). In other words, they distinguish between two “components of institutions,”

³⁹ Vadim Kononeko (2011, 5) uses an almost diametrically opposite biologism to describe the relationship “between informal groups and formal institutions,” calling it “a sort of symbiosis.” The relationship that Kononeko sketches in that very same paragraph, however, is arguably parasitic. The state is “chronically weak and subordinate to the networks, yet it is kept afloat as a sort of institutional carcass that the networks need.” Also Ledeneva (2013, 246) speaks of a “symbiotic relationship,” reflecting the fact that the state is too weak to exist without informal practices to mend its effects, yet she also contends that the informal governance of Russia is detrimental to the official policies in the long term.

namely rules and their enforcement (ibid). This is a useful point of departure for our purposes, as we have noted that it is exactly the rules and their means of enforcement that constitute the hybridity of selective law enforcement. A conceptual separation between the rule component and the enforcement component of an institution may therefore provide a more accurate model for our purposes than the above typologies.

According to Voigt and Engerer (2001, 132), “one can distinguish between rules whose non-compliance is sanctioned by representatives of the state and rules whose non-compliance is sanctioned by members of society.” This premise again forms the basis to separate “external institutions” enforced by the state and “internal institutions” enforced by society (ibid). Voigt and Engerer (2001, 133) also set up a typology of institution types based on categorizations along the lines of “kind of rule” and “kind of enforcement.”

kind of rule	kind of enforcement	type of institution
convention	self- enforcing	type-1 internal
ethical rule	self- commitment of the actor	type-2 internal
customs	via informal societal control	type-3 internal
private rule	organized private enforcement	type-4 internal
state law	organized state enforcement	external

Table 2: Typology of institutions in Voigt and Engerer (2001, 133)

In this typology (table 2) Voigt and Engerer attach one specific type of rule to one specific type of enforcement. According to the resulting typology, the identification of one “institutional component” will therefore be sufficient to identify both the other component and the institution type. This bundling of the two institutional components “rule” and “enforcement” is unfortunate, as it largely ruins the point of addressing them separately in the first place. Moreover, their typology replicates the above identified problems of separated formal and informal institutions on a different level. The separation of “private rules” – enforced by “organized private enforcement” on the one hand – and “state law” – enforced by

“organized state enforcement” on the other – again provides a bad fit with selective law enforcement. We may possibly apply a distinction between just and corrupted legal acts to decide whether the rule enforced is a “private rule” or “state law” and whether the enforcement should be considered “external” or “internal.” Yet, we end up struggling with the same problems of discerning motivations and outcomes as identified above.

The problem of Voigt and Enger’s typology originates in the authors’ assumption of a clear separation between state and society. For this reason, the authors are not able to remove the fog surrounding hybrid institutions in neopatrimonial systems. In the case of selective law enforcement, the law enforcers are not acting purely on the behalf of the state (external sanction), but neither are they completely privatized for corrupt interests (internal sanction). Rather, the law enforcers attempt to combine the two rule sets in order to reach their informal goal *within* the formal framework. The coexistence of the two rule sets reflects the blur between the public and private sphere in Russian politics. *Both* formal and informal rules have a role to play in the enforcement mechanism itself, something not accounted for in the models discussed. At the very least, formal rules provide the financial resources and the legitimacy of the formal order. It would be impossible to leave out this important fact in a concept of selective law enforcement.

As we have observed above, the neopatrimonial character of today’s Russia makes the application of standard models of informal and formal institutional interactions problematic. Kerstin Zimmer (2008) asserts that the Western separation between the public and private is normatively derived and artificially imposed on post-Soviet countries. Zimmer rejects much of the existing literature as ideologically biased and based on the erroneous assumption that neopatrimonial states can be seen as separate from their rulers. She contends that “informal rules and practices neither operate alongside nor in conflict with formal rules, and that they also do not replace the formal rules” (Zimmer 2008, 267). Instead, Zimmer asserts there is a “*blurring of formal and informal rules*” (ibid, emphasis in original).

Many of Zimmer’s comments are well justified. As noted, no rules develop in isolation from their environment. The interconnectedness of informal and formal rules is part of their functioning and their design. Notions of “pure” formality are meaningless at least with regards to intentions. We should also be aware of the trap of making formality a normative ideal in itself. As József Böröcz (2000, 352) puts it, a system of governance based on

formality alone would be “just about the purest and most absurd” form of dystopia conceivable.

With regard to our concept of selective law enforcement, the blur between the formal and the informal rules is important to the functionality of the mechanism because the formal rules provide an *instrument* while informal rules provides the *motivation* for the enforcement. In selective law enforcement, we see that “if p , then q ” but also that “if r , then q ,” where p is the formal predicate, r is the informal, and q is the expected consequence that gives the rules their integrity. In this model, the blurring of informal and formal rules is shown by the two rule sets sharing the same consequents. Because of this over-determination of q it will, like noted above, ultimately be up to the prosecuted and observers to interpret the inspections with regard to p , with regard to r , or possibly with regard to both. While easy to keep separated on a theoretical level, an absolute distinction between formal and informal rules is sometimes harder to apply in actual cases. Questions regarding legality become fuzzy since the mixture of informal intentions and *de jure* legality is fundamentally non-transparent. By actively playing on the indeterminacy of these issues, selective law enforcement evades, complicates, and distorts attempts at objective identification.

Because informal and formal rules have separate roles to play, however, their conceptual separation remains fruitful. As Guro Erdmann and Ulf Engel (2007, 105) note: “Under neopatrimonialism ... formal structures and rules do exist, although in practice the separation of the private and the public sphere is not always observed.” Indeed, Zimmer utilizes both the formal-informal and the public-private dichotomies in her own analysis. Rather than rejecting the conceptual pair as such, Zimmer presumably seeks to show how the interpenetration of the two makes a sharp distinction problematic and the relationship between them complex. Certainly, a distinction between formal and “the other” has both a normative and a descriptive purpose. After all, there *is* a difference between formalized rules and informal rules of conduct, and in many cases the difference is intuitive and obvious. The constitution *is* a collection of formal rules, and the semi-institutionalized rates on kickbacks to state agencies are certainly informal. This description holds true even if laws are designed in a process shaped by complex motivations which may or may not involve positive expectations about their potential instrumentalization for extralegal purposes (see section 6.6).

4.4 Selective Law Enforcement as Instrumentalized Ambiguity

Based on the above discussion, I arrive at an illustrative model of selective law enforcement in which informal rules challenge the prerogative of laws to define what is punished within the formal enforcement channels. Instead of two separate chains, selective law enforcement sees a blur between the formal or informal rules. The blur does not occur at the level of the rule as such (formal and informal rules are distinguishable). Instead, there is a blur of which rule set carries what influence upon the selection leading to legal processes. If we move up the chain from imposed sanctions to identify the reasons for the legal acts, we find that two different rule sets may possibly have influenced law enforcement.

Law enforcement officials and political insiders actively make use of this non-transparency. On the one hand, the crackdown against regime critics signals that the country is still governed by authoritarian leaders who insist on extra-constitutional prerogatives. At the same time, the practice paradoxically suggests that the country is ruled at least *by reference to law*, a fact that the Russian leadership plays upon especially in international discourse.

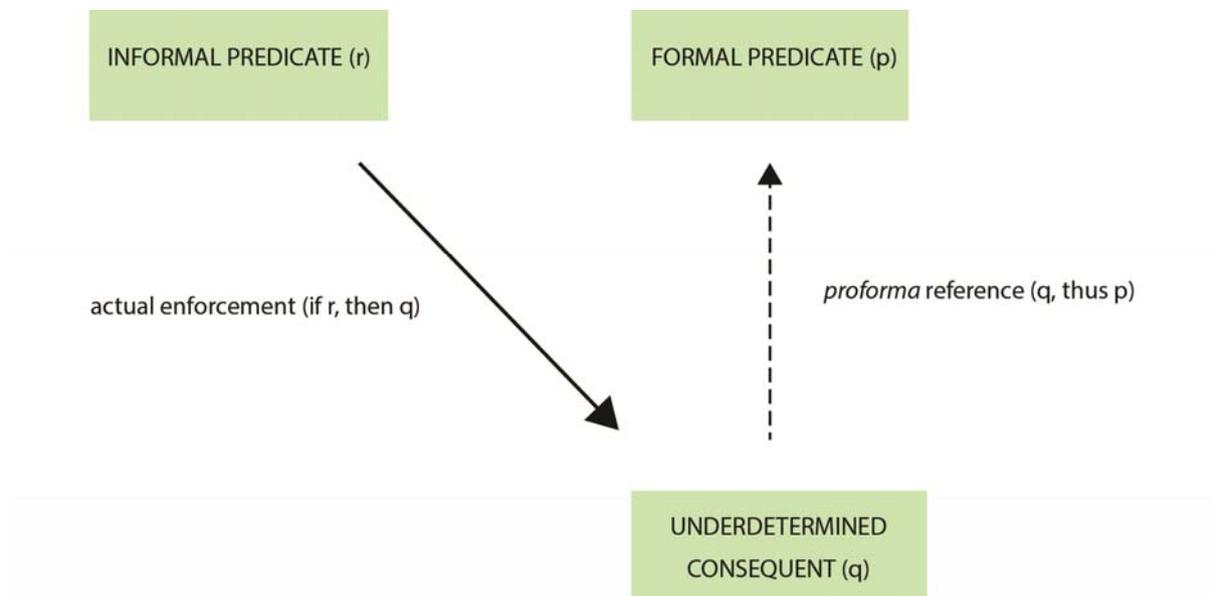


Figure 3: Hybrid model of selective law enforcement

A claim of selective law enforcement would necessarily stress the influence of informal rules, but initiators will be safeguarded by officially referring to the other, formal rule set. Figure 3 illustrates how selective law enforcement is an instrumentalization of the ambiguity created exactly by the problems identified in the above discussion of institutional interactions.

In terms of our rule approach, we see a formal rule “if p , then q ,” but also an informal rule “if r , then q .” The two rules have the same consequent, making selective law enforcement non-transparent and leaving the question of what actually *caused* the law enforcement to be a matter of opinion and controversy.

Critics observe the outcome q and interpret it as an enforcement of an informal rule: “if r , then q .” In other words, they believe r is what determined the decision to initiate a case. The authorities have already hinted that this assumption is a reasonable one (because they promulgate this rule) but will publicly brush off the accusations at the same time. They will focus on the fact that there is a legal rule “if p , then q .” They may argue that q is therefore the consequence of p . By utilizing this *discursive switch*, the authorities may move the discussion from one about political selection “ q , thus r ” to one about “ p or not p .” This latter discussion, however, will largely be futile because the existence of p is a strictly legal question which cannot be decided outside a court of law. In this way, a spokesperson may deflect criticism without resorting to direct lies. In a sense, the deflection is nothing but a well-known conversational trick – dodging an unpleasant question by answering a completely different one. The answer is absurd in the sense that it does not address the question. Yet, this incongruity does seemingly not make it any less popular.

As my analysis shows, the two issues of political selection and actual legal violations should be kept separate. Thus, the reference to legal violations cannot justify a political selection. In the same way, claims to political selection cannot justify legal violations.

5 Three Issue Areas of Controversy

In the previous chapter, I presented some of my main findings on what I call the analytical level of the concept. The next few chapters reduce the level of abstraction by presenting the examined legal issues more directly and move to the operational level of the concept. The focus on the interviewees' perceptions of selective law enforcement will also come to the fore in the next chapters, not least in Chapters 7 and 8, which are in part dedicated to the interviewees' subjective interpretations of informal games.

Below I will initiate this discussion by presenting three legal issue areas with stress on the most contentious legal issues and cases of alleged abuse. I will pay special attention to how and why the laws seem unable to constrain the informal influences upon enforcement, something that will be further discussed in the next chapter.

5.1 Selections before Elections: Double Standards in Implementing Registration Demands

For a considerable part of the political opposition in Russia, elections are something to be watched from the sidelines. Prior to elections, the election committees and courts determine who may stand for elections and who may not. Most committee chairs and judges responsible for legal review would insist that they are simply applying the law. To many among the opposition, however, registration procedures are experienced as a legal minefield designed to eliminate unwanted candidates and monopolize the contest for political power. By direct and indirect influence over the broader legal system, the incumbents may be able to filter out the most politically dangerous candidates before Election Day. With one viable contender after the other removed from the race, the elections themselves may be far less competitive than was the preceding fight for registration. As a result, voters are also deprived of their favored candidates – resulting in a dramatic reduction in democratic output. The candidates who can somehow avoid these mines emerge at great advantage.

Building primarily on material from local and regional elections in Perm and Vladimir in 2011, this section will discuss the legal framework and enforcement practices related to the registration of candidates to stand for elections and the denials of such registration. In both Perm and Vladimir, the elections were dominated by serious controversies after several viable

opposition candidates were denied registration. After the controversial elections in Perm, even Evgenii Kolyushin, a prominent member of Russia's Central Election Committee, said he was alarmed by "possible double standards" in the implementation of election registration procedures in the region (Polina 2011a). Remove "possible" from Kolyushin's statement, and most interviewees in this study would probably agree with him.

5.1.1 The Formal Framework

The legal framework regulating Russian elections is a very heterogeneous affair. Not only does it differ throughout the Federation, but it is also constantly amended on both the federal and the regional level. Since the establishment of one dominant party, United Russia (*Edinaya Rossiya*), in the State Duma and in most regions since about 2003, the number of amendments has escalated (see Lyubarev 2011b). In Vladimir, the local Election Code was amended 20 times in the course of one legislative period (Lyubarev 2011a, 416). In Perm *krai*, the most relevant regional laws were amended 16 times during 2010 and 2011 alone.⁴⁰ Even the federal framework law (Federal Law No. 67-FZ of 12 June 2002) that is intended to provide the main guidelines for federal and regional elections was amended several times every year in a period when United Russia enjoyed an absolute majority in the State Duma (Lyubarev 2011a, 425). In general, frequent changes in themselves lead to uncertainty, as every election will have a different legal basis than the previous one. Moreover, many changes are adopted immediately prior to the elections, giving candidates scant time for preparation (Lyubarev 2011a).

In accordance with the Putinist doctrine of a "unified legal space" (*edinoe pravovoe prostranstvo*), regional laws should not contradict the federal framework law. One may therefore reasonably expect that changes in federal law would trigger waves of regional amendments throughout the federation in order to adapt and bring one's framework into accordance with federal requirements. That is, however, an insufficient explanation for regional amendments. According to Arkadii Lyubarev, the amendments are not intended to clarify the situation or bring the legislation up to date. On the contrary, the electoral legislation specialist notes, they bear witness to "the creative spirit of regional legislators" (Lyubarev 2011a, 425).

⁴⁰ Perm Central Election Committee, see especially <http://permkrai.izbirkom.ru/way/949273.html>, [accessed 23.05.2012].

According to another study of regional election laws under Vladimir Putin's second term (Buzin 2007), regional legislatures have tended to adopt the strictest standards allowed by the federal framework. Andrei Buzin's (2007) study concluded that the amendments in sum made the legislation more vulnerable to extralegal pressure. The regional chapter of GOLOS (2011b) in Vladimir is of the opinion that the regional amendments to law in this region were detrimental to everyone but United Russia. Intentionally or not (see section 6.6), the legal minefield has not been cleared but intensified in the period examined.

5.1.2 Perceptions of Selectivity

In general, my interviewees were not happy with Russian election laws. It seems clear from their experiences, however, that Russian law should not be analyzed separately from its enforcement practice. The political scientist and campaign councilor Oleg Podvintsev in Perm summed up the situation in these terms:

[The main problem] is the implementation, of course. But in reality, it is both this and that because the law provides the basis for such an implementation. That is, the law is in reality contradictory and contains too many restrictions. Therefore, everything actually depends on the discretion of those implementing the rule. (Podvintsev 13.11.2011)

Against the opposition, the interviewees claim, election committees take great care to identify even the most marginal mistakes. A political advisor and social scientist I interviewed had recently had a chat with a colleague who had "worked against" one of the candidates:

She told me openly that it had been hard to block [him]. They called on some special lawyer from Moscow and searched for every possibility, worked tightly with the election committee to dig up a sufficient basis to block him from the elections. And dig it up they did. (Anon. political advisor 2011)

If the candidates are favored by the current authorities, however, even outright falsification of registration documentation could easily pass, according to the claims of some interviewees. As the above-mentioned advisor recalled, the election committee had brushed off his own request to engage graphologists to examine more closely the signatures of another candidate, "even though a blind man could see that these signatures were just fake." (Anon. political advisor 2011)

The political advisor (ibid) also summarized the situation in terms several other interviewees would probably agree with:

The thing is that the law [enforcement] is selective ... The [election] committee gets an instruction: "We don't need this guy, use whatever means it takes to get him removed" and everything is switched on. Or the committee on the contrary gets the instruction: "This is our guy so please don't touch him." ... It is simply selectivity. The rigidity of the law will only be applied in some occasions when it is necessary to block the road.

Notably, the complaints of denied candidates greatly resemble the opinions of Russian experts. This similarity holds true not only for interviewed local experts like Vyacheslav Beloborodov (13.11.2011) and Oleg Podvintsev (13.11.2011) in Perm or Lyudmila Eshanu (05.09.2011) in Vladimir, all of whom may possibly have stakes in the regional political games, but also for internationally known researchers like Lyubarev, Buzin, and Grigorii Golosov. Lyubarev (2007, 27) notes that the abuse of registration procedures often leads to "a selection of candidates and parties, not allowing those with good chances for victory to stand for elections." He holds this problem to be a major drawback for political competition in Russia and even calls it the "main inadequacy of Russian elections" (ibid). Golosov (2011, 627) notes how the deliberate disqualification of "viable challengers" from elections has become widespread throughout the country. The GOLOS reports confirm the tendency of an increasing politicization of administrative procedures prior to elections. Scholars from outside Russia often rely on the local expertise of GOLOS and researchers like Lyubarev to make similar conclusions (e.g. White 2011; Ross 2011).

5.1.3 Common Controversies

Even though the legal framework is heterogeneous, it is quite possible to identify some categories of common controversies related to registration denials and withdrawals in recent years. Most often, the denials find their formal basis in one or more of the following broad categories: (1) too large a percentage of the collected signatures are found invalid; (2) the candidates' registration documents contain errors or contradictions; or (3) the candidate has violated certain Russian laws in the pre-election campaign.

The requirement of signature collection may be the most controversial feature of Russian election law. Before each election, independent candidates (*samodvizhentsy*) or parties not currently represented in the State Duma must amass signatures to document their support among the electorate. The number of signatures to be collected depends on the size of the constituency, and it may thus range from a handful in a small electoral district to the two million signatures needed to register as an independent candidate for President of the Russian

Federation. If more than a certain percentage (also varying) of the signatures should be deemed invalid (*nedeistvitelnye*) or inauthentic (*nedostovernnye*) by expert evaluation, election committees can refuse that candidate or party list the right to run in the elections.⁴¹

Regardless of the indisputable importance of signatures in the registration of *samodvizhentsy* or smaller parties, federal legislation lacks specifications for how the signatures are to be verified. The procedures, then, are often subject to controversy. At the end of the day, the legal actors are left with wide discretion in deciding whether a candidate's signatures should be considered valid or not (Buzin and Lyubarev 2008).

An instance from Perm can illustrate the level of discretion and the fixation on detail that can accompany the verification of signatures. Among the signatures collected to document support among the electorate (for a sitting deputy), the experts found one signature which they insisted had been written with the letter "п" (p), not "ы" (y) as in the person's actual name, even though the signer publicly certified that it was indeed his signature (GOLOS 2011c, 103). In Vladimir, the party list of Yabloko was first registered but later lost the registration in court due to blots or corrections in signatures. According to GOLOS (2011b), these were irrelevant in determining the signatures' authenticity.

More often, the committees focus on alleged inconsistencies in the personal data that are to accompany the signature (e.g. Buzin 2006, 2007, Buzin and Lyubarev 2008). In Perm, for instance, many signatures were found invalid because of incorrect home addresses. In 2005, the region of Perm *oblast'* had merged with Komi-Permyak *okrug* into Perm *krai*, a new federal entity. "Perm *oblast'*" was thus no longer a correct address. On the other hand, most passports still stated *Perm oblast'* as place of residence, producing a catch-22 situation: no variant would correspond with passports *and* with the official registers (GOLOS 2011c, 103). In several controversial cases, signers are alleged to have given incorrect addresses of residence; this is particularly common when the street names contain abbreviations or are known under two different names, something which is not unusual in Russia (Buzin 2006).

Russian law stipulates that *all* signatures collected on incorrect forms are to be deemed invalid. In many cases in which the percentage of invalid signatures seems extraordinarily

⁴¹ Signatures are a common feature in Russian law, essential also to the registration of parties and the initiation of referendums. For the legal specifics for Perm *krai* and Vladimir *oblast'*, see and *Perm Krai Law No. 766-PK* and *Vladimir Oblast' Law No. 10-OZ*. On invalid signatures, see Article 32 and 33, respectively.

high, the dispute is not actually about the individual signatures but about the sheets on which the signatures were collected. Alfred Khaibrakhmanov, for instance, had to cancel his plans for re-election as city deputy in Perm. He was denied registration on the grounds that the signature sheets for his candidacy had printed the text “year of birth (if 18—day and month of birth)” as header of the column where the signer should write down her age. In recent amendments to the regional law, the header had been specified to be “year of birth (if age of 18 *on the day of election—in addition* day and month of birth).” For the lack of the extra seven words in the column header, all of the signatures were found invalid and Khaibrakhmanov was denied registration although nobody who had signed the list was below the age of 19 anyway. According to the Sverdlovsk District Court in Perm (2011), it would be unacceptable to show leniency in such a case. The court (*ibid*) held that it would be wrong to show flexibility in the enforcement of such a clearly-stated requirement, as this would “violate the principle of equality before the law of all the candidates, the principle of equal suffrage and [the right] for citizens to exercise their eligibility.”

Signature collection is not the only headache for politicians seeking to get their candidacy registered. Alleged irregularities in the documents provided for the committees form another frequent basis for denials. Because all candidates must submit registration documents, candidates nominated by parties in parliament can also be rejected by this procedure. The exact demands to documentation are not specified by federal law, so once again much discretion remains with local actors. After 12 years as a city deputy in Perm, Galina Slautina (13.11.2011) explains, she was asked to provide the election committee with her marks from high school, a document she had not seen in 30 years. In many cases, the stated basis for denial concerns inadequate documentation or lack of correspondence between the information given and the documentation provided. In other cases, the documents are simply found invalid. In Perm, one candidate for the Communist Party (CPRF) was denied registration due to an allegedly invalid passport, but won back the registration in court (GOLOS 2011c, 106). The same thing happened to Sergei Godunin (interviewed 06.09.2011), a political veteran running for the party Just Russia (*Spravedlivaya Rossiya*) in Vladimir. These disparities are a very common basis for denials, according to Lyubarev. Typical foundations may be incidental remarks in the passport (by state officials) or failure to provide a copy of the empty pages (Lyubarev 02.06.2011).

The third commonly applied basis for refusing registration may perhaps seem more substantial. Registration can be withdrawn if the candidate has violated certain laws during the election campaign. Abuse of office, using money from other sources than the election fund, and violating intellectual property rights or conducting “extremist activities” during the election campaign are all valid reasons for denials. The disallowance of financing election campaigns from outside the election funds are reportedly routinely violated, but only cracked down upon on occasion. In selected cases, however, it may be interpreted in an incredibly strict and formalistic manner (Lyubarev 02.06.2011).

Problems related to the two latter bodies of legislation will be discussed below. The denial of candidates or parties on grounds of extremist charges must however be considered a tiny issue compared to the problems above. Yaroslav Nemchaninov got some attention when he was accused of having incited hatred against a supposed “social group” – which consisted of “deputies of the State Duma, excluding the CPRF [Communist Party] faction”(GOLOS 2011b, 10). In another case some years earlier, the registration of the People’s Party (*Narodnaya Partiya*) in Vladimir was cancelled after its campaign was seen to incite hatred against the police as a “social group” (Lyubarev 2007, 26). Denials based on copyright infringements seem to be more common.

5.1.4 Registration in a Mine-Field

The interviewed candidates from Perm and Vladimir are in unison in one respect: the law is way too demanding on technical details. It is indeed these details that are most frequently pointed to when candidates are blocked:

It is very strict, very formalized ... If you want to remove somebody, find a comma—no problem. Some bagatelle, trifle or imprecision ... Any tiny non-correspondence and it will mean removal from the elections. (Cherkasov 05.09.2011)

The legislation is used in such a way that it is possible to find violations absolutely everywhere, but only on some occasions and only with some candidates will they [actually identify them]. (Podvintsev 13.11.2011)

Only the most experienced politicians with a very professional lawyer would be able to conduct a perfect registration application with signatures, said Lyubarev (02.06.2011) in an interview.

In some respects the detailed demands of Russian election law are not so unique. After all, modern bureaucracies everywhere tend to create masses of rules and standards. Commonly, however, those who fail to meet administrative standards will simply face the irritation of additional paperwork. At times, a fine or an administrative fee may be imposed. In the cases reviewed here, by contrast, the principle of proportional punishment seems to have been completely neglected, as administrative infringements are deemed sufficiently grave as to deprive the candidates of their constitutional right to stand for elections. As Lyubarev (02.06.2011) pointed out, “all important laws concerning registration should have only this goal: to filter out unserious candidates, but let those pass who have or can get real support from the electorate.” Denying registration because of minor technicalities has little or no connection to this purpose. But then again, the interviewees do not see this as the real reason for the denials.

This formalism is also evident in the fact that signatures are almost exclusively rejected for being invalid (*nedeistvitelnyi*) and very seldom for being inauthentic (*nedostovernnyi*), that is, written by another person (Lyubarev 2007). When Mikhail Kasyanov failed to register as a candidate for the presidential elections in 2008, for instance, 80,147 of the signatures controlled were found invalid, but only 213 unauthentic (Buzin and Lyubarev 2008, 81). When Grigorii Yavlinskii was unable to register as presidential candidate four years later, 25.66% of the signatures controlled were found invalid, but almost all of them because they had been delivered to the Central Election Committee (CEC) in the form of photocopies (Supreme Court decision 8.2.2012). In other words, the rejections were based not on claims of foul play, but of sloppy handiwork.

This formalism creates great frustration among critics. As a Yabloko politician commented:

Of course there might be mistakes but this is not a crime, not a falsification ... Even if there is an error in the passport number, this does not mean that the person is non-existent. It just means that the passport data has been written incorrectly.
(Vishnevskii 26.08.2011)

Because of frequent denials for invalid or inauthentic signatures, citizens have repeatedly deposed or testified before committees and courts to confirm that their support and signatures are real. Often, however, such statements are not considered relevant by committees or courts which insist that expert evaluations are more important evidence (Eshanu 2011c).

Implemented in this way, the signature collection is, in practice, not so much to document public support as to document organizational capacity. According to a member of United Russia and a regional CEC, it is exactly this element that makes his party stand out in registration processes. United Russia's low number of registration denials, he says, is due not least to their skilled and professional lawyers. From this perspective, he adds, "signatures are money" (Anon. United Russia member 2011). Quite a few, however, would find the crackdown on these alleged technical violations a strange priority in a country ridden with more grave election violations and even blunt falsifications (Myagkov et al. 2009). They make more sense, however, if interpreted as selective law enforcement.

5.1.5 An Insider's Perspective

When I pressed a member of United Russia and a Central Election Committee (CEC) on the issue of selective registration denials, he made a discursive switch (section 4.4) and assured me that the committee he works for only had rejected those who were actually violating the law:

Everywhere that we have had scandals, I have looked at the basis for denials. The law is applied in a clean way, legal and correct ... The reasons [for denials] are mistakes done by the collectors and the candidates' lawyers. (Anon. United Russia member 2011).

Not only did the committee not deny any candidate without a legal basis, the CEC member explains: The committee was in fact so soft-hearted that its members on several occasions had given candidates and party lists particularly light treatment. Recently, he claims, candidates from the Communist Party were let through on the committee's good will. Earlier the Union of Right Forces (*Soyuz pravyykh sil*) had been allowed to run under the governor's protection despite grave violations of the election law. "We have in [our region] no instances when the law has been applied unrightfully," the CEC member concluded, "[but] I can find instances where the law has not been applied – when more [candidates] could have been refused" (ibid).

Only a handful of candidates will be eligible in a single mandate district, and the local committee must vote over the registration of one and each of them. Selective non-enforcement therefore becomes an *active* decision in the same way as selective enforcement. The registration process is *binary* in that it has only two possible outcomes. From this perspective, the above-mentioned CEC member is in practice reformulating the pig

Napoleon's decree in George Orwell's classic novel: All animals are equal (none are *unequal*), but some animals are more equal than others.

The politician from United Russia stressed that party membership was not necessarily decisive for selective law (non-)enforcement: "We are not always independent from politics, but dependent on politics in ways not favorable to United Russia." In fact, the only case of selective law enforcement (in his definition) he could think of was against a United Russia candidate. This case was also mentioned by Lyubarev as the only example he could think of when United Russia candidates had been deregistered. You also have cases in which the merits are almost identical but they only rejected the candidate not from United Russia, he adds (Lyubarev 02.06.2011).

5.1.6 Selections before Elections

While practices such as bribes or ballot stuffing on Election Day still take place in Russia and elsewhere, much electoral manipulation has become legal or quasi-legal (Gandhi and Lust-Okar 2009) in modern states. Not only may changes in the electoral system have dramatic consequences for how the votes cast translate into delegate seats, but also the *supply* side of elections may be altered, with important impacts. In several African countries, for instance, incumbent legislatures have included nationality clauses in the election laws in attempts to block specific opposition candidates (Schedler 2002, 42).

My findings sketch out the workings of a less direct way of manipulating which parties or candidates end up on the ballot. Unlike, for instance, the above-mentioned nationality clauses, the practice is not openly restrictive against any particular candidates. Instead, selective denial of a candidate or party registration in Russia is based on a technically demanding environment for *all* candidates, including regime insiders who stand for elections.⁴² The interviewed candidates complain first and foremost about double standards in the implementation of registration requirements, and they are united in their belief that that the motive for denials is overwhelmingly political.

⁴² The parties with representatives in the State Duma are, however, not required to collect signatures before elections in Russia.

While unable to verify these accusations about ulterior motives in individual cases, this analysis confirms that the Russian registration system is indeed prone to abuse. The combination of vague and frequently-changing laws, mixed with a lot of strict requirements, formalistic enforcement and harsh punishment, creates a legal environment in which no candidates can be entirely safe from denials without informal support from the power networks. Because the incumbent regime has both formal and informal influence over administrative and legal actors, it can rely on this formally apolitical administrative framework to work as a *de facto* political filter.⁴³ Selection prior to elections in this way reduces the need to employ more direct and illegal means on election day in order to ensure victory at the polls. Indeed, at its full potential, it can make other means of manipulation more or less superfluous.

In many districts, the ultimate consequence is that the people are deprived of their right to vote for their favored candidate. Especially in single-mandate districts, alternatives are often scarce. As indicated by both my own research (see section 7.1) and the extensive study by Maria Popova (2012) on electoral disputes, it is exactly when a candidate has real chances to win that they are most likely to fight for their registration in court.

⁴³ The regime's control over the committees is rather straightforward. The central election committee in Perm, for instance, had for the most part been set up by the governor and the incumbent legislature, with the leader nominated by the Federal CEC in Moscow. Also various less formal methods allow the incumbents and administration to fill the committees with loyal members (Buzin 2007; Popova, 2012). On the short biographies of the members presented on the Perm CEC webpage in 2011, four of the committee members were listed with explicit reference to the ruling party. There is general consensus among observers that non-partisan committee members are also dependent upon incumbents and regional administration, not least for structural reasons (Buzin 2007; Golosov 2011; White 2011). Even the CEC member interviewed (2011) admits that the committees' set-up is "politics, purely politics." While the Duma parties were represented with one candidate each, even a united opposition of three votes would hardly make a difference among the committees' 14 participants when it comes to a vote on registration. GOLOS in Vladimir (2011a) has complained that the TECs tend to be the products of CEC lobbyists representing the interests of the ruling party. Lyudmila Eshanu (2011a) also claims that rapid reshuffling of the territorial election committees (TECs) just before the elections has already become a "tradition" in Vladimir.

5.2 Extremism or Criticism: Controversies of Anti-Extremist Legislation and Enforcement.

Moving from electoral politics to the legal issue of anti-extremism makes for a radical change of political setting. While it is technically possible for candidates to be denied election registration based on alleged extremist activities, anti-extremism is a politicized legal field that first and foremost deals with extra-systemic oppositional elements.

Confronted with considerable problems of anti-constitutional and violent groups of both nationalistic and extreme Islamist character, the Russian authorities have under the leadership of Putin and Medvedev channeled considerable amounts of money and prestige into fighting political and religious extremism. The measures against extremism, however, quickly assumed a character whereby freedom of speech was compromised. In several cases, law enforcers seemed to confuse the security of the state with the survival of the political regime. Taking advantage of the situation, some Russian state actors saw opportunities for ensuring their own welfare rather than that of the Russian state and society in the fight against extremism.

According to SOVA, the trend of using anti-extremism for targeting political opposition and regime critics was evident earlier also, but grew considerably stronger from about 2005 (Verkhovsky 2008b). It should be noted, however, that controversial prosecution of regime critics involves a fairly low number of cases compared, for instance, to the systematic persecution of religious minorities based on the same legal framework (Rozalskaya 2011, Kozhevnikova 2010).⁴⁴ This fact of course does not make prosecution of politically critical actors any less real. In the period under scrutiny, controversial enforcement of anti-extremist legislation against critical voices was a persistent problem.

5.2.1 The Legal Framework

To some extent, the Russian authorities have been addressing the issue of violent nationalist groups in both word and deed. In 2002, a uniform legal framework was adopted to encourage prosecution. This new law “On Combating Extremist Activities” (Federal Law No. 114-FZ of

⁴⁴ In recent years, the groups that have been hit most severely include various nonviolent Muslim religious organizations and not least Jehovah’s Witnesses.

25 July 2002) arguably did not change much, legally speaking (Levinson 2003). Politically, however, the law carried significance. As commented by Brian Gross (2003, 726), the “consolidation of scattered legal provisions” was needed to put focus on the issue and facilitate anti-extremist prosecution.

While Gross (2003, 732) welcomed the initiative of creating a separate legal framework, he also feared that the law would be open to abuse, especially on the local level “where enforcement tends to be arbitrary and self-serving.” In his evaluation of the law, Gross (2003, 759) specifically discussed the possibility of using the law as a tool for cracking down on political opponents. The main issue in this regard is the list that defines extremist activities. As he (2003, 723) characterized it, it could be considered “rather vague and unpredictable.”

The law “On Combating Extremist Activities” underwent significant amendments in Putin’s second term of presidency. In 2006, a law (Federal Law No. 148-FZ of 27 July 2006) was adopted to further expand the definition of extremist activities. Realizing the poor quality of the changes, however, the Duma cancelled many of them the next year. The main legal keys to the Russian anti-extremist campaign in recent years are therefore to be found in later amendments in addition to the original text from 2002. Most important here are the major amendments of 2007, “On Introducing Amendments of Certain Legal Acts of the Russian Federation in Relation to the Fulfillment of State Control in the Field of Counteracting Extremism” (Federal Law No. 211-FZ of 24 July 2007).

The 2007-amendments to the extremism law importantly established “extremist-oriented crimes” as “any crimes motivated by political, ideological, racial, ethnic or religious hatred or animosity, or by hatred or animosity towards any social group,” a formulation now included in several of the articles in the Criminal Code. While these amendments were subjected to heavy criticism by worried civil society actors, Verkhovsky (2008a) holds that many of the 2007-amendments were for the better, at least from a technical point of view. Not only were many uncertainties from 2006 removed before they came into use, but the changes also attempted to address a need to deal with ideological and political motivation behind, for instance, neo-Nazi attacks on anti-fascists or ideologically motivated killings of gay men – actions that previously had fallen outside the concept of racial or religious hatred (Verkhovsky 2008a).

The legislation on extremism simultaneously deals with major crimes, minor administrative infringements, and offenses mentioned in neither the Criminal nor the Administrative Code. All these offenses are subsumed under a rather lengthy “definition,” or rather list, of *extremist activities*. While the law on extremist activities provides grounds for sanctions against organizations (including media outlets), individuals can only be legally sanctioned for violations of specific articles in the Criminal or Administrative Codes of the Russian Federation. The most relevant points in the Criminal Code are Article 280 (Public Appeals for the Performance of Extremist Activity); Article 282 (Incitement to Hatred or Enmity, as well as Abasement of Human Dignity); 282-1 (Organizing an Extremist Community); and Article 282-2 (Participation an Extremist Community). In 2008, a special anti-extremist department was created under the Ministry of the Interior to intensify and coordinate the enforcement of extremist-related crimes. In 2011, a special commission was also set up for this purpose.

The institution-building was also followed up by real anti-extremist efforts. In 2008, Verkhovsky (2008a) could conclude that “appropriate enforcement is increasingly common.” In the examined period, the developments have been complex and marked by contradictory tendencies (see e.g. Yudina and Alperovich 2011). In the years of 2007-2011, abuse continued to be a persistent problem, and in 2012 it increased significantly (Kravchenko 2013). While legislators have repeatedly changed the definition of extremist activity, the vagueness seems to have survived all the amendments.⁴⁵ Not surprisingly, liberal critics have been equally persistent in criticizing this feature. One of the more controversial issues in politicized enforcement of the law became the term “social group,” which I will address in the following.

5.2.2 Prosecution through Vagueness

Russia’s anti-extremist legislation has repeatedly been criticized for the vagueness of its terms. The opaque character of the law has resulted in a large volume of cases hardly in line with any normal conception of the term “extremism.” Among them is a number of overtly political cases against critics of the government and law enforcement agencies. The idea that “extremism” is a highly flexible tool in the hands of (mostly regional) political authorities is

⁴⁵In addition to their reports on enforcement, SOVA also provides sound analysis of the amendments in their legal, social, and political context. Further documents are available on SOVA’s web pages at <http://www.sova-center.ru>.

firmly embedded among the interviewees. Many of them stress how the law can be stretched to encompass every political statement:

Now I am sitting here with you, and they can issue a warning that we are extremists. That is, [the definition] is so broad, that anything can count as extremism ... Look, we have tested it ourselves, it is really like that – every action can according to this law count as extremism. (Karastelev 03.06.2011)

If you here [in Russia] criticise the authorities today, you are an extremist. That is the approach. They try to present every publication critical to the authorities as extremist. (Vishnevskii 26.08.2011)

Earlier when someone was not pleasing (ne ugoden), they [law enforcers] tossed some narcotics into his pocket. Now it is very easy simply to charge him with extremism ... The law in its current form lets [the law enforcers] punish not only extremists but also those who are not pleasing the authorities (vlast'). (Anon. journalist 2010)

The case against Vadim Karastelev and the Novorossiysk Human Rights Committee may serve to illustrate what controversial enforcement can follow from a vague definition of extremist activities. In this case, a special slogan used in one demonstration became central in the accusations of extremist activities. The banner said "freedom is not granted, it is taken."⁴⁶ According to the expertise report that the court used as foundation for their ruling, this text implied the following proposition:

A human being has individual and unalienable natural rights – the freedom or right to think, express himself, live and so on. Thus one cannot wait for these rights to be given man from somebody "above", but one need to take them with force, use them without preliminary permission. (Florin 2009)⁴⁷

Because the said slogan gives "priority to individual rights over the state," the slogan was found to have an "extremist character."⁴⁸ The Russian ombudsman on human rights (2010) subjected the court decision to heavy criticism in his annual report: "If this slogan is extremist

⁴⁶ "Svobodu ne dayut, ee berut," a reference to Maxim Gorky's words "prava ne dayut, prava berut" from the 1901 drama *Meshchane*, sometimes translated *The Philistines* in English.

⁴⁷ The specialists in literature (*literaturovedy*) have clearly copied the entry in the "Encyclopedic Dictionary of Winged Words and Expressions" (Serov 2003) word for word.

⁴⁸ In the interpretation of court documents by Karastelev himself. See the forum entry under the pseudonym vprutin 01.07.2009: "fabrikatsiya ekstremizma novorossiiskim pravozashchitnikam" on <http://komitet23.org/forum/index.php>, [accessed 22.06.2011].

... so is the Russian Constitution.” Furthermore, the Ombudsman (ibid) considered the expert conclusions to be “endlessly far from the truth.”

In the caseload presented by SOVA (e.g. Verkhovsky 2008b, Verkhovsky and Kozhevnikova 2009, Kozhevnikova 2010, Rozalskaya 2011, Verkhovksy 2012) and the US Department of State (2007-2012) reports, we see a significant number of overtly political interpretations of the term “any social group” (*kakaya-libo sotsialnaya gruppa*). The legal term is also found in Article 29 in the Russian Constitution, protecting minority rights, and the concept of political, ideological, or social hatred is included in several articles in the Criminal Code, including Article 63, which lists hate motive as an aggravating circumstance for any crime under Russian Law. However, it was not until 2007, when the concept of hate crime became “completely absorbed” (Verkhovsky 2008b, 10) by the anti-extremist legislation, that the term became a favourite tool for prosecuting regime critics. The notorious Article 282 (not to be confused with 282-1 or 282-2) of the Criminal Code has an especially prominent role in this process.

Article 282 applies to:

actions aimed at the incitement of hatred or enmity, as well as abasement of dignity of a person or a group of persons on the basis of sex, race, nationality, language, origin, attitude to religion, as well as affiliation to any social group, if these acts have been committed in public or with the use of mass media.

It should be noted that Article 282 does not address “political” or “ideological” hatred directly. The term “social group” has, however, proven extraordinarily flexible when anyone has wanted to infuse it with a political meaning.

The period from 2007 saw what could almost be called a creative urge to test what could be achieved by using this term. In 2009, for instance, one case was initiated based on charges of inciting hatred towards the social group of “owners of domestic motor transport” (Verkhovsky 2010). In 2010, Roman Zamuraev was accused of inciting hatred against another “social group” – people who had *not* joined the organization *Armiya voli naroda* (Army of the People’s Will) (Kozhevnikova 2010, my emphasis). In this interpretation, the “social group” included almost every human being on earth and turned the idea of protecting minorities on its head.

More important than such anecdotal evidence, however, is the persistent push of the Procuracy (or the Investigate Committee) and law enforcement to establish a political interpretation of the term “social group” to shield the political authorities and themselves from criticism. According to SOVA, the cases in which Article 282 was used to protect professional groups with close connections to the regime constituted a “vast majority” of the cases that invoked this term (Rozalskaya 2011). In contrast, only a few attempts have been made to apply the article to protect sexual minorities. These attempts have repeatedly failed on the grounds that sexual minorities were not found to constitute “social groups” (Verkhovsky 2010, Rozalskaya 2011).

The broad and varying interpretations of article 282 are due at least partly to the fact that both the terms *hatred* and *social group* are poorly defined in Russian law. In addition, the 2007 amendments to extremist legislation included a technically minor yet greatly consequential move to disconnect “incitement to hatred” from the idea of “violence or threat of violence.” As totally nonviolent actions could also be seen as “inciting hatred,” it then became hard to distinguish ordinary criticism from hate speech – legally speaking. According to Verkhovsky (12.11.2010), the only strictly legal interpretation possible is that virtually *all* political agitation is extremism, “because incitement to social discord is the general agenda of any political movement.” It seems that well-connected political forces have taken advantage of the blurred legal lines to push their own agenda, often by punishing critics of the regional government or law enforcement.

In a plenary session resolution in 2011, the Supreme Court addressed the problem of political abuse. According to this resolution (2011, article 7):

Criticism in mass media of state servants (professional politicians) or their actions and views should not in all circumstances in itself be counted as actions directed against the dignity of an individual or a group of people. In relation to these people, the limit of what is acceptable criticism should be broader than that concerning private persons.

The resolution goes on to underscore the point that law enforcement should take into account the motive of the individuals who have been spreading the extremist material; in order to be convicted for violation of Article 282, it is not sufficient that a crime has been committed *in* hatred but that the action was intended to *incite* hatred. The Supreme Court also stresses that fact-based political and scientific discussions should not be considered a violation of Article 282.

Promising as this may sound, however, a SOVA report from the same year observed that the “prosecutors and judges are so far simply ignoring [the 2011 resolution]” (Rozalskaya 2011). Also in 2012, several cases were initiated on grounds of inciting hatred against police as a social group (Kravchenko 2013). A case against the two activists Oleg Vorotnikov and Leonid Nikolaev (both members of the art group Voina) was closed in May 2012, when the investigation concluded that “there is no consensus whether the police comprise a particular social group.” In other words, the issue is still pending.

5.2.3 Formalism and Counter-Intuitive ‘Anti-Extremism’: Prosecution through Strictness

Some parts of the defining list of “extremist activities” are fairly clear and semantically consistent. Yet, these have been used in a controversial manner as well. Indeed, not only extremely flexible terms but also the very *lack* of flexibility seems to back up controversial rulings. According to SOVA reports, imitated anti-extremism based on formalistic interpretation and a wish to produce statistics is widespread. Hundreds, possibly thousands, of warnings have been issued to schools and libraries – for failures to block access to banned Internet sites⁴⁹ and for distributing extremist literature,⁵⁰ respectively (Kozhevnikova 2010, see also Rozalskaya 2011).

The actions described in the articles on “demonstration or dissemination of Nazi symbols” (Art. 20.3) and “massive dissemination of extremist materials” (Art. 20.29) in the Administrative Code are also regarded as extremist activities. A common criticism raised against these formulations is that they pay no attention to the context in which Nazi symbols or extremist materials are used. For instance, practically all screenings of documentaries about

⁴⁹ Schools are required to block all *potential* access to all extremist websites, regardless of whether they are actually visited using school computers. Schools often use state-provided filtering software that is not seen to adequately block access to these sites.

⁵⁰ Libraries are caught in a catch-22 in which they are prohibited from helping to distribute extremist literature, yet by the laws regulating libraries they are not allowed to remove them from their collections. After a cooperation project with the SOVA Centre amongst others, the Russian Library Association (RBA) provided its members with special instructions on how to best cope with the contradictions in organizing their activity. For details, see SOVA (2010) and the instructions themselves at Zaitsev (2010), also available at <http://www.sova-center.ru/racism-xenophobia/docs/2010/06/d19095/> [accessed 20.07.2013].

Nazi Germany can by a strict interpretation be considered a public demonstration of Nazi symbols, regardless of how negative an attitude they display towards Nazism.

The responsibility to ensure that the Russian media complies with law lies with the monitoring agency Roskomnadzor.⁵¹ If the agency identifies an indicator (*priznak*) of extremism in a publication or broadcast, the monitoring agency issues a formal warning to make the media outlet refrain from extremist activities in the future. SOVA lists a range of cases in which they find Roskomnadzor's warnings to have been unfounded, although not necessarily selectively initiated on political grounds. According to SOVA, 15 out of 33 warnings issued in 2009 were inappropriate or unfounded. In 2010, the figure was 10 out of 28 (Verkhovsky and Kozhevnikova 2011). A formal warning about extremism is in itself inconsequential, but a repeated violation within a year provides grounds for liquidation proceedings in court. Thus, formal warnings act as a good way to produce statistics without creating scandals (in practice, the first formal warning is rarely followed by a second). At the same time, issuing warnings is often seen as a typical tool for exerting pressure.

In 2009, Roskomnadzor issued a formal warning to the newspaper Novaya Gazeta's federal edition for quoting and publishing material from the webpage of Russkii obraz, a group of ultra-nationalists.⁵² According to a journalist in the newspaper's federal edition, the article intended to show the readers the real character of this legal national group, and therefore included full quotes and photos in the article (Girin 01.06.2011). Roskomnadzor, however, found the newspaper article to "incite to social, racial, national and religious discord (*rozni*)" as well as "propagandizing and publicly demonstrating Nazi attributes or symbols."⁵³ As the press secretary said:

You can call anyone an extremist. You can call a newspaper, yes Novaya Gazeta, [extremist] ... The news about our warning gave the fascists a good laugh. They laughed hard on the right-wing websites, these people that are always writing commentaries about how we are an anti-fascist newspaper. (Prusenkova 22.06.2011)

⁵¹ Roskomnadzor was up to 2008 part of Rossvyazokhrankulturu.

⁵² Nikita Tikhonov, the editor of Russkii Obraz' journal, was (with Evgenii Khasis) sentenced in 2011 for the 2009 murder of human rights lawyer Stanislav Markelov and Novaya Gazeta's journalist Anastasia Baburova.

⁵³ Official warning from Roskomnadzor to Novaya Gazeta 31.03.2010, author's archives.

Or as the newspaper's journalist put it: "You cannot fight extremism by punishing those who are trying to fight extremism" (Girin 01.06.2011).

The Supreme Court (2010, article 23) attempted to curb simplistic, formalistic, and counter-intuitive enforcement of this type through a plenary resolution stressing that mass media quotes should not be taken out of context when considering their legality. In 2011, the director of Roskomnadzor, Sergey Sitnikov, expressed a need to eliminate "contradictions in legislation regarding the qualification of images of Nazi symbols," a statement that at the time created some hopes for change (Verkhovksy 2012).

5.2.4 Extremism or Criticism

This analysis of anti-extremist legislation and its enforcement has pointed to several plausible answers as to why anti-extremism has become a rather popular tool of selective law enforcement in Russia. The material indicates that amendments to the legislation created legal uncertainties that were quickly exploited. Selective law enforcement seems to take place in two distinctly different ways, on different scales, and with similar outcomes. First, the application of anti-extremist legislation against critics of the political authorities in Russia indicates how the discretion provided by vague formulations can encourage politically skewed law enforcement. Second, we have once again seen how strict rules, if enforced relentlessly, may serve to support what would normally be considered against the spirit of the laws. In the legal issue area of anti-extremism, this sort of formalism does, however, seem to be a much less prominent problem for critics than the vague formulations.

When a legal rule, like article 282 for instance, is *overtly* oriented towards delimiting civil freedoms, it is not self-evident whether or not its politically skewed use should count as selective law enforcement. In contrast with the notion that everyone may be framed guilty, many critics of anti-extremist law propose that the legal formulations are so broad that every form of *criticism* may be encompassed under the term. While the legal term "social hatred" is very unclear indeed, one cannot say that it is catch-all in the same sense as is a minefield of bureaucratic demands. For purposes of using selective law enforcement to curb political dissent, the two may seem similar. Yet, they are not identical. The difference not only concerns whether *all* are under the threat of legal sanctions, but also relates to the degree of *agreement* between formal and informal predicates (see section 4.2). This difference is purely

relational and cannot be understood through looking at the formal or informal components separately.

When overtly political laws such as the ones on extremism are overextended, self-perceived targets and other critics of selective law enforcement roughly agree with the legal documents with regard to what action caused a reaction. This form of selective law enforcement may be relatively hard to separate conceptually from that of legal interpretation. Not only is the legal issue area highly politicized to begin with, but we may find it less easy to separate the distinct meaning of vague legal rules from informal rules that are also fluid by definition. The interviewees' conceptualization of coupled law enforcement also reflects this. Typically, a critic may claim that anti-extremist law is used as an instrument to get critics of the regime rather than to fight *real* extremism. This assertion is in essence not only a claim of political selection, but also a statement that disputes the law enforcers' interpretation of what can be considered extremism. The contention is thus also one over the meaning of poorly-defined terms.

At the same time, this form of law enforcement may still fall under the definition of selective law enforcement; it is politically biased, and the enforcers' purported "interpretation" of formal rules is allegedly guided by unofficial preferences and informal interests. We may also suspect that the targets are often predetermined with little care for what the law does or does not concern. While the interviewees may partly agree with the legal proceedings as to what *act* caused a legal reaction, they still insist that the motives were extralegal and not prescribed by law.

5.3 Raids on Pretext of Copyrights Enforcement

The third and final legal issue I will consider in this chapter is the legislation surrounding intellectual property rights and copyrights on computer software in particular. The practice of using, buying, and selling pirated software, movies, and music is known to be rampant in Russia. In the period of inquiry, piracy products were distributed openly on the Internet, by street vendors, and even in shops. As in most parts of the world, most citizens found no reason to actually worry that the violation of copyrights might suddenly result in legal sanctions.

While the task of policing may seem overwhelming, official Russia is not blind to the problem of copyright violation. It was under Putin's second term that Russian authorities started to take the issue more seriously, partly due to considerable pressure from international actors. After a few years of increasing state attention, stakeholders' reports (BSA 2004-2012) indicated impressive results, though certainly from a poor starting point. In the entire period investigated, the governmental enforcement of copyrights has gone up, and the relative amount of pirated software has gone down. In a 2010 press release, Georg Herrleben, the regional⁵⁴ leader of the international Business Software Alliance (BSA), praised the Russian government. Herrleben evaluated Russia's efforts as "highly effective," not least considering the uneasy world economy (BSA 2010). Two years later, BSA (2012) still evaluated Russian efforts positively and accredited the success to both the legislation itself and its effective implementation.

At the same time, there have also been accusations of selective law enforcement against critics of the government and candidates of the opposition.

This is the legal environment surrounding the third examined legal issue area that will be discussed in this chapter. As will be evident, the analysis sheds light on yet more aspects of selective law enforcement and variations in how it may be employed for political purposes.

5.3.1 The Legal Framework and Its Enforcement

Judging by the annual Global Software Piracy Reports of BSA (2004-2012), the increased attention to copyright violations paid off. Klein Preston, an expert on the topic, asserted in 2008 that "Russian law on copyrights provides a more than adequate legal framework for protecting intellectual property rights ... and has created an atmosphere of legal predictability" (Smith 2010, 141).

Although homemade copies are still distributed openly, the statistics indicate a largely successful enforcement of copyrights in Russia in the period examined. In the period of inquiry, the percentage of pirated software went down every year despite challenging economic conditions. In 2006 the estimated share of piracy on the software market was 87%

⁵⁴ Eastern and Central Europe, the Middle East, and Africa are together considered one region in the BSA organization chart.

(of total worth). Five years later, it was down to 63% (BSA 2004-2012). Indeed, in the years 2007 and 2008 Russia could boast the greatest improvements in this regard of all the 110 countries included in the BSA reports (BSA 2009).

For the purposes of this thesis, the most relevant legal text is Article 146 of the Criminal Code (Violation of Copyright and Neighboring Rights). The basic outline of the article was laid down in 2003 and defined the scope of possible punishment for the illegal acquisition, use, and sale of illegal software. It contained (and still does) a set of aggravating circumstances, including “repeated violations or violations by a group of persons in a preliminary collusion or by an organized group,” and in 2003 allowed for a punishment of up to five years of incarceration for the most serious cases.

It was not until the article was amended in the early spring of 2007 (Federal Law No. 42-FZ of 9 April 2007) that most of the controversial crackdowns based on article 146 took place. By these amendments, willful possession and use of software is considered a criminal offense if the total worth of the software exceeds an estimated 50,000 rubles. In addition, the amendments increased the potential punishment for aggravated crime from a five- to a six-year sentence. Importantly, this increase implies that an aggravated violation is now considered a “grave” (*tyazhskii*) crime according to article 15 of the Criminal Code.

The mere planning of a grave crime shall be punishable (Art. 30 of the Code); heavy fines (those exceeding EUR 15,000) may be imposed on an offender who commits a grave crime (Art. 46). ... A person who committed a grave crime may be brought to justice for such an offence at any point within ten years from the date of wrongdoing (Art. 78). A convicted grave crime offender shall endure a sentence in a penal colony (Art. 58). A release on parole shall be a complicated and long-lasting procedure in the case of committing a grave crime (Art. 79). Finally, a person who was given a sentence shall only have the right to cancellation of a criminal record six years after his (her) release from custody (Art. 95). (Golovanov 2007)

In other words, the changes turned copyright violations into very serious crimes, out of touch with the actual behavior of Russian end-users and their real expectations regarding the law’s enforcement.

5.3.2 Controversial Enforcement

The year 2007 became an important one in the history of political abuse of the laws on copyrights. In the spring, just a month or so after the new changes to the criminal code came into force, a conflict escalated in and around Samara, in which unlicensed software suddenly

became a hot topic. A Council of Europe summit was to be held in Samara-Tolyatti on May 17-18, and Angela Merkel and other top-level politicians had announced their attendance. To benefit from the international attention regarding the event, the protest movement associated with the Other Russia umbrella group arranged to hold the annual “Dissenters’ March” on the same date as the said summit.

The rally was sanctioned but simultaneously suppressed by a large-scale campaign involving mass arrests, intimidation, and harassment of local organizers, as well as other means. Shortly before the march was to be held, a special police department conducted several controversial raids in the city – allegedly in search of unlicensed software. The inspectors seized a number of computers from the purported suspects and initiated criminal proceedings for alleged violations of the mentioned Article 146. Not only are there strong reasons to believe that the raids were politically motivated, but it also seems the cases were completely uncalled-for legally speaking. The supposed “tips” that purportedly made the investigators conduct the raids were dubious. As the legal cases developed, the investigators (or hired expertise) even seemed to fabricate evidence in support of some of their cases. The prosecution eventually crumbled, and the Ministry of Finance was later required to pay compensation to the editor of Novaya Gazeta in Samara for the unlawful prosecution (Radio Svoboda 2011).

In the same year and on the same pretext, a number of well-known targets experienced similar raids in Nizhniy Novgorod. Newspapers and human rights organizations were targeted, and once again criminal procedures were initiated against an editor of Novaya Gazeta, this time of the Nizhniy Novgorod edition.⁵⁵ In these cases, the interviewees also share the view that ulterior motives guided the legal processes and that fighting software piracy simply served as a handy pretext.

Yet another controversial case in the same year and on the same pretext was the raid against the organization in Tula supporting the presidential candidacy of Mikhail Kasyanov (who was denied registration, see 5.1). My material also includes an interview I did with Anastasia Denisova (17.12.2010), who experienced similar trouble in Krasnodar in 2009 and 2010.

⁵⁵This editor happens to be Zakhar Prilepin (real name is Evgenii Prilepin and he sometimes writes using his second pseudonym Evgenii Lavlinskii), an internationally known author. Prilepin is also known as an activist and for his membership in Other Russia and the now-banned (for extremism) organization the National Bolsheviks, two organizations whose members keep being targeted by various means.

According to Chikov (22.06.2011), these incidents, together with one in Siberia,⁵⁶ account for most of the very blatant cases of political abuse of this kind in Russia in the relevant timeframe, making it a relatively isolated phenomenon.

Common to most of these cases and in clear contrast with the other two legal issue areas is the participation of private and international actors in the controversial prosecution. Not only the Russian state but also international firms and rights holders have intensified their fight against software piracy in Russia. Microsoft, in particular, was involved in many cases. Some observers interpret this circumstance as important. “Our law enforcement finally realized that computers are very important for their opponents,” said Vladimir Pribylovsky at the Panorama Research Center in Moscow, “and they have decided to take away these tools by doing something close to the West’s Agenda ... I suppose you can say it is very clever” (quoted in Finn 2007). In this interpretation, law enforcers’ cooperation with private partners has made it more difficult for international actors (particularly in the USA) to criticize the selective crackdown. We can imagine that the effect of this would have been considerably more significant if so many of the cases had not turned out to be completely fraudulent. Only after the *New York Times* stressed the issue (e.g. Levy 2010b) did a Russian interest group representing the victims of selective law enforcement manage to meet with Microsoft. As a result, the software giant halted its support for selective law enforcement and instead took some initiatives to counteract it (Levy 2010a).

Before we continue the analysis of the above cases, it should be mentioned that there is also a different category of cases that may still fall under selective enforcement of intellectual property rights. The selective and political use of intellectual property rights not only concerns raids against critical organizations accused of acquiring and using unlicensed software, but also deregistration of candidates for Russian elections. According to Russian law, a candidate standing for election may request an opponent to be disqualified for the elections if the latter can be proven to have violated intellectual property rights during the election campaign. A number of controversial cases have taken place on this pretext. Similarly to other ways of depriving candidates from standing for elections, creative

⁵⁶ Another case that received significant attention in the period of inquiry is the one against the NGO Baikal Environmental Wave (a.k.a. Baikal Wave) in Siberia. It is in many ways very similar to the cases against human rights organizations and newspapers in European Russia. See the organization’s own presentation of the problems in the temporary English language account at <http://baikalwave.blogspot.no/> [accessed 19.07.2013].

approaches in combination with an almost unbelievable formalism and completely disproportionate punishment are used in order to get unwanted candidates deregistered. In Perm, for instance, the central opposition figure Konstantin Okunev had his registration withdrawn after he had used photos of a public monument in agitation material, without the necessary permissions (Polina 2011b). A local source claims that at least one candidate from the party in power had done the same thing, but that the case against him was dismissed (Podvintsev 13.11.2011). Similar cases of controversial deregistration on the basis of such infringements have taken place on several occasions, among which the case against Evgenii Urlashov possibly is best known.⁵⁷

5.3.3 Indecent Enforcement of a Decent Law?

Despite the positive remarks of BSA, the support and respect for copyrights in Russia remains underwhelming. According to a representative of Novaya Gazeta in Nizhniy Novgorod, for instance, the newspaper did “of course” not have all software licensed at the time.

[One of the officials] told me personally that almost 99% of Nizhniy Novgorod’s newspapers have licensed software. Of course I knew that this was not true because it is not possible for a regional newspaper to have the money for licensed software – it is a very expensive thing. So of course I was supposed to be ashamed .. .but I just looked at him and said, “Oh please don’t tell me this lie because it is just ridiculous.” (Novruzova 16.12.2010)

According to Prilepin, who has been editing this newspaper, “it’s perfectly clear that up to 90 percent of companies, and practically 99 percent of regional newspapers and medium-sized businesses, and 100 percent of private computers, have some sort of pirated programs on

⁵⁷ Evgenii Urlashov won the mayoral elections in Yaroslavl in 2012 despite his critical attitude towards the incumbent regime. The victory was celebrated among the opposition all over Russia and even got some international coverage. Less well known is perhaps the case that was launched in order to get Urlashov deregistered for the unsanctioned use of “valentine hearts” and other clip art found on the Internet. On his blog (<http://urlashov.livejournal.com> [accessed 26.2.2012]), Urlashov states that the charges might indeed have threatened his registration had they been sustained. The opposing candidate, who earlier had filed the case, did however withdraw his claims in what seems to be the result of some sort of political compromise. Author’s correspondence with Ksenia Maltseva, GOLOS Yaroslavl, September 2012.

In 2013, Urlashov once again made the headlines when he was relieved of his duties, arrested, and charged with taking kickbacks. Unsurprisingly, Urlashov has declared that he found the charges to be politically motivated. See e.g. Herszenhorn (2013).

them” (quoted in Osipovich 2007). Kurt-Adzhiev (18.11.2010) also suggests that the pervasive non-compliance with this law is part of the explanation as to why the search for software in 2007 turned into a popular tool “to calm down ... the more intelligent part of the population.” Considering the massive non-compliance at the societal level, the odds of striking gold on randomized raids for pirated software would presumably be good.

Adding to the insights from election law and the law on extremist activities, the example of selective copyright-enforcement indicates how a law need not be vague or otherwise weak in order to be effective. Because non-compliance with the legislation is so common, even a crystal-clear law has the potential to be used selectively and with some success against a large segment of the population. Several interviewees make sure to tell how “everyone” uses pirated software in Russia. The high degree of criminalization may be popular with international actors such as BSA, but the harsh punishment and the extensive mandate of investigators may be seen by others as draconian. It is also not easy to know at all times whether your software is indeed genuine, or if it is simply created to look like the real thing.

The fact that interviewees bring up these issues, however, does not imply that the targets of selective enforcement are actually guilty of any violations at all. Most of the interviewees in fact stress that their software was indeed licensed. In at least some of the cases, the later development indicates that they were right. In the case against Sergei Kurt-Adzhiev, the chief editor of *Novaya Gazeta* in Samara, a second expert analysis (on the initiative of the defense) revealed that the pirated software was installed only after the day of confiscation, a discovery that won the case and embarrassed the prosecution (Andreeva 2009a). In the case against Kuzmina and GOLOS in the same city, the criminal case was based on alleged use of a pirated version of “Garant.” According to Kuzmina (19.11.2010), the law enforcers did not even care to remove the USB stick they had used to install the pirated software before taking photos of the computer screen as evidence: The message “a new USB device has been detected” still showed in the corner of the screen. By standard procedures, the investigators may themselves choose which experts will conduct the technical examination for piracy software, obviously no guarantee against the fabrication of evidence (Andreeva 2009b).

Obviously, lack of evidence of legal violations did not stop the raids from taking place or criminal cases from being initiated in several cases. What explains the popularity of this suppressive ‘technology’ (see section 3.3.1) then is seemingly the combination of two circumstances.

First, the law enforcers enjoy a broad mandate to act upon weak or non-existing suspicions. As one official put it, “any person with a sense of justice” may file a request to conduct a search (Andreeva 2009b). This individual will also be safe from legal repercussions unless the accusations can be proven to be deliberate lies (ibid). In the case of Novaya Gazeta in Samara, the investigators formally acted upon a suspicion filed by a person completely unknown to the editor. When he was later called in for interrogations, this individual claimed to have read about the newspaper using unlicensed software on a website, but could not remember which (Andreeva 2009a). The case is not unique, and it is hardly very difficult for Russian police to find a person willing to produce such a request. In the case of the raids against the Volgainform news agency, one of the targets in Samara, the police had no permit at all, but instead subsequently acquired a backdated document (Kotova 18.11.2010).

The second answer to why this practice has become so popular is probably the immediate and crippling effect of hardware confiscation, leaving the targets no time to react or defend themselves before they have come in harm’s way. The political context of the raids suggests that several cases have been timed to coincide with particular events. As Chikov observes, “they have suddenly decided it’s a great tactic ... They can stop all the activities of a group at a key moment, before a march or during the election period” (quoted in Finn 2007). Furthermore, criminal cases are often accompanied with travel bans, and excuses can be made to hold computers for a prolonged period of time. In addition, raids can be an efficient way to gather intelligence on troublemakers. Even if the search and subsequent expert examination reveal no actual violations, the law enforcement officials’ efforts may have serious consequences.

5.3.4 A Third Way to Selective Law Enforcement

As was the case with anti-extremism, we can see how increased legal attention towards a real problem can create new opportunities for actors who want to pursue their informal interests. In both cases, we see how the resources poured into the legal system for fighting a general problem were also instrumentalized by elite groups for extralegal purposes. At the same time, the two legal issue areas are very dissimilar. The law on copyrights does not of course address political views. In addition, the examined abuse of Article 146 seems to be primarily a tactic to cripple the short- and medium-term capacity of the targets through confiscations, travel restrictions, and criminal investigations.

Yet, we can by no means rule out that the massive non-compliance with the law on copyrights in Russian society at large has also contributed to the decision to utilize this particular tool in selective law enforcement. Because the level of compliance is so low, the prosecutors had a statistically good chance of hitting substantial evidence upon which they could build more solid legal cases and thus hope for more severe punishment to be imposed.

6 The Role of Law in Selective Law Enforcement

I have underscored the point that formal rules in selective law enforcement primarily function as a pretext for enforcing the informal rules of political conduct. We have also seen that Russians in general do not put much stress on the law in their conceptualization of legal abuse. While laws do not serve as the law enforcers' "reason for action," the legal rules, however, still have an important part to play in selective law enforcement. The previous chapter provided some answers to why different legal issue areas have become favored tools for selective law enforcement. In this chapter, I will synthesize some of the findings to explore how legal texts are put to use in quasi-legal repression on a higher level of abstraction. Towards the end of the chapter, I will also provide some tentative conclusions on whether it would be plausible that weak laws are being legislated on purpose. First, however, I will briefly examine some other relevant aspects to how the laws utilized influence the repressive practice.

6.1 The Role of Law in Selective Law Enforcement

Before I start to look at the role played by "prohibitive law" in selective law enforcement, the role of "secondary rules" should be mentioned. Various rules defining jurisdiction and procedures are important for selective law enforcement on several levels. On a fundamental level, the empowerment of rules and legal actors to implement them is at the core of the rational-legal mode of organization on which selective law enforcement is parasitic (Schauer 1991). Just as it is impossible to envision a legal system without jurisdiction, it is also impossible to imagine selective law enforcement without it. The institutionalization of checks and balances between the executive and judicial branch is also crucial to how discretionary rules turn out in actual enforcement practices. In addition, jurisdictional rules shape selective law enforcement in a more direct fashion. Extending a law enforcement agency's mandate to conduct surveillance or make inspections, for instance, may have a direct impact on how this agency is utilized in quasi-legal schemes. We have already seen how the mandate to conduct searches based on thin evidence has been important to selective raids formally initiated on suspicions of pirated software.

While all this is true, this study will not deal with jurisdictional questions at great length. Whereas the secondary rules are not a core aspect of my conceptualization of selective law enforcement, the *formal predicates* of prohibitive rules play a central role – namely the role of *pretext*. Even though selective law enforcement is theoretically speaking not law enforcement at all (see chapter 4), the choice of a particular legal pretext bears significance for at least four reasons:

- **Popular support may be a relevant aspect of selective law enforcement**

The choice of legal issue area may have relevance for the economic funding and popular support of the repression. As argued throughout in this study, there are reasons to be very careful when discussing how much popular approval the “legal veneer” (Levitsky and Way 2010, 28) may lend selective law enforcement. This fact is abundantly true in Russia where trust in both law and its enforcers is extraordinarily low (see section 3.1). That being said, we cannot rule out that instrumentalization of formal rules on *some* occasions may resound positively with *some* parts of the population.

There are presumably two minimum prerequisites for selective law enforcement to gain popular approval to any significant degree. First, the legal charges must have some degree of credibility. Second, the legal violations should resound with societal norms. In Russia, where law suffers from considerable disrespect and thus has a limited degree of normative authority in itself, we can expect that the violation itself must be in direct conflict with established norms if it should lead to social condemnation. For this reason, to prosecute politicians for large scale embezzlement will have greater chances of mobilizing society’s support than to prosecute them for copyright violations.

The two requirements above are the very same that would make for an effective smear-campaign. We may therefore reasonably question whether it is indeed the legal veneer that produces popular support or rather the enforcement of societal norms. If the prosecution of Khodorkovsky attained a certain level of popular support, it was not necessarily because he was believed guilty as charged, but because many thought he *deserved* punishment, morally speaking.

A third factor influencing the popular support of selective law enforcement relates to how popular acceptance for legal acts may be manipulated through the framing of an issue. The

Putinist campaign against extremism provides a good example of a propagandized campaign designed to mobilize popular approval and simultaneously be used for repressive purposes in Russia. During his first two terms of presidency, Putin spent much time promising to fight the threat of extremism, and his successor Medvedev also stressed this topic. The clustering of extremism with other political issues such as political dissent, foreign interference, and political instability presumably made it easier for the government to prosecute political dissenters as extremists (Horvath 2013).

Also legitimacy that can be achieved in this way is limited in Russia. As E.P. Thompson (1975, 262-263) said: “The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation, and seem to be just.” If this precondition is too seriously undermined, legal façades “will mask nothing, legitimize nothing” (ibid). The obvious use of legal tools for repressive purposes will, over time, undermine any attempts to convince the general public that today’s Russia is ruled by law and not men: observers “will not be mystified by the first man who puts on a wig” (Thompson 1975, 262). In this way, to the degree selective law enforcement plays upon legitimizing aspects of law, it simultaneously undermines this legitimacy. With regard to anti-extremist legislation, Rozalskaya (2011) reports that its continued abuse has led to an “ultimate loss of public confidence” in its enforcement.

Campaigns may also generate a sort of pressure that can influence selective law enforcement indirectly. Many resources and much prestige may be invested in such campaigns, something which will also produce administrative pressure to produce statistics to justify the efforts. We have seen that law enforcers have rushed into inappropriate and unnecessary acts against such targets as schools and libraries. SOVA links this action to a need to “beefing up the numbers of anti-extremist activity” (Verkhovksy 2012). This element may also have affected law enforcement with political motives:

For the people in power (dlya vlastei) it is very important to charge (obvinit') civil activists precisely for extremism. A verdict of extremism is very important for them because the E-department is measured by the number of cases it produces within the frames of extremist legislation. They don't want to catch real criminals as this is very difficult. But we are always nearby. (Karastelev 03.06.2011)

- **The pretext may influence legal behavior**

Selective law enforcement may also retain a modicum of *actual* law enforcement – if not by intention then in practical consequences. So far, I have argued that selective law enforcement is not aimed at enforcing formal rules. Furthermore, I have stressed that at the end of the day it is the *perception* of predicates how people will react to a legal act. For this reason, I have suggested, selective law enforcement is not really law enforcement at all.

In practice, however, even actors who claim to be prosecuted for political purposes may choose to respond to the legal issues. The interview material suggests that some self-perceived targets *do* follow the law more carefully after they have experienced a crackdown, at least when the laws are internally coherent. While the above quoted co-editor for Novaya Gazeta in Nizhniy Novgorod found it unrealistic for a regional newspaper to use licensed software, she also pointed out that the newspaper acquired all the necessary licenses after the crackdown. To judge from a leader in the Russian Human Rights community, the example is far from unique: Numerous “activist groups across the country” reacted to the 2007 raids with checking upon the legality of their software (Finn 2007).

With this in mind, one may argue that the enforcement is somewhat effective and possibly legitimate after all. In my opinion, however, neither claim should be credible. First, the effectiveness and legitimacy of enforcing formal rules must be seen in relation to the overall tasks of law enforcement. With regard to the above example, punishing minor end-users may be less than effective when considering the well-known leniency toward distribution of the very same pirated software literally around the corner. Second, and more importantly, the issues of legal violations and political selectivity should not be confused with each other. Even if a given organization “deserves” the law enforcers’ attention from a legal point of view, and even if such attention will increase the level of legal compliance in the future, this fact does not make a *political selection* any more legitimate. The modicum of actual enforcement of formal rules does not change the defining characteristic of selective law enforcement: legal procedures have been initiated based on informal criteria.

- **Laws define the scope for *de jure* punishment**

The choice of pretext is also important because it defines the scope of possible *de jure* punishment. This element of a law, the *consequent* in the above terminology, presumably

influences how a certain law is used in selective law enforcement. To get a well-known political activist behind bars in order to scare the politically active public, the initiators of selective law enforcement would need a different scope of *de jure* punishment and a different pretext than if they only wanted to temporarily impede the efficiency of an organization without creating a great scandal. An equally harsh punishment for every form of non-compliance would also remove the incentive for petty violators not to radicalize and increase the severity of their infringements. In this way, the functional aspect of the *proportional punishment* principle is also valid for the enforcement of informal rules.

- **The laws constitute the backdrop for informal influence**

Finally, and most central to my analysis, the way laws are formulated may be important because some formulations invite informal influence into the legal system. Not all laws carry the same potential for selective law enforcement. A law that is coherent and clear yet not overly strict, routinely enforced, and generally respected could be manipulated only with difficulty. In such a case, law enforcers must base themselves on both real and substantial violations or on fabrications, at least if they are to push a case all the way to (and through) a court of law. Laws that contain vague formulations or bureaucratic demands that nobody adheres to may, for this purpose, be a much better tool.

As will be discussed at length below, these laws contribute to a legal situation in which legal actors are granted wide discretion to make decisions based on legally irrelevant criteria. Instead of legislating laws that are openly targeted against liberal and leftist opposition, the skilled manipulator can, for the same purposes, use the potential inherent in weak laws. In this way, incoherent laws can decrease the need for manipulation beyond the initiation of a case – and increase the chances of an informal violation to end up in a formal sanction.

6.2 The “Catch-All Theory”

Most of the interviewees do not hesitate to share what legal prescriptions they have been accused of violating. Many claim that their cases were riddled with procedural errors or even that evidence had been fabricated. Some admit that they did indeed infringe on the law, while others reject this. All the prosecuted individuals, however, have a dismissive attitude to the legal pretext in common. They do not in any way feel that they have infringed upon any rule

of normative significance. In the previous chapter, we saw that the interviewees frequently argue how the laws used against them could be used against whomever the authorities pleased. Some also suggest that the laws are legislated for the particular purpose of selective enforcement against people such as themselves.

I have noted (in section 2.3) how Russians' colloquial phrases reflect a full subordination of law to power, leaving little room for complexities. And according to the framing of selective law enforcement I sketch out above, the law may indeed seem irrelevant. If it may be used against more or less everyone, it will have little impact upon the actions of the legal subjects and can be seen as completely peripheral to the practice. Yet, this argument may also be turned on its head. The law seems to be an important key to opening up the legal system for informal influence. It seems to be exactly the weakness of law that makes it so useful for repressive purposes. In other words, a law may be important by virtue of its unimportance. What the regime insiders would need for the purpose of quasi-legal repression would be a law that does not stand in the way between the informal initiative and the harmful consequence to the target. Rather, they would want a law to bend easily to give access to the coercive power associated with it.

The proposition that Russia has a legislative framework according to which every critical voice may be found guilty of non-compliance in some way or another is a crucial aspect of my interviewees' stories of selective law enforcement. In the following sections, I will refer to this idea about the legal environment as *catch-all* perceptions or *catch-all* theory.

Below I will deal with the catch-all theory in three ways. First, I will explore the foundation for the catch-all perceptions. As indicated by the examination of the three legal issue areas, legal incoherence may be constituted in different ways and seem to contribute to selective law enforcement. As will be seen, these different *sources of incoherence* give the laws a broad field of possible application.

Second, I will show why these sources of incoherence in themselves do not provide a sufficient explanation of how laws connect to actual quasi-legal practices. The argument is basically that while incoherence gives laws a broad field of possible application, so also do other discretionary laws – including laws that in positive terms may be called *flexible*. I will argue that the essence of legal discretion concerns *delegation* of power and that the outcome of discretionary laws is entirely dependent upon the mechanisms that influence this delegation

of power. In other words, the idea of catch-all and hence the contribution of laws to selective law enforcement can only be understood in the cultural and political context.

Third, I will explore and extend a concept used by Ledeneva to address legal incoherence in the specific Russian context. I will also discuss the possibilities for incoherent laws in this context to be legislated for the particular purpose of selective law enforcement.

Finally, I will subject the catch-all theory to a number of objections and point out some weaknesses in the interviewees' claims. As will be clear, we should not accept the pointed formulations on face value, yet neither should we dismiss them as irrelevant.

6.3 A Typology of Incoherence

Lon Fuller (1958/1977, 33-39) famously showed his readers eight ways in which a law can *fail* to be law. The dull King Rex in Fuller's allegory has a sincere wish to attain a status in the history books as a "great lawgiver." Despite relentless efforts, however, Rex simply fails. Subjected to one meaningless law after another, the king's subjects fail to see their purpose and find no incentives to act upon them. Fuller's point was that law has an "inner morality," a set of traits necessary for law to succeed in being law.

I have no intentions to actively participate in the voluminous and still ongoing debate that Fuller's perspectives has raised on the inherent morality of law.⁵⁸ Rather, I use the below list as an illustrative example of what Jeremy Waldron (2008, 1145) calls "legal principles" – and then especially "formal principles" – "principles about the form the legal norms should take". In a non-essentialist meaning, these principles are not highly controversial as rules of thumb, albeit all of them may be subjected to exceptions if we look hard enough (see Marmor 2003). In "The Morality of Law" Fuller formulates the principles in the negative, summarized in a list of "eight distinct routes to disaster":

⁵⁸ The publication of Fuller's "The Morality of Law" in 1958 came to be a subject of hefty debates, especially the one in retrospect known as the Hart-Fuller debates. See Fuller (1958), Hart (1958) for the original contributions and Cane (2010) for a recent collection of articles on the debates. For a criticism of Lon Fuller's more controversial claims on the tight relation between morality and law, see for instance Kramer (1998) or D'Amato (1981). For an integrating perspective, see Waldron (2008).

The first and most obvious lies in the failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective chance; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the power of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally (8) a failure of congruence between the rules as announced and their actual administration. (Fuller 1958/1977, 39)

While no real legislation would fail so utterly to regulate human conduct as did the laws in Fuller's allegory, some laws do, if seen through critical lenses, come remarkably close. Russian laws that are utilized in selective law enforcement have been criticized as being difficult to understand, excessively burdensome, contradictory, too frequently changing, close to impossible to comply with, and marked by inconsistent and arbitrary enforcement. Rather than simply dismiss all Russians as legal nihilists, we should therefore also look at how the legislators are contributing to the uncertain legal situation by acting partly as King Rex did. In the following sections, I will outline some of the key ways in which Russian legislators create what may seem to be ineffective legislation.

Rubber Formulations

Clarity is often reported to be lacking in Russian legislation. Several of the legal issue areas that reportedly are used in selective law enforcement in Russia are regulated by laws that have been termed opaque, vague, or ambiguous.⁵⁹ We may call the controversial passages *rubber formulations*, as their main quality for the purposes of selective prosecution is that they can be stretched to encompass a large number of cases.⁶⁰

With regard to anti-extremism, vagueness constitutes the most important foundation for selective law enforcement, not least in relation to the term "social group." Alexander Verkhovskiy (12.11.2010), director of the SOVA Center, suggests that the law on extremism offers no legal guidance whatsoever on how to enforce it: "It is very easy to accuse practically

⁵⁹ Marmor (2003) underscores that vagueness should not be confused with ambiguity, the latter being a more technical deficiency in legislation such as those raised by homonyms. The reviewed literature and informants do, however, not consequently discern between the two terms.

⁶⁰ A similar colloquial term "rubber article" (*rezinovaya stat'ya*) exists in Russian.

anybody of extremism. Of course it is used selectively – how can it not be used selectively?” Verkhovsky’s position is not unfounded and certainly not unique– similar views are common among my interviewees. It should be noted that while some vague laws may be overextensions of their mainstream interpretations, rubber formulations may also provide legal foundations in cases in which there is no agreement between formal and informal predicates at all (see 5.2.4).

The Legal Minefield

Another good place for the regime to seek suitable legal pretext for quasi-legal crackdown is the infamous Russian bureaucracy. Bureaucratic overregulation has long been seen as a major problem in Russia, cutting into the power of the sovereign and keeping the population hostage to extortionist schemes (Karklins 2005). In the words of Vladimir Pastukhov (2002, 68), at the turn of the millennium, the Russian bureaucracy was reminiscent of that of the pre-industrial era: “A machine which is irrational and not subject to genuine control.” In the case of selective law enforcement, however, it is not the bureaucratic actors themselves who are seen as extortionists. Rather, they partake in the fight against political dissent on behalf of their patrons (see section 7.3).

Ordering a legal subject to cross a legal minefield without making mistakes is in effect close to demanding the impossible. As Fuller (1958/1977, 37) puts it: “To command what cannot be done is not to make law; it is to unmake law, for a command that cannot be obeyed serves no end but confusion, fear and chaos.” Surely, there are no laws in Russia similar to his caricature legislation in which citizens summoned to the throne were given ten seconds to report (1958/1977, 36). The number of legal traps, however, compensates for such requirements. To quote Jackson (1940, 19) again: “With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost everyone.”

The above review of election registration enforcement is full of examples of how a legal minefield may work in practice. With help from the best lawyers in town, the most experienced of politicians may possibly manage to get through the minefield unharmed, but this maneuver surely cannot be a meaningful requirement for participating in political elections in a democracy.

Sleeping Statutes

Sleeping statutes are incoherent in a way that differs starkly from the rubber formulations. In fact, sleeping statutes may be both clear and internally coherent. They are also different from the legal minefield – to comply with a sleeping statute would not necessarily be so difficult. To the degree that we can speak of incoherence, it lies with the sleeping statutes’ lack of touch with the society they are intended to regulate. When a law is generally not enforced and is ignored by many or most legal subjects, its sudden enforcement can provide a handy pretext in quasi-formal schemes.

Violations of sleeping statutes may in theory lead to severe repercussions, as in the case of the Russian law on intellectual property rights. Yet for the most part, few experience the sleeping statute as a major constraint. By definition, there is a mutual understanding between the law enforcers and the population that the law will be left sleeping or only enforced in grave cases. Such deliberately lax enforcement is sometimes referred to as *gedogen* after the (previous) Dutch policy on light narcotics.⁶¹ When suddenly the otherwise unenforced law is selectively and harshly enforced, it comes as a surprise attack.

We have seen that international observers are very satisfied with the Russian progress in enforcing copyrights. One may argue that it does not, then, fit a notion of a sleeping statute. Considering the massive numbers of minor end-users who infringe on this law, however, the chance of being randomly caught must be seen as miniscule.

Contradictory Rules

Legal subjects may from time to time encounter legal situations in which the law requires and prohibits the same conduct at the same time, both “ ϕ ” and “not ϕ .” As Fuller (1958/1977, 65) points out, however, a requirement to do both “ ϕ ” and “not ϕ ” simultaneously is not a contradiction in *logical* terms. While it is not logically contradictory to demand something and then impose a punishment for the very same act, such laws will surely be both mean and unfair. Given equal sanctions, they will also have poor (if any) capability to guide conduct

⁶¹ “*Gedogen*” is Dutch and roughly translates as “tolerate,” “permit,” or “condone” (www.wiktionary.org), though some claim it does not translate into English at all. As opposed to toleration, *gedogen* is an active government policy to deal with behavior that is legally forbidden yet culturally acceptable.

and will effectively ruin the legal subjects' possibility to stay on the virtuous path of law. This latter attribute, of course, is exactly why contradictory rules may be exploited with success in quasi-legal schemes.

Rasma Karklins (2005, 22) has stated that exploiting "contradictory rules" is "a common tactic" in Russian business, but today many of the more blunt legal contradictions have been removed. In the above analysis of controversial anti-extremism, however, I noted how libraries are trapped between two contradictory demands (see fn. 50).

From my presentation of politically motivated law enforcement, we remember a similar situation arising from the signature verification process in Perm. When signers in Perm had to state their registered place of residence in the 2011 elections, many residents found themselves trapped in a situation in which two authoritative documents (passport and official name of the region) provided different answers to whether they officially lived in Perm *oblast'* or Perm *krai*, and any answer might be found wrong at the discretion of the controllers. This trap of binary and mutually exclusive interpretations is not an inherent contradiction in the law itself, but rather is based on discretion of interpretation. Yet, the outcome is reminiscent of a catch-22.

Lack of Promulgation and Frequent Changes

If we stick with Schauer's terminology (see fn. 36), a subject may "happen to comply" with a rule one does not know about but cannot be *guided* by this rule, and thus will not *follow* it. Therefore, while provisions unknown to the public may guide law enforcers, they cannot guide the conduct of legal subjects. No ordinary citizen or even expert may possibly know all legal rules in detail, but we may usually depend on the information being available when sought after. When rules are not promulgated, we have no certainty that we are complying with them. Secret laws and decrees exist in Russia and could in theory provide a powerful political tool. In practice, however, such laws are not seen as a big problem within the Russian human rights community and certainly not with regard to the examined legal issue areas.

Closely associated with the lack of promulgation, and far more relevant to the examined cases, is the practice of amending rules so frequently that the legal subjects cannot react to the changes. The obvious example from the material presented above is the incredibly frequent amendments to Russian election legislation. Too often are amendments introduced just before

elections or “on the sly” (Bundina 06.11.2011) when opposition deputies are unaware (e.g. away on summer holidays). The idea (and concern) here is of course to amend the requirements so close to the election campaign that the opposition has no time to prepare properly and will fail to recognize all the subtleties of the new amendments until it is too late.

6.4 Legal Discretion and the Delegation of Power

Rules can never be equal to their justification. A rule is by definition an abstraction, sacrificing case-specific circumstances to more easily comparable criteria (see Schauer 1991). A legal formalist may argue that, for the benefits of an impersonal mode of governance, the few unfair or even absurd rulings may be justifiable. In Schauer’s (1991, 228) words: “It is exactly a rule’s rigidity, even in the face of applications that would ill serve its purpose, that renders it a rule.” Within this conception, we would normally expect legislators to delegate authority to the rules by making them coherent. By doing so, the rule-makers would entrench some generalizations of today to make these generalizations valid in the world of tomorrow (ibid). Only to the degree that the rules are clear will the legal actors understand what the rules (or rather the legislators) require of them.

Even so, it is not rigidity but flexibility that has become the mantra of modern law: “Foregoing maximum clarity is a sign of compromise and pluralism” (Marmor 2003, 27). In this way, laws in modern societies are increasingly rules of thumb. In many cases, it makes sense for legislators to leave further specification of broader law to the experts in specialized departments. Leaving room for interpretation not only makes room for the more specialized legal actors to carve out details, but also makes it easier for them to more easily adapt if or when implementation reveals unintended consequences. To safeguard flexibility for dealing with yet-unspecified threats to the state, legal systems also tend to include rather lofty references to vital security interests. Political leaders do not want rigid rules to stand in the way when real threats are to be dealt with. In other words, the open-ended character of the Russian law on extremism is not unique.⁶² In general, security concerns seem too important to be left to law alone.

⁶² The principle that security can trump individual rights is even endorsed in the European Convention of Human Rights. As formulated in the Convention (article 2.10), some restrictions to civil and human rights are legitimate in the interests of “national security, territorial integrity of public safety, for the prevention of disorder

From this perspective, discretionary rules are good because they allow legal actors to take the context into consideration. We may hope, therefore, that legal actors will use this discretion to interpret the “purpose” or “spirit” of the law. In this way, “open flexible rules are arguably fairer, less harsh, more in tune with the sense of justice” (Friedman 1975, 35). At the same time, we have seen how in certain contexts any such hopes would be in vain. How then should we interpret the Russian catch-all theory? Why does discretionary justice turn out to be so radically different in different settings?

6.4.1 The Delegation of Power

Following Schauer (1991), I have suggested that legislating is normally done to entrench generalizations and to *empower* them so they will have real influence on decision-making elsewhere and in the future. However, if these generalizations are very broad or otherwise unclear, they are not very empowered at all because their ability to curb the discretion of the legal actor will be minimal. By legislating a discretionary law, therefore, the legislators delegate less power to the rules and more power to the legal actors; the legislators in effect grant the implementers *de facto* legislating power (Schauer 1991). In the words of Marmor (2003, 14), “the question is basically one of institutional choice.”

When flexible rules are thought necessary, legal systems “must somehow keep discretionary rules in proper bounds” (Friedman 1975, 35). In other words, legislators grant the legal actors discretion by legislating flexible laws, but they are also responsible for controlling and delimiting this very discretion. Influences that limit the actual discretion may be many, but the power to define what is proper (in Friedman’s terms) does not transcend the power relations in a society. When the rules leave discretion with legal actors who are vulnerable to outside pressure, the outcome of this discretion will largely depend on the political context. Put differently, the discretionary law will never be better than the legal actors responsible for implementing it, the legal and political systems they are acting within, and the tradition they are part of.

or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

For these reasons, it would be naïve to trust a claim that discretionary rules necessarily take heed of our “sense of justice.” Instead, discretionary rules pave the way for extralegal influences, and they do this for better or for worse. Political and social tendencies may play into the actual enforcement as may particularistic interests. Because the legal actors are human beings, how the discretion plays out is contingent not only upon legal but also upon social and political contexts. In today’s Russia, the vacuum left by discretionary (or incoherent) laws tends, when stakes are sufficiently high, to be compensated for with particular concerns. In an environment with strong traditions of exploiting legal defects, incoherent formal rules turn out to be especially troublesome for those who run up against powerful interests.

6.5 Catch-All in Russian Context

The above analysis indicates that catch-all perceptions are at least partly justified and that selective law enforcement on the ground may not least hinge on the legal texts themselves. It also suggests, however, that the weakness of laws is not a sufficient explanation by itself. If weak laws open the way for discretionary (in)justice, so may also other laws in other societies where some room of maneuvering is seen as a common good. What is considered weak, then, is in part dependent on the context of the laws. In particular two elements of the Russian legal and political system play into this issue.

First, the legal actors are highly dependent on the power networks in charge of the county and may thus be suspected to interpret rules according to their interests. The top-down dimension of legal nihilism in Russia will lubricate the willingness of regime insiders to instrumentalize the discretionary laws for their own purposes and the willingness of legal actors to participate in the scheme. The authoritarian and clientelistic incentive structures will presumably reinforce this tendency.

Legal nihilism also has a second face. Not only state agencies, but also the population in general, are not particularly law-abiding and shows a dismissive attitude to law and legal institutions they do not trust. Many rely on informal practices to survive in the grey-zones of the Russian economy and also to deal with the state. The legal nihilism on the part of society influences the role of law in selective law enforcement because it lubricates its catch-all properties from below. The reason President Kuchma in Ukraine could use anti-corruption laws to keep his subordinates in line, we recall, was not least the pervasive level of corruption

(Darden 2001). Dazzled by the outstanding cynicism and apparent unfairness of the above cases, we should not forget this aspect of Russian quasi-legality.

While I give ear mostly to self-identified targets of selective law enforcement in this work, we cannot understand the role of law without considering the legal nihilism among the population. The election committee member from United Russia, for instance, lamented how horribly bad the opposition, especially the local communists, filled out their registration documents: “What the communists do with their documentation show two things. First, they spit on the preparation of documents, on quality. The question is what are they hoping for? [They hope] for a scandal or for administrative resources!” In the categorization of the United Russia politician, there are three basic categories of candidates in Russian politics: first, you can be an *edinoross* (a member of United Russia). Second, you can be on the governor’s black list. Third, you can be a nobody. Every candidate wants to run for elections under the flag of United Russia, he claims, but at least “it is better to be in the black list of the governor than a nobody” (Anon. United Russia member 2011).

The director of SOVA noted that claiming to be politically persecuted has become a viable strategy for individuals that are charged with extremist activities and also among those who in reality have little to complain about (Verkhovsky 12.11.2010). When I discussed selective law enforcement with Daria Miloslavskaya, who represents both the Lawyers for Civil Society and the International Centre for Not-for-Profit Law, she was also quick to lament the opposition networks lack of legal compliance:

From my point of view, it is easy to follow legislation ... My colleagues whom you mentioned don't like to follow the law, but rather to tell me or other lawyers that it is impossible ... If our oppositional groups and organizations were ready to follow the law, they would not have any problems. But unfortunately, they do not ... And every time they think that [their problems] is because of their political orientation. (Miloslavskaya 16.11.2010)

There is little reason to doubt there is a grain of truth in these statements, although they seem to be too sharply formulated to fit most of the cases I have examined.

One scholar that tries to deal exactly with the interactions between the particular Post-Soviet Russian environment and incoherent formal rules is Ledeneva. In her most theoretical passages, Ledeneva (esp. 2006b, 10-27) discusses how the legal texts and path dependencies interact to form opportunity structures upon which actors form their strategies and practices. In her view, the legal dysfunctions cannot be seen independent of Russian historical

trajectories and legal culture. In other words, she does not challenge the potential of the laws to regulate behavior as such, but points to its shortages in the Soviet and Russian experience and how these shortages are reproduced.

According to my interviewees, we might recall, the Russian laws utilized have certain properties that make everyone vulnerable for prosecution. Ledeneva observes the same phenomenon in her research on Russian informal practices: “The incoherence of formal rules compels almost all Russians, willingly or unwillingly, to violate them” (Ledeneva 2006b, 13). In other words, she stresses the legal dysfunctions in order to explain informal practices. In the very next sentence, however, Ledeneva shifts her focus to see the legal dysfunctions as products of the economic and social context: “Anybody can be framed and found guilty of some violation of the formal rules because the economy operates in such a way that everyone is bound to disregard at least some of these rules.”

In other words, the laws may not be exceptionally well-written in themselves, but they are particularly dysfunctional because they are not in line with the society they are expected to regulate. Ledeneva makes no attempt to hide her disregard for post-Soviet lawmaking but underscores that it is the *totality* of the legal situation rather than independent laws that reproduces the legal situation. Where corruption pervades a system, even anti-corruption laws may be easily adapted for corrupt purposes.

Because of the pervasiveness of rule violation, punishment is bound to occur selectively on the basis of criteria developed outside the legal domain [...] ‘Unwritten rules’ compensate for defects in the rules of the game and form the basis for selective punishment. The violation of unwritten rules can result in the enforcement of written ones, which paradoxically makes it just as, if not more, important to observe the unwritten rules as the unwritten ones. (Ledeneva 2006b, 13)

In this way, we can see the role of weak laws in the specific Russian context and identify a link between catch-all (as construed by both incoherent laws and path dependencies) and the penetration of informal criteria into law enforcement. The result is a situation where the individual is extremely vulnerable to the system: “While everybody is under the threat of punishment, the actual punishment is ‘suspended’ but can be enforced at any time” (Ledeneva 2006b, 13).

The punishment is left suspended in most cases, because the state has neither the capacity to nor an interest in punishing everyone (Ledeneva 2006b, 13). Punishment, therefore “becomes a resource in short supply” (ibid). Ledeneva seems to argue that the influence of extralegal

criteria is not only a possible consequence but also structurally necessary to compensate for the legal vacuum.

The idea of suspended punishment is in many ways reminiscent of *kompromat*, the gathering of compromising material for purposes of direct or (more often) indirect blackmailing. In both cases, the individuals are kept under constant pressure, what is sometimes called “on the hook” (*na kruchke*) in Russia (section 7.2). In the case of suspended punishment, however, the collection of compromising material is downplayed. As the argument goes, because rule violations are everywhere (at least according to a strict interpretation), the manipulators do not need to search extensively to find them. As noted in the introduction of Darden’s “Blackmail State” (section 1.3.2), the regime insiders have no need for massive surveillance to find a legal basis for prosecution if the legislation itself is really catch-all. As we have seen by now, the legal system and its misfit with society produce a “pool” of formal pretexts. It is this pool that constitutes the source of catch-all legality in the Russian context – a pool consisting not only of laws but also of a legal system unable to curb grave manipulation and a political system where informal patronage is an important form of organization.

While the above-mentioned legal vacuum created by pervasive rule violations may possibly encourage the penetration of extralegal rules into the legal domain, it does not in itself provide a sufficient explanation as to why this happens. Indeed, we may reasonably claim that no modern state has ever had the capacity to punish everyone guilty of infringements. Due to a lack of resources, punishment is therefore a resource in short supply *everywhere*. Law enforcement agencies are hardly able to catch every criminal or regulate every bureaucratic exchange, and pervasive non-compliance is common worldwide in fields like software licensing. Yet, the degree and character of extralegal influence vary across time and space.

There is more than one way for the regulators to solve the issue of distributing punishment. Legitimately it might be solved by establishing a transparent policy of priorities, like selectively investigating the potentially gravest violations before minor infringements within the same field.⁶³ To effectively combat software piracy or narcotics criminality, smart law enforcers will prioritize catching the big fish or limiting supply rather than arresting private

⁶³ As mentioned in the introduction, some scholars also use the term selective law enforcement about such legitimate priorities in a reality of limited resources.

end-users. If we presuppose that law enforcers are rational (and disinterested), they will seek the best overall accomplishment of their tasks within the frames of their limited resources.

Second, the limited “supply of punishment” may give room for the norms and values of the legal actors, which in general would be expected to more or less reflect that of the population as a whole. In this form of discrimination, there are in general no immediate material benefits involved for the prosecutors. A typical example would be systematic administrative racism through systematic, but not necessarily conscious, prosecutorial bias.

Third, the mechanism of suspended punishment may lead to selective law enforcement. As stressed earlier, the actual outcomes of legal discretion are highly contingent upon political context and legal culture, something my study serves to illustrate.

6.6 Weak Laws on Purpose?

With the assistance of Ledeneva’s idea of “suspended punishment,” I explored above how incoherent laws in Russia contribute to create a legal vacuum that may open a door for selective law enforcement. The institutional insufficiencies, it may thus seem, have certain “enabling aspects” that actors can exploit. One implication of this line of thought is worthy of separate attention: those who are able to fill the legal vacuum may have an interest in creating it in the first place. In other words, because authoritarian leaders are in a position to benefit from the non-transparency and incoherency in legislation, they also have incentives to contribute to its reproduction; weak laws are not necessarily weak for everyone.

The interviewees predominantly find regime insiders to be behind the initiation of their cases. Not seldom do they blame individuals associated with the same elite group that also legislate the rules that are subsequently manipulated (section 7.3). On occasion the manipulator may even be a legislator himself.

In the years under examination, the regime was possibly at its strongest to date. In 2008, Russia’s political leadership successfully transferred presidential power to the preferred candidate and controlled the State Duma through the party United Russia, which enjoyed about two-thirds of the seats. From this position, despite processes of hearings, reviews, and sharp criticism of draft laws, Russian legislators kept acting like dull king Rex in Fuller’s allegory, not least with regard to laws on extremism and elections. It is pertinent to ask why.

While we cannot conclude on the intentions of law-makers, we can make assessments of incentives and legal output. We know from experience that Russian legislators are not reluctant to use legislating power for furthering private or group interest (e.g. Karklins 2005; Yakovlev and Zhuravskaya 2009). The interview material also shows that several interviewees believe that laws are created to be incoherent on purpose. In the particular field of election law, various ways to tweak the system in the incumbents' favor are known in many countries. What is new in this regard is the allocation of repressive power to legal actors instead of, or in addition to, authoritative legal documents. As Wilson (2005, 84) notes: "the authorities have a vested interest in *not* cleaning the system up. As long as all are guilty to an extent, the state decides who is punished."

We have also observed how selective law enforcement on many occasions seems to take place directly after controversial amendments whose incoherence may lead the way for abuse. It would be reasonable to assume that a certain proportion of the subsequent abuse is influenced, if not triggered by, these changes, giving the political leaders windows of opportunity to crack down upon their adversaries. Yet, we may also suspect that the laws are created for the purpose of cracking down in periods of increased political tensions. In this way, the laws and their abuse may paradoxically be aimed at the same target.

Several scholars on post-Soviet legality seem to have thought along the same lines, though the length and complexity of such arguments is lacking, and evidence remains circumstantial:

Formal rules [in Ukraine] are often purposefully designed in such a way, that informal patron-client relations must be used in order to act successfully and that all actors are rendered potentially vulnerable. The legal framework creates uncertainty and can simultaneously be used as an instrument to exercise control and power. (Zimmer 2008, 268)

Hendley (2010, 6) notes how Soviet law was often drafted in a purposely vague manner with the goal of preserving maximum flexibility for the state in enforcing it. Robertson (2011, 193) holds that the amendments to NGO legislation in 2006 were intended to create "a legislative framework that can be used selectively." Also Ledeneva suggests on occasion that incoherence in fact may be the legislators' ulterior purpose and not necessarily a work accident:

The government could set up selectively targeted but accountable tax policies to regain the profits that were made by the oligarchs in the 1990s. But this would 'liberate' the oligarchs, enable them to play further with such clearly set formal

constraints, and deprive the state of informal means of control. Reserving informal leverage against oligarchs in order to make them stay in line is an effective tool and an essential feature of political power in Russia. (Ledeneva 2006b, 194)

Ledeneva thus strongly suggests that the political regime refrains from legislating better laws because they want to stay on top of the situation.

The weak formal institutions and their manipulation, Vladimir Gel'man (2004, 1030) concludes, are not a "legacy of the past" but a result of political institution building. In his conception, it is exactly according to this blueprint that Putinism is built.

From this perspective, this use of quasi-legality to an extensive degree violates what Waldron (2008) calls the "formal principles" of legality, exemplified in Fuller's list. In sharp contrast to Fuller's King Rex, however, Putin's regime has some success to show for it. For purposes of regime consolidation and keeping dissent down short- or medium-term, at least, selective law enforcement has been a very useful tool and incoherent laws have been part of the success story in this regard.

Fuller's point of departure was that the law is necessarily intended to guide human conduct. I build upon rather than challenge this basic premise. What other purpose may rules possibly have which does not fall within this general purpose? Fuller did not, however, account for the possibility of the law promoting the ability to shape human behavior in a different fashion. More than anything, selective law enforcement is a mechanism of rule-enforcement and is thus aimed exactly at guiding human conduct. While the mechanism of selective law enforcement utilizes law, however, it does so in a very different way from what Fuller considered.

In our case, goals are achieved through a domination of the whole system, including legislators, law enforcers, "neutral expertise," and partly the judicial branch. For this reason, there is no need to draw the rules for exercising power clearly on the legislative level. Even though the laws are unclear, they can be used to carry out an important instrumental function in the political system. As we have seen, incoherent rules may assist the repression of diverging views and the reproduction of the regime. Obviously, the incoherent rules do not achieve this *by themselves*, isolated from the system they are part of. They only guide human conduct when supported by informal institutions. In themselves, we might contend, they are not much more than hollow shells. But then again, no laws work independently of their implementation.

What selective law enforcement lacks in clarity and structure, it gains in applicability. Selective law enforcement can promote interests and enforce rules where ordinary law enforcement is hindered by democratic or constitutional constraints. In fact, had these rules been perfect laws in a Fullerian sense, they would have been all but defunct for what we now speculate is their designated purpose. The Fullerian model not only assumes that law *must* guide behavior in order to be a law, but also that law must do this in a special *way*. In other words, it does not take into account a political system in which laws may work in a completely different fashion and be legislated with quasi-legality in mind. Yet all laws are legislated in a particular context, and their meaning cannot be grasped outside it.

6.7 Validity of Catch-All Claims

Above, I have discussed the catch-all theory in a broader perspective of legal discretion. So far, I have largely accepted the foundation of this discussion, namely the catch-all theory. In this section, I will adjust the perspective somewhat by subjecting the catch-all theory to some validity tests. While a notion of catch-all may be useful, not least in discussions like the one above, it should be used with care and benefits from being employed in a moderated version.

Maria Rozalskaya (2011) is correct when she observes that “while expressing opinions on extremism, a person is likely to note that in our country [Russia] this concept is “‘elastic,’ and virtually everyone can be labeled as extremist.” She is also correct, however, when she adds that this is not an “entirely accurate” description of reality. Many critics that promote such a view lack “sufficient command of the necessary facts or legal issues to be able to expand on their statement” (ibid). The analysis in Chapter 5 indicated that several Russian laws have properties that make them valued tools for selective law enforcement. Yet it would be a simplification to simply accept that “everybody may be found guilty” according to Russian law.

Perhaps the strongest argument against the belief that every Russian may be found guilty of legal violations is that many indeed are *not*, even when powerful interests seem to be pushing the case against them. While investigations have been *initiated* on a great variety of pretexts that may give us the impression of catch-all legislation, the cases are filtered through a system of legal actors who do not always support the accusations. Prosecutors may refuse to run cases handed to them, and judges turn down many selectively initiated cases on the grounds that nothing illegal has in fact been done.

Within the interview material, there is a frequently appearing inconsistency. While many of the interviewees make claims supportive of the catch-all theory, several of them simultaneously exempt themselves from its validity; they themselves are *not* guilty. The interviewees that blame the law simultaneously lament the various illegal elements *within* the legal cases. I have already mentioned the cases of planted evidence in Samara. Another illustrative case is the trials in Khimki, Moscow region. For his alleged leading role in the storming of the Khimki administration building, the anti-fascist activist Aleksei Gaskarov was charged with aggravated hooliganism motivated by hatred. Gaskarov rejected the charges, however, and claimed that the prosecution used small-time criminals to produce false witnesses in court:

The police did not put them in prison, but used them for their own ends. Usually, they go to the court to give [false] explanations. These guys have taken part in many court cases earlier ... When the court case began I had the first opportunity to speak with these guys. After three questions it was obvious that they worked for the police and had never even been in Khimki. (Gaskarov 02.06.2011)

Less serious violations on the part of the law enforcement seem to be very frequent in the examined cases, at least if we are to believe the interviewees. Procedural errors are a big problem in the execution of justice in Russia's legal system, and it does not seem less prominent in selective law enforcement. Many cases are filed on claims that are later rejected by procuracy or courts as too far-fetched, and legal experts are not always impressed by the legal veneer: "You don't have to be a lawyer to understand the absurdity of these claims," writes Buzin (undated) commenting on a case from the Moscow region: "But being a lawyer I will say that this is, I beg your pardon, judicial drivel (*bred*)."

The legality of cases is often up in the air as the secondary rules and judicial practice are also subjected to interpretation. Far-fetched "interpretation" of vague formulations, formalistic enforcement, disproportional punishment, dubious expert analysis, and raids on poor foundations are all elements whose legality is not always easy to determine.

The great advantage of selective law enforcement as an instrument of repression, writes Riabchuk (2009b, 269), is that it allows "persecuting political opponents with clearly non-political charges, in full conformity with the letter of a law." My own research indicates that the cases are often not so clear after all. And if the laws had indeed been so incoherent that they would make everyone guilty of violating them, this form of manipulation would be superfluous.

If we turn to the reactions of the prosecuted targets, we also see here an element that forces us to adjust the catch-all theory. As indicated in the beginning of this chapter, some targets of selective law enforcement adjust their legal behavior in order to “remove the pretext.” In the same way as highly dubious manipulation, this behavior is, from a legal point of view, also inconsistent with the full implication of a catch-all theory. If there is an indefinite number of pretexts in the pool, it would make no sense to remove one or two of them.

In conclusion, Russian law is probably *not* a tool of universal application from which no political activist can escape, even in an environment that in many ways seems to encourage particularistic use of laws. In many cases, at least, the legal filters are too strong (or not weak *enough*), and at the very least the success of the cases is contingent on how much political power is put behind them. Russia is not a lawless society, only one in which the law is frequently manipulated. Also, Russia is not a repressive machine whose only interest is to please its leader. The police, the bureaucracy, different special agencies, the secret services, the procuracy, and the courts in many cases do not act in unison, even when a case is selectively initiated by powerful forces. Rather, they operate in a complex social reality and are, like other human beings, subjected to several impulses and capable of independent thought.

At the same time, the incoherent laws *do* seem to play an important role in how the political authorities and law enforcement agencies suppress critical voices. Many of the controversial cases are founded precisely on the most criticized legal formulations and often shortly after new amendments provided the opportunities. While we should be aware of the limitations, there are several reasons to take a moderated catch-all theory seriously.

First, in order to be a meaningful concept, catch-all should of course not be understood literally. Catch-all does not refer to *all* legal subjects as such, but rather to an unreasonably high proportion of them, the exact numbers being less interesting for my purposes.

A second observation that makes a notion of catch-all relevant is that, while a selectively-initiated case against a regime critic will not always get that individual convicted, the legislation seems to provide sufficient grounds to *initiate legal action*. As will be elaborated in Chapter 8, the interview material suggests that even when no punishment is officially recognized as taking place legal acts have preventive and punitive qualities in themselves. To a considerable extent, therefore, law enforcement agencies can enforce the agenda of the

political regime without extensive support from the judiciary. At the very least, incoherent laws seem to be a sufficient pretext to engage in quasi-legal harassment.

Third, the catch-all theory is possibly more relevant to targets who lack the resources and capabilities to defend themselves adequately. Because a well-organized defense can mobilize public support and draw on informal networks in addition to providing legal assistance, it would be reasonable to suspect that overly speculative accusations will have a lower chance of success in these cases. We can only suspect that targets with less to put up against selective charges will buckle to unfair proceedings and court rulings more quickly.

Finally, we should note that the hypothetical question of whether everyone *may* be found guilty cannot be answered; we can only see that not everyone in practice is. What potential lies with the incoherent rules and what may be realistically effectuated are different entities. When it comes to building a selectively initiated case “properly” with good chances of achieving its purposes, the manipulative and legal skills of the prosecution are hardly unimportant. In Bækken (2009, 97-98), the lack of skills in preparing cases seemed to be an important factor in why human rights NGOs often won cases in court when subjected to selective law enforcement. The poor preparation of selective cases is obviously relative to the skill of the defense in counteracting them. In Bækken (ibid), the lack of ability and experience of state actors to frame a case upon NGO legislation became starkly evident when contrasted to the skill and professionalism of civil society lawyers specialized in exactly this legal field.

7 Perceptions of the Game

The idea of selective law enforcement as a complex mechanism of rule enforcement presupposes a set of conceptual components. In this chapter, the conceptual components related to the informal workings of the mechanism will be examined in more detail. In the second part of the chapter, I will also look more closely at how the interviewees come to interpret the cases as political. These indicators of selectivity are necessary for the legal acts to be interpreted as informally motivated and thus tell us how the political regime may transmit its informal rules to actors within society.

On some issues, the perceptions of actors who see themselves as subjected to selective law enforcement are crucial to the functioning of the mechanism itself. Perceptions of informal criteria, for instance, directly influence how actors act upon the legal problems. Information as to why the interviewees come to believe in these criteria, moreover, tells us something about how informal rules are transmitted and reproduced in society. How the interviewees experience this politicized law enforcement is part of what selective law enforcement is and how it works.

On other issues, the perceptions themselves are not of crucial impact with regard to how the mechanism functions. Here, our interest therefore lies not with these perceptions, as was the case in the above examples. Rather, we seek empirical data about informal political games to which my methodological approach has no *direct* access. Questions of this type include who the initiators of selective law enforcement are, what their motives are, and how they communicate their wishes to the legal actors who act upon them. The answers my methodology can produce on these issues are second-hand. Considering the interviewees' field of work and their experience with selective law enforcement, their statements on these topics should be approached as those of experts, albeit clearly biased ones, considering their personal or professional stakes in the cases.

As will be seen, the research presented on the informal components in many ways stirs up more questions than the explorative research design is able to address adequately. Yet the data is sufficient to sketch out the great variation within the conceptual components of selective law enforcement, and it suggests how the variation can be addressed in further research. For the sake of textual fluency and the considerable interconnection between various components, some elements are addressed outside of their designated subsection.

7.1 The Informal Criteria

The words, faces, and voices of my interviewees indicate bitterness, frustration, and possibly contempt for the individuals responsible for their problems. Yet, their narratives are strikingly matter-of-fact. Often, the interviewees rationalize the legal actions against them as dictated by the logics of power and by reference to the path dependencies of Russian politics. The adversaries are not depicted as demons but as *cynics* within a corrupt system. Selective law enforcement is in this view the product of instrumentalism, pragmatism, and ideological nihilism. The successful manipulator is the one who is willing and able to instrumentalize both formal institutions and informal networks. In other words, the interviewees tend to see selective law enforcement through the lenses of instrumental rationality.

If I were to articulate one core rule that guides selective law enforcement in Russia, it would be something like this: If you threaten the interests of powerful groups or individuals –by criticizing or otherwise drawing negative attention to them – you stand a substantially higher risk of experiencing quasi-legal trouble. According to the interviewees, problems occur for those who are “not agreeing” (Starkov 15.11.2011), “not pleasing” (Anon. journalist 2010), “unwanted” (Eshanu 05.09.2011), “who speak their mind” (Slautina 13.11.2011), or are “critical to the authorities” (Vishnevskii 26.08.2011). One interviewee gathers that the main principle is always the same: “to pressure those who think and speak differently” (Kuzmina 19.11.2011)

There are certain costs in terms of time and resources to arrange a selective legal crackdown. Although Putin’s regime as a hybrid political system may be particularly vulnerable to political dissent (Robertson 2011), we would expect intervention to take place only when it is assumed to be worth the price. The more substantial, visible, and personal the criticism is, the more likely it will be picked up as a considerable threat by regime insiders and the greater is the risk of reprisals. Vadim Karastelev explained how the Novorossiysk Human Rights Committee had been working consistently and purposefully against the interest of the regional authorities for years.

[The krai authorities] want to create a good image for themselves. We talk about the ugly stuff which is going on, and this contradicts what they are saying in the mass media. And because we also point to facts, laws, experts, and so on, they don’t like it at all. If we just shouted “Aaaah, everything is bad here,” they would hardly pay any attention. But when we come up with facts, take them to court, write letters, meet journalists – they don’t like it. This has gone on for more than ten years, so

now they simply hate us. If somebody put a gun in their hands, they would shoot us immediately. (Karastelev 03.06.2011)

Some of the prosecuted interviewees see their cases primarily in terms of a long-lasting bad relationship with the authorities. Others see the prosecution first and foremost as triggered by a specific act or acts that preceded the legal crackdown. Typically, this trigger may be the publishing of a critical report, conducting a journalistic investigation, or organizing (an) oppositional event(s). In the case of tax claims against the Kazan Human Rights Center, for instance, one of its lawyers sees the tax claims as a direct response to the human rights organization's (successful) initiative to bring a high-ranking police officer to justice for violent behavior under the influence of alcohol: "This was the main and obvious reason, there can be no other reasons" (Khrunova 13.12.2010). She explains that the NGO repeatedly put forward such cases against the regular police, but that they first experienced trouble when they touched one of its leaders (ibid).

In a third set of cases, the selective law enforcement takes the form of preemptive actions aimed at limiting the impact of planned events, such as meetings, conferences, rallies, and similar activities.

While we may categorize the informal criteria in such groups, the informal criteria are often more mixed. Frequently, the legal crackdown is part of a dynamic conflict that has lasted for some time. Commonly, for instance, a sour, long-term relationship culminates over specific issues or actions. In more than one case, a bad relationship culminates in specific events leading to legal pressure that again is sustained into election campaigns, in which the political leadership is particularly sensitive to criticism. In the case of Nikolai Gusak, the trouble started with repeated conflicts at work in which he attained some legal experience. Then the trouble escalated after he became involved in a property dispute and went further as he decided to run for office with the opposition in the local elections. As he summed it up himself, referring to the local power networks: "My activity was too high for them". After Gusak found a reason to take rumors about his planned mutilation or assassination seriously, he sent letters of caution to various state agencies, including FSB, in order to protect himself. As it seems, the letters unleashed a chain of legal charges, starting with accusations of planned terrorist bombings of the local court. Gusak states that the court chair personally filed a total of 38 accusations against him in the following months (Gusak 10.06.2011).

The complexity and time-span of legal cases allow for considerable improvisation in the duration of the process. Actors on both sides have time to adapt to changing circumstances and engage in informal bargaining. The motives for initiating a case are not necessarily the same as the motives for sustaining it over time. While selective law enforcement is *phased* in the meaning that a selection by definition precedes the first legal acts, this does not imply that the informal influence is limited to the initial selection only. On the contrary, there are reasons to expect informal interests to keep pushing cases in which they have stakes.

In addition, in the few cases in which we would possibly have expected informal criteria to be more clear-cut, the improvisation upon changing circumstances makes the informal criteria more complex and context-bound. The raids that took place in Samara may serve as examples. Circumstantial evidence and the timing certainly indicate that the raids were related to the suppression of the so-called Dissenters' March (*marsh nesoglasnykh*), a planned opposition rally that was set to coincide with a major EU-Russia Summit in the region. The rally was officially sanctioned, but its potential for mass mobilization was suppressed by a number of means, including the mass arrest of activists in several Russian regions (Horvath 2013, 194-195).

In the days preceding the planned rally, the editorial office of Novaya Gazeta in Samara was searched and its computers confiscated. Criminal proceedings were initiated against the newspaper's editor-in-chief, Sergei Kurt-Adzhiev. Officially, the raid was conducted on suspicions of unlicensed software, but according to Kurt-Adzhiev (18.11.2010) the crackdown was intended to paralyze Novaya Gazeta's activity as one of few local media outlets which authorities suspected could mobilize readers for the Dissenters' March. They also raided the neighboring office of the news agency Volgainform, presumably to stop them from lending Novaya the necessary hardware to continue publishing.⁶⁴ The leader of the agency, Lyudmila Kotova (18.11.2010), who is also Kurt-Adzhiev's spouse, is unsure whether the agency's political attitudes may have influenced the decision to take away their computers, but she is positive that the raid was based on improvisation and not part of any prearranged plan.

⁶⁴ In contrast to the planned raid of Novaya Gazeta, the raid against Volgainform seemed unorganized and lacked an official permit, Kotova (18.11.2010) explains. Days later, a permit was issued and backdated.

Almost simultaneously, the regional office of GOLOS was subjected to similar treatment. The office computers were confiscated on alleged suspicions of copyright violations, and a case was opened against its leader Lyudmila Kuzmina. The NGO's staff was locked out of the premises with access neither to documents nor hardware. Like Kurt-Adzhiev, Kuzmina is a well-known critic in the area. Before the rally, a chain of related events unfolded in which Kuzmina became involved in criticizing how the police tackled the situations arising as tensions grew. One day when the rally drew near, she had just given a critical address on a radio program on *Ekho Moskvy* when she was informed that the GOLOS office had been raided by a special police unit.

Although these raids were presumably part of an initiative to suppress the "Dissenters' March" in Samara, the two targets of the raids were not released from the hook when this task had been completed. The computers of Novaya Gazeta were not returned, and criminal proceedings against Kurt-Adzhiev (18.11.2010) were sustained for more than two years. Criminal investigation against Kotova (18.11.2010) was dropped, but another case was opened against Volgainform, in which Kotova had official status as a witness.

Although the procedures against Kuzmina in person were cancelled in December 2007, both Kuzmina and other GOLOS staff experienced continued harassment. Kuzmina (19.11.2010) suggests that someone had hopes of paralyzing GOLOS' ability to monitor elections the same year. While the case against her was already cancelled in 2007 due to lack of evidence, she was not informed until March the next year, two days after the presidential elections (Kalatch 2008). Novaya Gazeta was not able to function without hardware and ceased publication.⁶⁵ While the crackdown seemed triggered by the Council of Europe summit, this is only part of the story. As Kurt-Adzhiev has explained, he and his newspaper have always been a "bone in the throat" of the regional government (Arutyunov undated). The fact that his daughter is a prominent activist complicates the issues further.

The interviewees' perceptions of informal criteria in general fit with the core rule as formulated above. Beyond that point, however, the answers bear witness to the complexities of informal schemes. Informal rules are never fixed, but must always be seen in relation to the complex context in which they are acted upon. A skillful player in this game will understand

⁶⁵ A new edition of Novaya Gazeta based in the same region (*Novaya Gazeta v Povolzhe*) began publication in March 2010.

the applicability and implication of both formal rules and informal norms under any given circumstances (see Ledeneva 2006b). Within the interview setting, the interviewees are “forced” to articulate these complexities, and the informal criteria thus become more tangible for outsiders who want to put labels on them. Yet, the reasons for the trigger are contingent upon a more complex background which makes it difficult to isolate the informal criteria from each other and from the broader context.

In the case of selective registration denials, some interviewees also repeat the by-now-familiar claim that candidates from the opposition and candidates that have a reputation as troublemakers will have a particularly hard time getting registered. In addition to these criteria, however, there is a widespread view that opposition candidates “will get special consideration from the committee” if they have some weight to throw around (Cherkasov 05.09.2011). Regardless of policy preference or political stance, candidates may be removed from the race if they appear to stand a fair chance of winning against incumbents or friends of the incumbents. When the Duma party Just Russia (*Spravedlivaya Rossiya*) was denied participation in some municipal elections in Vladimir oblast, its leaders took this almost as a compliment: “We had a quite strong team, they just feared us” (Godunin 06.09.2011). These findings echo Maria Popova’s (2012) research on election disputes, which uncovered a significant statistical correlation between election disputes and competitive districts where more than one candidate had real chances of winning. Competitiveness increases the incentives not only for more active campaigning and thus more violations, but also for getting the main competitor de-registered before Election Day so as not to risk defeat.

Precisely who the candidate is running *against* can be assumed to be particularly important in single-mandate districts, of which there are many in the Russian regions. If you are serious in challenging an important incumbent from the ruling party or a favorite of the governor in a single-mandate district, the chances are good you might just as well start readying yourself for an appearance in court. The Perm candidate Andrei Starkov was young and rather unknown in the region, as were his personal attributes and political views. According to Starkov (15.11.2011), his registration was blocked only when the incumbents realized that he might actually win the seat. The ruling elite could not afford to lose this seat to an outsider, explains Starkov’s political advisor, because the governor’s favorite was the general director of a Lukoil subsidiary and “one of the sponsors” of the current regime (Podvintsev 13.11.2011). Khaibrakhmanov is another candidate who was eventually denied registration to the same elections. He was seemingly in agreement with the regional leadership about his candidacy,

but fell out of favor when his opponent's business associates in Moscow used their channels to convince the Governor to change his priority (Anon. political advisor 2011).⁶⁶

7.2 Perceived Motives

Most of the interviewees of this study rejected any suggestion that the legalistic veneer had been intended to provide the harassment with any popular support. Denisova reacted in disbelief when I hinted in this direction.

No, no, no, they are not trying [to look legitimate]. Why? Everybody understands! Come on! It's funny, because when you speak to the public you don't have iron clad proof that this is selective [law enforcement], but to say that [the prosecution] is done for the sake of protecting somebody's rights [would be] simply unbelievable ... The majority of the people says that this is bullshit. (Denisova 17.12.2010)

Once again, the façade theories have a poor fit with my findings on the ground. Instead of interpreting their experiences in terms of deception and hidden repression, the interviewees tended to talk about selective law enforcement in the context of power relations. As noted in the methodology section, however, the interviewees did *not* speak explicitly in terms of informal rules and their enforcement – this terminology is my own extension for purposes of concept-development. Yet, the way interviewees frame the issues is clearly reminiscent to me of a rule enforcement perspective. They speak about “scaring” (deterrence), “setting an example for others” (general deterrence), and “hindering” the working of an organization (preventive acts). In their statements, the communicative aspect of rule enforcement is also evident.

Just as the informal rules that guide selective crackdowns are complex and context-bound, the related perceptions of *motivations* behind selective law enforcement are similarly multi-faceted. If we exclude the special case of selective denials of election registration (whose purpose is relatively straight forward), most interviewees that had experienced legal attacks believed that the prosecution had several motives. “I think it was 80% to prevent young people from taking part in such actions and 20% against me personally,” said Aleksei Gaskarov (02.06.2011), one of the young men prosecuted for the riots against the city

⁶⁶ Incidentally, Khaibrakhmanov was the previous director of the Lukoil subsidiary, whose new director opposed Starkov in a different electoral district. Khaibrakhmanov's opponent held a high position within the Russian Military-Industrial Complex.

administration building in Khimki in 2010. Anastasia Denisova, a human rights activist who worked for the NGO Memorial and headed the NGO ETHnICS in Krasnodar *krai*, had her computers confiscated and was charged with copyright violations and with “creating, using and distributing” illegal software.⁶⁷ Simultaneously, she was investigated for possible extremist activities. According to her interpretation, the initiators wanted:

to grab the information from my laptop and personal computers to see how much to expect from me, to divert me from human rights activities, and to engage me in[to] self-protection at the expense of my mission. I think [the proceedings] were [intended] to make me busy with something else rather than making projects and working ... They wanted to scare [me], they wanted to stop me. The best scenario for them would be that I went away from the region, which actually I am on the brink of doing because I don't want to follow Karastelev⁶⁸ and be beaten up. (Denisova 17.12.2010)

Several of the self-perceived victims use the term *davlenie* (pressure) when describing what motives they see behind the legal acts. In two separate cases, the state media monitoring agency, Roskomnadzor, issued formal warnings for extremist content to two branches of Novaya Gazeta. “It [the warning] is a way to keep us under pressure, so that we don’t get too deep into these issues,” explains Natalia Pruzenkova (22.06.2011), press secretary of the newspaper’s federal edition in Moscow. Boris Vishnevskii (26.08.2011), part-time journalist for the St. Petersburg branch, has a similar view, but with a greater stress on the informal criteria. “It is a way to pressure,” he explains, “you see, this is also a signal that if you are going to criticize the authorities [*vlast*], we can arrange for a second warning.”⁶⁹ By adding pressure, the selectors communicate a warning to discourage a target from repeating the unwanted acts, and they build up psychological stress by showing attention to a specific case or actor. In other words, the term *davlenie* is strongly related to deterrence.

As discussed above (section 5.3), easily fabricated “suspicion” allows law enforcers to conduct searches and confiscate documents and computer hardware, not least on the pretext of enforcing copyrights. In these cases, some interviewees hold that the gathering of information may indeed be an important goal of law enforcers or their patrons. As the interviewees see it,

⁶⁷ The Criminal Code, Article 146.3 and 271.3, respectively.

⁶⁸ This person is likely the same Vadim Karastelev who figures in this study.

⁶⁹ While a first warning for “extremist activity” from the media monitoring agency Roskomnadzor has no direct legal effect, a second warning will open the way for liquidation procedures in court.

the raiders do not primarily seek unlicensed software or signs of extremism –which may be the pretext for the raids– but try to find any internal documents and correspondence that may give them some form of leverage in ongoing or future political conflicts.

The gathering of information (not least *kompromat*) and the exertion of pressure are connected in the Russian term *povesit' na kryuchke* (to hang on the hook). When a troublemaker attracts the attention of authoritarian leaders, legal investigations may both communicate a warning and help to gather information on the subject. The information obtained from raids may give the law enforcers a possible edge in a conflict, and the opened case makes it easier to pull (*potyanut'*) the hook when or if necessary. The investigations against Denisova for conducting extremist activities and cybercrime were eventually closed as she went into (internal) exile in Moscow. But as Denisova (24.5.2011) said: “They open and close criminal cases just like that. If I go back [to Krasnodar Krai] and become active [again] they may reopen it. They already did it three times, [so there is] no guarantee there won't be a fourth, a fifth, and so on.”

In the case of Sergei Simak, the law enforcers confiscated a computer, but at the time of the interview the case had hardly moved forward: “They are only doing an investigation ... In Russian, this is called to keep (*derzhat'*) on the hook. They know if they bring the case forward at this time, they will probably lose. At the same time, they do not want to close the case” (Simak 22.11.2010). We should also recall the case in which Volgainform's leader Kotova had status as a witness. According to her husband, this was also a political move – a way to “keep her on the hook” (Kurt-Adzhiev 18.11.2010). It would not be hard to change her status back to accused in the middle of the investigation, he explained (*ibid*).

In the special case of selective registration denials, the motivations are often seen as less complex, because the electoral context makes the stakes obvious. As noted in the section above, a wish to get rid of an unwanted candidate from the election race may simultaneously be an attempt to increase the chances of a favored candidate to win a seat.

7.3 The “Selectors” – Who Are Seen as behind Selective Law Enforcement?

The interviewees rarely identify the informal interests behind a case to be actors within the law enforcement structure itself, though there are also examples to the contrary. When the

blogger Robert Zagreev was sentenced to a penal colony for various extremist activities, for instance, his lawyer believed that the FSB initiated and pushed the case because they were themselves targets of Zagreev's criticism (Ural 08.06.2011). Denisova (17.12.2010) finds reasons to believe that the FSB was also involved in initiating the legal process against her, and Dmitrievskii (16.12.2010) makes a similar claim, though both of them also stresses the role of regional authorities in the background. In some cases, the Federal Security Bureau seems to act as the middleman between the state administration and less politically active law enforcement agencies. In one spectacular case from the Bashkortostan town of Tuimazy, the court chair himself repeatedly tried to get the engineer-turned-activist Gusak (10.06.2011) convicted, amongst other things for planning terrorist attacks.

More commonly, however, the law enforcers are seen to act on behalf of patrons or networks external to the formal law enforcement structure. Selective law enforcement takes place not only by means of *pro forma* laws, but also most often through straw men.

In the majority of the examined cases, the interviewees link their problems to powerful figures in the regional administration, typically governors or their close associates. Some insist that the head of the region himself had issued an order; others mention names of bureaucrats or advisors within the administration. More than one electoral candidate denied registration in Perm, for instance, claimed that the selective registration denials were arranged by a certain individual within the governor's "team" (*komanda*). Yet other interviewees are less specific in their accusations. They may have little knowledge or interest in these details or are hesitant to make personal accusations.

A point worth noting is the difference in the degree and nature of the Kremlin's perceived involvement in the regional conflicts in which selective law enforcement is used. Not in a single examined case did the interviewees suspect the personal involvement of the President or Prime Minister in initiating a case. One of the interviewees even held that criticizing Putin in general is safe, while criticizing local authorities may be fatal. Igor Averkiev's article comparing Putin to Hitler did, however, provoke the attention of the state monitoring agency *Rossvyaz'okhrankul'tura* in 2007, but Averkiev (15.11.2011) also doubts that the President or his office were involved in the processes.

That being said, many of the interviewees claim that top political figures are involved in the informal schemes leading up to their prosecution, including not only the regional elite and governors, but also other higher federal officials and the presidential administration. The cases examined leave us with the impression that the links between the rulers in Moscow and the regional elites do not follow a simple chain of command but take many different forms.

Several interviewees have suggested that federal interests were at stake in the March 2010 elections in Vladimir, in which a large number of serious candidates were denied registration. Lyudmila Eshanu, a journalist who also works for GOLOS in the region, suggests that the purge (*zachistku*) was orchestrated by a central figure within United Russia:

He acts like he is the “ruler (khozyain) of all Rus.”⁷⁰ He comes here and starts to whisper and everyone for some reason fears [him] ... He headed the staff, so therefore everything went through him – All these lists, whom to purge, whom to crush. (Eshanu 05.09.2011)

Prior to the elections, many territorial election committees in Vladimir received additional support from officially neutral advisors, hired from various parts of the country. Part of their work was directly concerned with the registration process. These “highly qualified lawyers knew all the election laws ... and they approached the opposition candidates in a very scrupulous way and tried to deny them registration,” Eshanu claims (*ibid*). In a short article for GOLOS Vladimir, she (2011b) strongly suggests that these lawyers in fact worked unofficially for United Russia and for money from outside the city.

In the crackdown against several offices in Nizhniy Novgorod in 2007, Moscow was allegedly involved, but in an indirect fashion. The raid and confiscation of hardware took place the same year and in a manner outwardly similar to the one in Samara. According to the journalistic investigation of Viktor Demeniev (e.g. 2007), the governor travelled to Moscow to get clearance from a top figure in the Presidential Administration for the use of “active measures” against a number of organizations.⁷¹ The plan was already developed locally, and a list of organizations was apparently ready in advance. The human rights activist Stanislav Dmitrievskii was among the targets. If the decision to crack down was cleared with Moscow,

⁷⁰ “Ruler of all *Rus*” is a reference to early eastern Slavic tribes and the medieval Russian/Ukrainian state.

⁷¹ Demeniev’s findings, according to Novruzova (16.12.2010).

the tactical details on how to engage the task had to be decided locally, he explained (Dmitrievskii 16.12.2010).

A journalist charged with extremist activities reported that the legal cases against him were undertaken on local initiative. At the same time, he suspected that Moscow provided protection (lit. roof, *krysha*) to his antagonists and blocked his efforts to resolve the conflict within the formal system (Anon. journalist 2010).

In many cases, the interviewees stick to regional explanations and do not mention Moscow at all. In the examined claims about selective registration denials in Perm, nobody mentioned anything but regional elites, and Gusak presented his problems in Tuimazy as locally constituted. Densiova (17.12.2010), whose problems originated in Krasnodar Krai, even reported that she felt “more or less safe” in the capital, where she had gone into internal exile. Although she believed that her problems originated with regional authorities and the highly centralized FSB, her antagonists seemed to lack the influence or willingness to act outside of their own region.

In conclusion, the interviewees depict regional elites very capable of pulling the strings of law enforcement and administration in their region on their own. Moscow may be involved in many cases, but not in the classical notion of a power vertical or chain-of-command. Instead, federal interests play a multitude of roles. There is little in the research material to suggest that selective law enforcement in all its forms and shapes takes place according to an unwritten master plan. Whatever patterns we may discover in the material should therefore more plausibly be interpreted as more or less uncoordinated actions which are all based on the same rules of the game. Similar incentives give birth to behavioral patterns and thus perceptions of unity. These perceptions of unity, however, produce the effects associated with rule enforcement on a higher level of abstraction. The individuals, networks, or institutions that the interviewees see as behind their cases are primarily seen as representatives of *vlast'* (see section 3.3).

Moreover, even if the initiatives are often local, it would be reasonable to expect that the federal elites will take action whenever they find regional rulers who act beyond their (informal) mandate and in conflict with Moscow's interest. Even if a case is initiated by regional law enforcement, administration, or private interests, the initiators may act also with intentions to show off in front of their patrons in the Kremlin. The perceptions of the activist

and politician Damir Garifullin (09.06.2011) may illustrate the point. He suggested that the legal case against him was initiated by a local political leader. At the same, time he sees this action as dictated by the logics of power: If this person had not taken action then somebody else would have and the former would have lost his job.

From my methodological perspective, it is hard to tell whether or not the regional actors acted as they did with the explicit or implicit blessing of Moscow, and we should, moreover, be careful about inferring more general conclusions based on limited material. The findings do not undermine the assumption that there is centralized and large-scale repressive campaigns similar to those which Horvath (2013) has called the “preventive counter-revolution” under Putin’s second term. It does, however, remind us that we should resist the temptation to reify the ruling elite in authoritarian systems, by imagining the multiplicity of actors as a real and compact collective entity. When we are studying authoritarian or autocratic regimes, non-transparency and popular myths make an exaggerated belief in central authority and control especially tempting. Even the tsars, however, were not as autocratic as they wanted to be. Although Putin has introduced a centralistic form of governance, the huge, non-transparent, and highly corrupt country is by no means easy to rule, whether by formal, informal, or quasi-formal means. For more details on how the cases come to be patterned and institutionalized as informal rules, see the next chapter.

7.4 The Lines of Communication

As was laid out in the previous chapter, the laws that underlie many cases of selective law enforcement grant legal actors broad or at times almost indefinite discretion in decision making. Or so it may seem if we look at law alone. As everywhere, the discretion that the legal actors may at first seem to possess is in reality strongly compromised by a range of influences, including professional, social and political expectations of their work. Some of these expectations are in Russia also backed up with quasi-formal sanctioning mechanisms, reproducing the logic of selective law enforcement within the broader legal system.

In the cases examined, the interviewees claim that the legal actors pass on most of their decision-making power to their patrons within the regime, letting the political preferences of these insiders determine against whom legal acts should be targeted. What power the discretionary or incoherent legal rules allocate to the legal actors, then, is in these cases largely illusory. In the narratives of interviewees, therefore, the legal actors predominantly

operate as cogwheels in an authoritarian machinery. In another words, the initiators of selective law enforcement not only instrumentalize laws, but also the manpower within the law enforcement system. Subservient legal actors are a key prerequisite for selective law enforcement to be effective.

A catch-all legal framework, corruption within the system, and a culture of legal manipulation provide incentives to instrumentalize the legal system. These incentives are, however, in theory present to any actor. The political leadership needs to ensure that selective law enforcement takes place in a way not contrary to its own interests. The discretion must, as I noted in the previous chapter, somehow be controlled and delimited.

These goals require some sort of coordination between the political elite and the legal actors. In order to be successful, selective law enforcement is therefore dependent upon the legal actors' ability to distribute punishment effectively and accurately, according to the interests of the ruling elite and according to the informal rules of which they are the main beneficiaries. In other words, the ability to constitute a consistent link between the informal rules of political conduct and the formal legal acts is dependent upon both the coercive and the cohesive capacity of the regime. The coercive ability is a direct function of law enforcement capacity. The cohesion is measured as the degree to which the political leadership is able to control the direction and severity of selective law enforcement.

In my interviews, I asked the self-perceived victims of selective law enforcement to share their perceptions on how the selectors' motivations get translated into concrete legal acts. As is the case with most of my other questions, I inquired about the interviewees' personal experiences of selective law enforcement, but did not stop them from voicing more general opinions. I sought to explore not least whether the political bias was internalized within the law enforcement system itself or dependent on constant reinforcement by commands from higher up in the hierarchy.

A considerable proportion of the interviewees explicitly stated that the cases against them were initiated by means of direct commands from officeholders in political or administrative positions. In other words, they perceived the power to work according to the logics of "telephone justice" in a narrow sense.

This view was particularly evident in case of selective denials for election registration. "There were direct orders, of course," said Sergei Godunin (06.09.2011), who is the former mayor of

Suzdal (Vladimir *oblast'*) and a politician with considerable experience in regional politics. Eshanu (05.09.2011), the above-mentioned journalist and GOLOS-worker, shares Godunin's interpretation of the regional and local elections in Vladimir: "the lawyers had direct orders to purge this, this, this, and this [candidate]." In Perm, Andrei Starkov (15.11.2011) was denied registration and blamed a politicized registration process organized by telephone. In Starkov's mind, the process is very simple indeed: "They just call and say 'hello, this man needs to be rejected.'"

Outside of the election registration context, a part of the interviewees also believe that the insiders control the selective initiation of legal cases by means of clear-cut orders. "[There were] direct commands. They don't talk to each other in other ways," said Karastelev (03.06.2011) in Novorossiysk Human Rights Committee. He continued: "It's very simple. They called and said that [our organization] had to be closed. They sent lawyers to show up in courts and the judge did what he had to" (ibid). In another case, Irek Murtazin served a sentence in a penal colony for extremism-related crimes and slander against the President of Tatarstan republic at the time. Unsurprisingly, the President as the offended party was heavily involved in the case. Murtazin's wife, however, believed that somebody else close to the President exerted pressure from outside of the courtroom: "I think that here we have something called telephone justice when everything is decided by telephone calls," she said (Sitdikova 13.12.2010). Another example of perceived direct commands may be found in the Nizhniy Novgorod raids in 2007, where the governor allegedly operated with a list of specific organizations that needed attention.

In other situations, the interviewees depicted a less direct transmission of informal agendas from the political actors and the law enforcers. "I don't think [the case] has a direct link [to regional authorities]," said Denisova (17.12.2010) from Novorossiysk. "Instead, it shows the general attitude and the environment – the general flow of things in the region. It is a silent agreement between the regional authorities and the law enforcement agencies." A source close to Gaskarov believes that the police feared that their careers might have been in danger if they had not taken action in response to the Khimki riots: "[the Governor] said that they had to find the person that did this, but he did not say who. They just needed a scapegoat" (anon. social activist 2011). Neither of the two interviewed representatives of Novaya Gazeta in Moscow thinks that there were any explicit political orders to issue an extremist warning to

the newspaper. Rather, “it was their [Rozkomnadzor officials’] personal initiative to please the Kremlin,” the press secretary Natalya Prusenkova contended (22.06.2011)

Finally, several interviewees also take a third position. They talk about the translation of informal criteria into legal acts neither in terms of their complete internalization by law enforcers nor as the result of direct commands. Instead, they focus on signals and political discourse. Although Emilia Novruzova in the regional *Novaya Gazeta* sees the situation in Nizhniy Novgorod as an explicit order from the governor, she stresses how political signals often are more subtle:

[selectivity] is a primary characteristic of the whole political system in Russia. These commands are not just given when somebody calls somebody else. A political will is expressed and spread to all the [administrative] branches. [The branches] accept it and work in the way that they think necessary. (Novruzova 16.12.2010)

Kuzmina (19.11.2010) in Samara explained how administrative leaders might provide public signals which agencies interpret as start flags: “Such a signal sounded from the President’s representative (*glavnyi federal’nyi inspektor*) in Samara oblast ... And naturally, the lower part of the vertical reacts to such signals in its own way and executes a persecution.” In the particular case, Kuzmina pointed to a newspaper article and some anonymous Internet postings that warned against spies and saboteurs in relation to the upcoming EU-Russia Summit. These postings explicitly mentioned the names of Kuzmina and Kurt-Adzhiev, both of whom were soon subjected to similar raids and subsequent criminal procedures (*ibid*).

It seems safe, then, to say that both direct commands and internalized practices among legal actors are relevant to the phenomenon. There is no real contradiction between the direct commands stressed by some interviewees and the vaguer signals from above emphasized by others. Rather, the different explanations reflect particular cases and tell different parts of the same story. The two forms of communication are complementary rather than conflicting. The core rules of Russian authoritarian politics ensure a certain level of “automated” repression of regime critics, but also that the law enforcement agencies must adjust their routine to signals or direct commands from above. On the level of the political regime, therefore, the combination of internalized bias and the continued practice of telephone justice make perfect sense. Although heads of law enforcement agencies are politically conscious in their work (see below) the political leadership will still need to encourage and direct this bias by pulling strings manually from time to time. To make a successful career in law enforcement, the rules of the game dictate not only that you must be aware of the political signals and take active

measures to curb political dissent, but they also dictate that you are ready to serve your patrons more directly when prompted, even when this may contradict the law.

Yurii Cherkasov's (05.09.2011) statement supports this interpretation: “[The election committees] know there is a general arrangement, let's say you should never register Yabloko under any circumstances. Here there is no need for telephone justice, they will do this themselves.” Cherkasov, who is a member of the Communist Party, moves on to explain a more complex case where an earlier member of Edinaya Rossiya was denied registration. “Here,” he concludes, “we have an outright order. Here, of course, we have telephone justice” (ibid).

One should also note that any direct order from a patron is likely to influence the client's interpretations of the future situation. For this reason, direct commands will also influence the institutionalization of patterns and expectations about how selective law enforcement works within the political regime. In other words, direct orders are strong normative expressions and for this reason also carriers of informal rules.

7.5 Indicators of Selectivity

What I call indicators of selectivity are basically what would elsewhere be called circumstantial evidence for ulterior motives. For my purposes, however, the indicators of selectivity are of great interest not least because they are the manifestation of the link between informal politics and law enforcement as interpreted by the interviewees. It is these indicators that determine how targets and observers alike come to interpret legal acts as motivated by particularistic and extralegal interests. Following the logic of deterrence, the indicators of political selectivity are first and foremost flags to signal informal rules of political conduct. This section shows some examples from the interview material on how this flag is set up (consciously or not) and identified in actual cases.

Even though the political motivations are often denied publicly, my research indicates that legal actors in Russian make little if any attempt to hide the informal underpinnings. While the exact reasons for initiating these cases may sometimes be difficult to ascertain and the ulterior motives hard to prove legally speaking, the cases look like anything but apolitical. As will be clear, then, the findings give little support to façade theories that would see selective law enforcement as a smoke screen to hide repression from observers (cf section 1.3.5).

7.5.1 Extraneous Elements

The targets of selective law enforcement may sense political motivations by identifying what they see as extraneous political elements in a given setting. As the argument goes, if a legal case had indeed not been politically initiated, it would not be paid attention to by political actors. Irina Khrunova worked with the Kazan Human Rights Centre before she engaged herself in the defense of Pussy Riot. In an interview about what she sees as politically motivated tax charges against the human rights NGO, Khrunova explained her suspicions towards the regional authorities in part by referring to their awkward presence at a press conference:

When we arranged a press conference in relation to this case [on police violence], lots of journalists arrived and the victims [of the beatings] also came to Kazan. They explained how everything happened, and the journalists listened. And at this press conference arrived also the head of the Internal Security Agency of Tatarstan Republic⁷², though what he wanted to do there is not known. The deputy head of the regional press service of Tatarstan MVD⁷³ came too, and also others ... A cop filmed the whole thing. (Khrunova 13.12.2010)

“Why would employees on such high level come to some [minor] press-conference?” Khrunova asks rhetorically (ibid). In another case, Novruzova in Novaya Gazeta in Nizhniy Novgorod detected a political element in the composition of the law enforcement group that raided their editorial office:

One of them, I don't know what he would do in that delegation, was connected with the agency that fights against terrorism and extremism ... He was one of the threats for oppositional activists in Nizhniy Novgorod, always doing his best in order to make problems for those who try to work in the political sphere. (Novruzova 16.12.2010)

While such incidents in theory may occur for several reasons and need not necessarily signify anything on its own, these indicators of ulterior motives are often supported by others.

7.5.2 Timing and Coordinated Crackdown

The timing of events is commonly referred to when interviewees explain why they see a case as triggered by extralegal criteria. As Dmitrievskii (16.12.2010) noted after the occurrence of

⁷² Glavnoe upravlenie sobstvennoi bezopasnosti MVD RF.

⁷³ *Ministersvo vnutrennikh del*, Ministry of the Interior.

subsequent raids and interrogations: “all these inquisitional acts related to this case happened against us precisely when we arranged some kind of event.” For the purpose of communicating informal criteria or rules, the timing of crackdown with specific events has the advantage of showing rather precisely what action is considered unwanted and *de facto* punishable.

Another common indicator of selectivity is the coordination of crackdown upon several organizations sharing a similar critical profile or operating in the same sphere. In Nizhniy Novgorod, for instance, the Tolerance Foundation was raided the same day as the cooperation partner Committee against Torture in Nizhniy Novgorod (Dmitrievskii 16.12.2010). The regional Novaya Gazeta edition had the abovementioned visitors the following week (Novruzova 16.12.2010).⁷⁴ Dmitrievskii (16.12.2010) also notes that the law enforcement officials produced identical documents to sanction the raids against all three organizations, something he found peculiar. A similar coordination of raids took place in Samara where, among others, the two offices of GOLOS and Novaya Gazeta were raided more or less simultaneously.

The multiplicity of similar cases does not need to coincide in time in order to be interpreted as related. In some cases, it may be sufficient that they follow similar trajectories. Denisova for instance, saw her own case in relation to the above-mentioned conflict between regional authorities and Vadim Karastelev, who experienced legal charges and later was hospitalized after severe beatings in the same region of Southern Russia (see OMCT 2010):

I see that in my situation the succession of events is the same. It is some kind of informal scheme. If a person is not easy to approach to make him loyal and less critical, they make a checkup against his organizations or open criminal cases against him in person. And if that doesn't work, they beat him up. (Denisova 17.12.2010)

That several similar organizations and individuals experience similar crackdown on formally unrelated grounds gives observers a reason to seek out the informal criteria by looking at what

⁷⁴ To deny the political selectivity of these raids, the police claimed that “more than 100 businesses and other organizations” had been searched for unlicensed software this year. A police spokesman also stated that a bread factory had been raided the same week as Novaya Gazeta, presumably to show that various incidents may very well be unrelated. Unlike the more standard answer of the Samara police, referring to legal violations (which turned out to be fabricated), the Nizhny Novgorod police thus actually attempted to deny the accusations of *selectivity* (see Osipovich 2007).

characteristics the targets have in common. The coordinated crackdown provides a signal as to what elements of civil society are currently moving beyond the borders of what is seen as acceptable by the authorities. In this way, informal rules concerning unwanted attitudes of fields of work are transmitted by means of enforcement patterns.

7.5.3 Consistent Harassment

Whereas, in the campaigns discussed above, many targets are hit at the same time, campaigns may also take another form. In many cases, one and the same target is hit again and again to make it keep its head down and to remove all doubt that the prosecution is a matter beyond formal regulations. Many informants have found themselves in a situation in which a number of punitive measures are initiated against them at the same time, be it legal charges, harassment by police officials, smear campaigns in mass media, or physical attacks by unidentified assailants.

“In short, it was such a nightmare,” said Leisan Sitdikova, the wife of Irek Murtazin, who at the time faced very powerful interests in a Tatarstan court:

I don't want to think about it. Every day, court bailiffs packed at our doors saying that he [Irek] had not paid aliments. They wrote some kind of drivel and posted some kind of porn clips [on the Internet] in which he allegedly participated. (Sitdikova 13.12.2010)

Through local newspapers and Internet portals belonging to *Tatmedia*, the largest media corporation associated with the regional government, the smear campaign was made public. Then, Sitdikova recollected, it became physical: “in November 2008 they attacked him in the parking lot by the house and beat him up. He was hospitalized.” Sitdikova explained how she lost her job, and how even relatives of the couple were experiencing serious pressure (ibid).

The prosecution and harassment of Kuzmina provide another example of creative campaigning “coinciding” with legal problems. Uniformed police warned neighbors against her alleged drinking and troublemaking (*chto ya p'yu i deboshiryu*) and suggested that she may be spreading extremist literature. In the investigation that originated in claims of unlicensed software, the investigator had her examined for mental illness and drug abuse. Rumors were spread that Kuzmina, as well as other named critics (including Kurt-Adzhiev), planned to sabotage the said summit by blocking the doors. Today, she still gets strange looks on the street, she added with a short laugh (Kuzmina 19.11.2010).

The persecution of Dmitrievskii, a human rights worker concerned with human rights violations in the Chechen Republic, is rather notorious within the human rights community⁷⁵ even abroad:

In the start of 2005 the process of destroying the organization had begun. It started with a criminal case initiated against me, where I got a two years suspended sentence in 2006 and the organization was liquidated for extremism. We registered a new organization, but there were also serious tax attacks. In short, it was such a war. (Dmitrievskii 16.12.2010)

To show how the various forms of harassment are interrelated, Dmitrievskii explains how the Anna Politkovskaya Memorial Conference was “torn apart” (*sorvana*) on the 7th of October:

Firstly, all our guests who arrived from Great Britain, the USA and the National Endowment from Spain were informed that all pre-booked rooms allegedly leaked water from the ceiling. Repairs began immediately and nobody was allowed to move into the hotel ... A similar disaster struck in the hall we had rented for the conference and press-conference. One hour before the event, we were suddenly notified that the lights were out and that the keys to the [seminar] room had accidentally been lost ... In addition, the car that we used was confiscated, purportedly because it was on a list of stolen cars ... Finally, we move on to our topic. On the first day of the conference I was summoned for urgent interrogations related to my criminal case. When I refused to testify, they did a new search to get documents and possible hard drives with piracy software that could've been at the office, and in short to not let us work. The search went on for about three hours, and at the same time the whole day a car from the OMON⁷⁶ circled [our building]. (Dmitrievskii 16.12.2010)

The concurrence of selective law enforcement with (other) harassment techniques is important for several reasons. First, this campaign obviously serves as a very strong indicator of selectivity, leaving no doubt about the extralegal nature of the conflict. As Dmitrievskii himself concludes: “This whole circus was very telling” (*vot takoi tsirk byl ves'ma pokazatel'nyi*).

⁷⁵ For more on the persecution of Dmitrievskii and the banning of Russian Chechen Friendship Society (RCFS), see for instance the special Human Rights First (2006) report. Since I interviewed Dmitrievskii in Nizhniy Novgorod, he has again been detained and charged with legal violations. His organization had been attacked at least twice – on one occasion with Molotov cocktails. For the year 2012 alone, see for instance the short reports of Front Line Defenders (2012a, 2012b, 2012c).

⁷⁶ *Otryad militsii osobogo naznacheniya*, generic name for special police units in Russia.

Secondly, the concurrence of selective law enforcement with other forms of *low intensity coercion* illustrates that selective law enforcement is not merely a high-profile issue concerning diplomatic rows over political prisoners. In its more common form, selective law enforcement may be less dramatic (drowned out by even more serious attacks), yet it contributes over time to strongly deter civic activism (see chapter 8). Finally, to see selective law enforcement in this context goes a long way towards explaining why Russians tend to see the practice as not fundamentally different from other means of repression, including those of a purely illegal nature. It seems clear that the legal actors (and their patrons) actively contribute to the reproduction of “legal nihilism” in Russia (see section 3.1).

7.5.4 Informal Criteria and Blackmail

We have seen a multitude of ways that insiders may signal that extralegal interests are at stake when a target is prosecuted by quasi-legal means. The informal rules, however, are transmitted in a more direct fashion as well, namely through blackmail. Through more or less overt threats, the prosecuted party will get to know in more detail what criteria may unleash legal acts and sometimes also who is behind the initiatives.

Karastelev (03.06.2011) reports that in the very first meeting he and his colleagues had with the regional authorities, the persons he met with “offered (*predlagali*) us their cooperation and said that if we would not cooperate, they would use the law on extremism against us. They said this to us themselves.”

Gusak (10.06.2011) had just been blackmailed for half a million rubles by a man previously unknown to him when the court chair (and leader of a criminal network) called Gusak to make him understand: “I am the one sending people to prison in this town, and not you.” The sum was presumably a reference to an earlier legal claim made against Gusak in relation to a conflict at work in which all his problems began (*ibid*). In another case, a police officer told one of the interviewees directly

... that he would do anything to get me jailed ... They said specifically that they would initiate a criminal case against me if I did not stop writing... They beat me up after the meeting where I said openly that our city authorities steal money [...] They beat me up just there at the meeting – three thousand witnesses [watched] and not one of them reacted. (Anon journalist, 2010)

Other cases show that the direct communication does not simply come in the form of blackmail. When there is a mutual understanding of informal motives, the various actors do

not necessarily take any care to pretend there are not engaging in blackmail. To make it all even easier, some political leaders personally file requests to the procuracy to initiate criminal cases against their critics. In this form, anti-extremism has in part taken the form of an extended defamation suit where there is a *general* agreement between the prosecutors and the targets of what acts caused the law enforcement. There are, however, also cases in which the criticized individuals initiate cases formally unrelated to the criticism. The court chair who had been confronted by Gusak (10.06.2010) in Tuimazy, for instance, not only blackmailed him but also personally filed requests to the procuracy to take action after he allegedly had heard talks of Gusak planning to join an Islamic group to blow up several buildings in the town center.

A third form of direct communication would be to provide hints of why a reaction already has taken place in order to stop similar things from happening in the future. The interviewees of this study actually fall short of mentioning this possibility, but my own experiences with the FMS officials (see the introduction of chapter 1) may illustrate the point.

In conclusion, the practice of blackmail is not insignificant in the observed cases, but neither can it be called a corner stone for the promulgation of informal rules (cf Darden 2001)

7.6 Some Concluding Notes on Communication

Making law enforcers act in specific ways and according to certain patterns is obviously central to the mechanism of selective law enforcement. Knowledge about how the internal communication takes place may contribute to our understanding of how well selective law enforcement is institutionalized (see also the next chapter). The interviewees are divided with respect to whether direct orders or political signals provide the primary form of transmitting informal criteria downstream in their individual cases.

Instead of seeing this division as different interpretations, we may see them as different sides of the same coin. There is a common understanding that interpreting informal rules is an important skill to promote one's careers in the state machinery, including law enforcement and the courts. Research such as Ledeneva's (2013) fieldwork among regime insiders confirms the importance of signals and subtlety within the ruling networks and law enforcement. This understanding of political agendas, an awareness which makes legal actors

pro-active and sensitive to political winds, presumably make the actors more open also to direct interference with their work.

This chapter has again shown that the importance of communication in rule enforcement is twofold. First, the authorities in the regime must provide guidance to legal actors on how to implement the law selectively. Second, communication is also needed in order to make the targets –and not least other *potential* critics– interpret the legal acts in a way that makes them reconsider their political activity and oppositional stance.

Although the task is thus at least twofold, the challenges may to some degree be met by the same means. If legal actors are ready to interpret political signals, so also is the more politically conscious part of the citizenry. The core rule of Putinist repression, as formulated by Marie Mendras, (2012, 231-232) is loyalty – “expressed in the negative [passive] – do not criticize or hinder the center of the constellation, and in the positive [active] – take action against disloyal actors.” Partly as a result of historical experiences and path dependencies, at least parts of the citizenry are ready to interpret political signals within this frame of interpretation in both the positive and the negative expression of this core rule.

In the wave of repressive measures following the orange revolution in Ukraine, Putin actively participated by explicitly condemning their activities.

When non-governmental organizations are financed by foreign governments, we see them as an instrument that foreign states use to carry out their Russian policies. (Putin quoted in Schofield 2007)

I object categorically to foreign funding of political activity in the Russian Federation. I object to it categorically. Not a single self-respecting country allows that and neither will we. (Putin quoted in McMahon 2005)

Then-head of FSB Nikolai Petrushev and President Putin himself have also accused these NGOs of outright espionage (Kaban 2006; Saradzhyan 2006). Simultaneously, as this harsh rhetoric took root, the NGOs received an extraordinary level of quasi-legal attention. What is striking, however, was that the NGOs within this group accused of Western espionage were overwhelmingly attacked with completely apolitical charges, mostly concerning issues of taxation or alleged infringements of the NGO-law (Bækken 2009).

Alexander Verkhovsky has observed the same phenomenon and explains it in the following way:

*People here they have a vast Soviet experience in understanding the general line of the ruling group, not from legal books but from the front page on the Pravda newspaper [*laughs]. So when we see something, or hear, that Putin as president said something about those Western spies or something like that – everybody will understand what will happen next. (Verkhovsky 12.11.2010)*

While the Russian media is less than free, the active citizen will easily get to information about the political connotations of selective law enforcement. The politically interested public does not need to frequent underground clubs in dark basements or read illegal periodicals to get information on selective law enforcement. The political context of the raids in Samara (section 5.3), for instance, were discussed openly in the mass media locally (e.g. Zverev 2007), domestically (e.g. Chernova 2007), internationally (e.g. Levy 2010b) and even in scholarly works (e.g. Horvath 2013, 195), in addition to various blogs, forums and similar sites on the Internet. Whereas a few may possibly see the Samara crackdown as an offensive against counterfeit software, most interested individuals will quickly interpret the situation in a political light. Because the political interpretations circulate more or less freely, the informal rules are also spread horizontally, a fact which eases the job of rule promulgation for the authorities.

When properly institutionalized, this is a very powerful tool of control for the government. The society may react to the mass media's headlines as Americans in the Wild West would react to a "Wanted poster": Most will hide, but some will go bounty hunting. As Verkhovsky concluded his above line of thought:

... The prosecutors also know this. So they do not need formal orders to take action. They understand that this is a new line in politics, and [that] they have to do something. If they do not have orders they will not be too enthusiastic of course, but at least they will do something. If they do get orders, they will of course do anything [requested of them]. (Verkhovsky 12.11.2010)

I thus arrive at a model of communicating informal rules that may be lubricated by path dependencies, but whose existence is dependent upon both encouragement and enforcement from above (figure 4).

Once again, my evidence does not support a façade interpretation. As Mendras (2012, 220) put it: "no effort has been made to keep up appearances [since 2004]. The crushing of opponents is shown on television." Though Mendras takes an active stance against façade

interpretations, I would suggest a small but important revision to her interpretation: The fact that the crushing of opponents is shown on television may just as well be interpreted as if the regime *does* care for its domestic appearance. The overt suppression of certain elements in society does not therefore necessarily indicate a careless attitude, but may more likely be part of an active policy to “demarcate the limits of permitted opposition in Russia’s sovereign democracy” (Horvath 2013, 172).

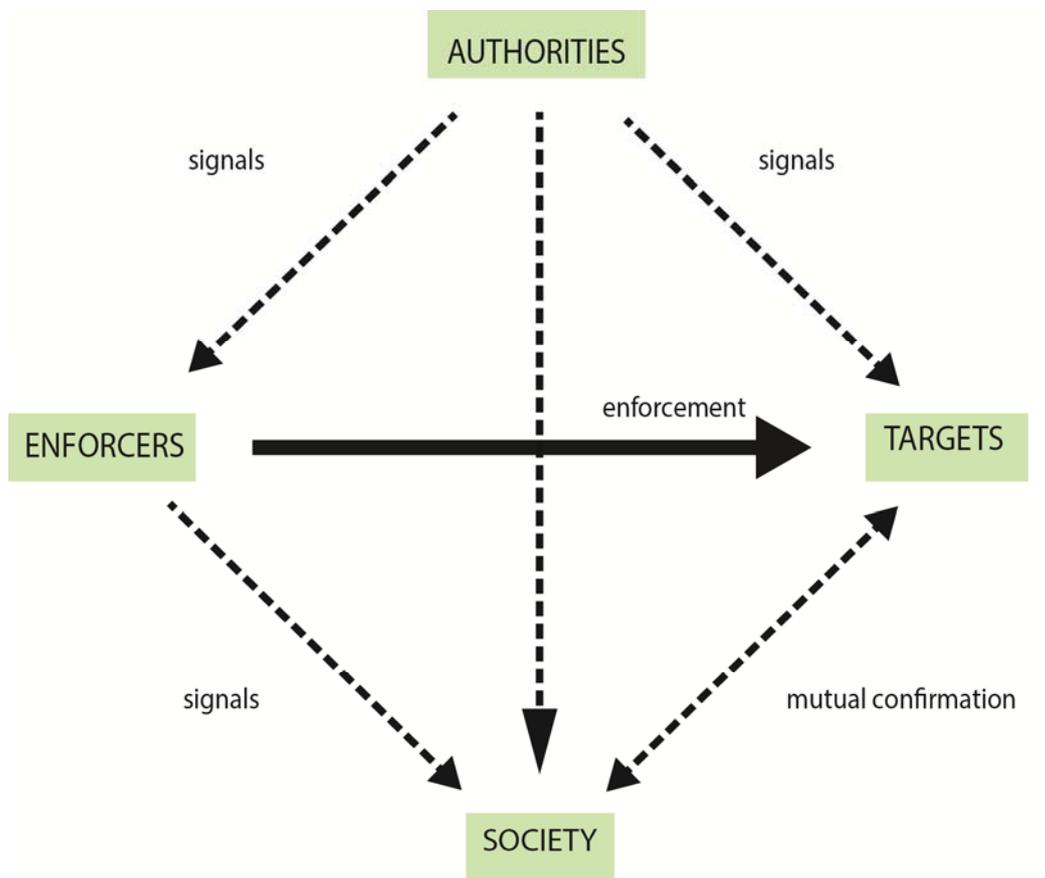


Figure 4: Communication of informal rules

8 Rule Enforcement and Political Repression: The Impact of Selective Law Enforcement upon Society

I have defined selective law enforcement as a rule enforcement mechanism. In the above chapters, I have argued that the phenomenon seems to fit this conceptualization well. In the previous chapter, I also presented some suggestions as to what the motivations behind the practice may be and what informal criteria may trigger quasi-legal action. What is still missing is an examination of to what degree selective law enforcement actually brings about any consequences for the targets or for society at large. If the mechanism is indeed a rule enforcement mechanism, it ought to enforce rules. While most interviewees would not admit to being deterred from continuing their oppositional and critical activities, the material still suggests that the suppression of constitutional rights is substantial.

8.1 Punishment as Experience

Unsurprisingly, many of the cases of alleged selective law enforcement presented here resulted in legal sanctions. In the legal issue area of election registrations, court rulings in the examined cases validated the election committees' decisions to deny registration. With regard to anti-extremism, both administrative and criminal punishment was enacted against the interviewees. The Moscow and St.Petersburg editions of Novaya Gazeta attempted to overturn the formal warnings of Roskomnadzor in the judicial system but without success (Vishnevskii 26.08.2010; Prusenkova 22.06.2011). Irek Murtazin and Robert Zagreev were sentenced to deprivation of freedom for their purported extremism (Sitdikova 13.12.2010; Ural 08.06.2011). Many travel bans were issued while investigations were pending, not least connected to alleged copyrights infringements (e.g. Kurt-Adzhiev 18.11.2010; Kuzmina 19.11.2010). Gaskarov was subjected to pre-trial detention for many weeks, as was Gusak (Gusak 10.06.2011; Brusnikin 2012).

Other cases, however, were never taken beyond the investigative phase, and some were eventually closed by court decision due to lack of evidence.⁷⁷ Several of the interviewees who were charged with unlicensed software not only escaped formal punishment, but also received official apologies and financial compensation (e.g. Denisova.yhrm.org 2011, Samara Biznes Konsalting 2011). Also Gaskarov won his case and was later awarded compensation for moral damages (Brusnikin 2012).

From the evidence of the research material below, one element appears as strikingly important. Even when charges are dropped and even if the targets are later compensated for prosecutorial misconduct, they have little reason to celebrate. While observers at times suggest that won cases are ‘celebrations of justice’ (e.g. Arutyunov undated, Denisova.yhrm.org 2011), most of the interviewees would probably object. While legal sanctions would presumably be even worse on most occasions, the legal processes are harmful even when won. For this reason, even “successful” cases can be considered lost, and there might be more to come around the corner. Indeed, some interviewees suggest that the very aim of the processes is not to win cases, but to sustain pressure and keep the targets preoccupied.

I understand this criminal case as one attempt in a series of other attempts ... simply not to let the organization work by any means. The task was not so much to put me in prison, for instance, as it was to torment me with these actions every day, every hour. (Dmitrievskii, 6.12.2010).

As noted above, the litmus test of what can be considered punishment is whether or not non-compliers are put in worse situations than those who comply (Macrory 2008, 37). The legal acts can evidently bring about both punitive and preventive effects, even when these effects are not officially recognized. As will be shown below, the law enforcement agencies of the executive branch successfully impose *de facto* punishment without the support of the judicial system. As in the U.S. (see Gershman 2008; Shields 2010), the prosecutorial power is of great importance, as are the indirect effects of its abuse even under judicial review.

⁷⁷ The acquittal rates are incredibly low in the Russian court system, especially with regard to criminal cases (below 1% on average). The low percentage is contingent on a legal tradition in which courts have been seen as an extension of the law enforcement apparatus and acquittals as a failure on part of either the judge or the prosecutor. The low level of acquittals, however, does not imply that every initiated legal case leads to a formal sanction. While acquittals are rare, cases are more often rejected, aborted or withdrawn earlier in the process.

The difficult situation with authorities induced for instance both Denisova and Karastelev to move from Krasnodar to internal exile in Moscow, and their organizations stopped functioning. Novaya Gazeta in Samara had to close when the criminal procedures dragged on and the confiscated computers were not returned. Also the Nizhny Novgorod edition of the same newspaper was temporarily shut down when they were deprived of their hardware (Novruzova 16.12.2010). It is not difficult, then, to see why selective law enforcement may work to enforce rules even in cases in which no official punishment is enacted.

Most interviewees assured me that they would keep on challenging the regime despite the troubles associated with it. Several of them were hardened critics who expected no less harassment than they got. Some of the interviewees, however, contended that the obvious incentives to change could not simply be ignored.

First of all, I will try to do less journalism, and in particular of the investigative type ... I quit because I have now been through all the stages. They have threatened me and beaten me up, and the next stage would be ... simply to kill me and that's it. Why would I want that? I want to live! (Anon. journalist 2010)

Needless to say, in cases like the one above, quasi-legal repression seems to be of secondary importance to even more serious threats. In many other cases, what is the outcome of quasi-legal practices and what is caused by the other harassment become impossible to discern.

8.1.1 “It Simply Takes Years off Our Lives”

If the broader legal system through its acts cannot deter its selected targets, it may still have the capacity to curb their efficiency by keeping them preoccupied at all times.

Eshanu was among those who by no means were satisfied even when candidates were able to get registered after several rounds with election committees and courts. After all, she said, “the candidates have lost time, energy and often considerable sums of money – everything to fight off some absurd charges” (Eshanu 05.09.2011). Many interviewees report similar problems of time and resources spent on legal processes: “It just deprives us of so much time and energy,” said Kurt-Adzhiev. “It simply takes years off our lives,” Kotova added to her husband’s point. “It would be much easier to pay some bribes or sign some papers about cooperation with police of FSB,” Kurt-Adzhiev concluded (Kotova and Kurt Adzhiev 18.11.2010).

For Dmitrievskii and his colleagues, repeated episodes of quasi-legal attention made an already strained situation almost unbearable:

We already had very limited resources, depleted from this judicial war with everyone. At the end of the day, we faced this question: Should we appeal all the unlawful decisions and try to fight this criminal case or should we concentrate all our efforts to finish this monograph [on human rights violations in Chechnya]. We considered the preparation of this book to be our most important task so we had no possibility to get involved in all of these episodes. After half a year, they once again took our equipment on some other pretext. In the end, we had to finish the work from our private apartments. (Dmitrievskii 16.12.2010)

Dmitrievskii regretted the fact that he could give me little information on the latest developments in recent proceedings against him, and explained how he simply refused to let these pretexts take more time from his work than they had already done.

Researchers know the importance of working undisturbed. It is not hard for us to imagine that constant inspections, interrogations, and requirements to produce documentation for investigators will make effective work considerably more difficult, not least when the hassle come in addition to already burdensome standard requirements of registration and reporting. Add confiscated hardware, the occasional beating with subsequent hospitalization, harassment of your family and staff. The eventual legal sanctions often come on top of this form of pressure.

In this regard, the initiators of selective law enforcement have little to lose. If a case fails, the state will pay the cost, and it will at least serve the purpose of harassment and an informal warning. If a case happens to lead to a legal sanction, it may very well be considered a bonus. In the case of election registration denials, a legal sanction (a denial) would presumably be a clearly favored outcome for the initiator. Yet, even in this field there are indirect benefits to be reaped from instrumentalizing the legal system. To quote a pair of Russian “political technologists”:

We are talking about legalistic attacks on the competitor on absolutely every move he makes ... Here it is not important if he wins all the processes. The important thing is that it will wear out his nerves ... The important thing is to keep him in suspense and make him careful. He will refuse to participate in some plans and events, and act more modestly or restricted in others. This is all in our favor ... And of course nobody can exclude the possibility of some case ending up in success and you will finally have succeeded in denying registration to your competitor. (Matveichev and Novikov 2003, emphasis in original)

8.1.2 Additional Pressure for Legal Compliance

An indirect effect of selective law enforcement is an additional and informally constituted pressure to comply with law. While extra incentives to comply with law at first glance may look like a healthy side effect of selective law enforcement, they actually contribute to suppressing criticism. If the violations of informal rules increase the risk of a law being enforced, a link between the informal rules and the final punishment has been established. If legal regulations are enforced selectively against a certain segment of the population, this segment will have stronger incentives for complying strictly with these regulations. The bias will lead to an unequal situation, and the additional incentive to comply will work to enforce the informal rules.

The situation of the opposition party Yabloko in Perm may provide an illustrative example. Because the party expected extraordinary scrutiny on the legality of their campaign, they spent a considerable amount of time preparing for every eventuality. When I visited the party at their premises, one of their members showed me some flyers showing two hands holding an apple.⁷⁸ Because the party is arguably systematically suppressed and since the opposition candidate Konstantin Okunev had been denied registration on the basis of unlicensed use of photos in the previous election campaign, Yabloko had made sure to get all the documentation necessary to verify that their campaigning material was strictly in accordance with the law on copyrights. To be on the safe side, they obtained a written permission of the person whose hands were on the photo, the party representatives explained. Considering the tremendous problems surrounding both copyright violations and election campaigns in Russia, the irony of such strictly law-abiding behavior should be obvious.

The problem is certainly not limited to party politics. According to one prominent human rights NGO leader in Russia, human rights activists all over the country reacted to the raids in Samara (discussed in section 5.3) by rushing to make sure that their software was licensed (Finn 2007). The behavior of the activists in this situation suggests that there were two important factors determining their decisions. First, we can see by their increased efforts to follow the law that this is perceived as a meaningful defense against quasi-legal charges. At the same time, it is obvious from the timing of the human rights activists' sudden care for licenses that it was not the legal prohibition as such that prompted them to take action. Rather,

⁷⁸ The name of the party, *Yabloko*, means apple in Russian.

they found the risk of enforcement to increase because they shared some informal characteristics with the organizations that were targeted in Samara (and a bit later in Nizhniy Novgorod).

This behavior not only indicates the semi-institutionalization of informal rules, and how broadly selective law enforcement may impact the relevant actors. It also shows how running an oppositional party or a critical NGO requires more resources than working in less contentious fields. As we can see, extraordinary pressure for compliance in effect eats into the organizational resources of regime critics and political opposition. It should be noted that the extra time and resources Yabloko spent on getting documentation for the legality of their apple photo were a direct outcome of an increased risk perception stemming from challenging the incumbents.

8.1.3 Recruitment and Stigmatization

Russian veteran activists may be incredibly hard to scare away from their mission. Presumably, the experiences of quasi-legal repression may even strengthen the determination of some activists to fight against the *status quo*. If the goal of punishment is to get this hard core of regime critics to reconsider their critical attitude, it is likely to backfire. We have seen, however, that the restrictive aspect of rule enforcement is still operative in these cases. Moreover, deterrence is believed to have a much broader impact through the effect of general deterrence.

Karastelev continued to work on human rights issues even after he moved to Moscow, and in a form similar to what he did before. He believed, however, that cases like the ones against him and his organization have a serious impact upon society:

[After the crackdown] organizations fear controls, fear that they may be closed. [...] Now they stopped working with [these matters], or they started to work for the administration. [People] are generally not criticizing nowadays. They have gone either into business or they work with children, with pensioners, with the handicapped. Well, with any topics not connected with criticism [of the authorities].

The effect of *general deterrence* hits a broader segment, in principle anyone aware of the rule and its enforcement (Friedman 1975, 72-73). Recruitment to this sphere of political or human-rights oriented activity may therefore be considerably limited by the kind of deterring measures presented in this study. Most young professionals would not want to work in a human rights organization in order to fight selective legal claims against the organization. In

this way, we can see that even preventive acts carry a deterring potential. By means of systematically targeted suppression, the state apparatus makes organizations with a critical mission become less attractive workplaces. Youth that know how the state *de facto* punishes political disobedience have strong incentives to make the most of the situation *within* the system instead of challenging it. In addition comes the economic uncertainty of working under constant threat of quasi-legal bombardments and possible liquidation of one's place of work.

Several interviewees experienced that parts of the surrounding society reacted to their persecution by withdrawing their support. Denisova and Murtazin not only lost their jobs but their partners lost their jobs, too. "When they initiated criminal procedures against my husband, they fired me from my work. They also fired his [partly] retired father who just had some work on the side ... They tried to manipulate (*vozdeistovovat*) my parents [too]," Sitdikova (13.12.2010) explains. Selective law enforcement hits the social environment of the targets like bad news on the stock exchange as the surrounding actors with less political ardor withdraw their support.

Harold Garfinkel (1956) has called the criminal trial "a status degradation ceremony." The legal punishment is often just the tip of the iceberg for convicted criminals, and the shame associated with legal prosecution leads to social ostracism and stigma that may linger on for longer than it takes to serve a sentence. We should not assume, however, that the effect would be equally strong in Russia. That is, even if we can see a similar effect of stigmatization, it comes from a different source. As Garfinkel (1956, 423) noted, for the status degradation ceremony to be successful, the "denouncer" has to convince the audience that he or she is condemning on the basis of commonly shared norms and not for his own purposes. If the denouncer cannot do this, the status degradation ceremony will misfire. Because the informal backdrop of the cases is obvious to most relevant observers, also stigmatization must be understood with reference to the informal rules. We have already seen that the law in itself has limited normative power in Russia.

In the case of selective law enforcement, observers do not shun prosecuted individuals because they believe them to be criminals. Most social actors would, even if they had believed in the charges, care little as to whether an NGO has infringed on the copyrights of Microsoft or Adobe. On the contrary, the society shuns the prosecuted critics exactly because the political links are understood and most Russians want to stay clear of trouble. In this sense,

the selective law enforcement has the effect of stigmatizing the targets as *troublemakers*. To Russian society, the prosecution signifies a controversy with the ruling elites and the power networks – with *vlast*'. The golden rule, Mendras (2012, 191) maintains, is to “keep away from anyone in trouble, because the machine is likely to also destroy those who express their support for the victims.”

8.2 Capacity and Willingness: Explaining Non-Sanctions

Concluding from the last section, it seems clear that punishment *is* enacted and that the targets of selective law enforcement *are* affected by the practice. While I have focused on the less obvious indirect effects of legal acts, the direct legal punishment should of course not be forgotten, and is in several cases more substantial. The legal sanctions, moreover, come *on top* of all the other experienced punishment and strengthen the total effect with regard to both special and general deterrence. In some cases, the consequences of official sanctions are similar to the indirect consequences of quasi-legal or other forms of harassment. From an outcome perspective, it may be less important for the staff whether an organization is liquidated in court or forced to cease its operation for other reasons.

That being said, the cases that have *not* lead to legal sanctions are worth considering. Unfortunately, the question of why some cases are dismissed by legal actors is not easy to answer definitively. From the formal documents we get little information about whether these cases are dismissed for reasons associated with formal rules, informal rules, or a more complex mixture of the two. If the charges are pro-forma, so may also the “legal” decision to abandon them be.

Some of the most flagrant cases of manipulation reviewed above, not least those built on alleged copyrights violations, were rejected by the courts. This rejection may suggest, albeit tentatively, that legal concerns are not irrelevant to their dismissal. The material in this regard, however, is inconclusive, as several interviewees find that poor or non-existing legal foundations may also lead to formal sanctions (e.g. Ural 08.06.2013). With regard to election registrations, for instance, Lyubarev suggests that while the election committees seek a sound legal basis for their denials, more casual or even invented foundations may also work at times:

As candidates turn more and more experienced and more and more careful to align their documentation [internally and with the requirements], the election committees will see that there are no clear errors and start to look through and through in search of non-existing insufficiencies or sometimes just think up something. (Lyubarev 02.06.2011)

Considerable sums are spent on legal service to deny candidates, hinting to the importance of a quasi-legal cover to the initiators. We get the impression that the more the election committees can do by purely legal means, the better. In other words, selective law enforcement is favored over means without a legal backup; selective law enforcement on good legal foundations is better than selective law enforcement on poor legal foundations.

A veteran in this game, however, suggested in my interview that the legality or illegality of political technologies is not necessarily the most relevant attribute when they are considered by “technologists.” More important, he maintained, was the amount of *noise* a technology would make when employed. When somebody wants to remove a candidate from election, he explained, they will start with the most “silent” (*tikhie*) technologies: Informing the candidate about the situation and adding soft pressure behind the scenes. If these attempts do not work, “then they will ‘turn on’ (*vklyutchat*) the level of committees and lawyers who must find some hook or pretext to deny registration to the unwanted candidate. If this also fails, then the “political techologists” may “plug in” (*podklyuchat*) absolutely illegal stuff”. The authorities will never hesitate to use any form of pressure, the interviewee assured: “If they have to use them, they will use them. If they don’t need to, they will not” (anon. political advisor 2011).

The legality of many cases is often up in the air as the secondary rules on jurisdiction and legal procedures are also subjects of interpretation. Far-fetched “interpretation” of vague formulations, formalistic enforcement, disproportional punishment, dubious expert analysis and courts strong reliance on this evidence, committees’ failures to provide due warnings to lacking registration documents, and copyright raids on thin evidence are all elements whose legality is not always easy to determine. To conclude, it seems like a certain legal backing would possibly make it easier to get a case through court, but the borders of legality are unclear and a solid legal foundation is not absolutely necessary in all instances to get a court to impose legal sanctions.

Another element that we cannot ignore, yet not check for, is the possibility that the targets of selective law enforcement or their associates and defenders engage in informal bargaining behind the scenes. They may have been able to come to an agreement by themselves or

worked to lobby actors higher up on the ladder to intervene on their behalf. We can also assume that some cases are counteracted at the initiative of political forces higher up in the system if they see the level of manipulation becoming exaggerated. In the case of Gusak (10.06.2011), for instance, the criminal activities of his antagonists finally made the regional FSB turn the heat on them. To what extent situations like this are the outcome of political games or simply a matter of law enforcement is beyond my research to answer. Since the issue of informal bargaining is not explored, I can only restate a suggestive statement by one of my interviewees: “We are all experts with high education – we know how to adapt to Russian realities” (Anon. NGO-leader 2008).

To seek further explanation for the cases in which no legal punishment is imposed on the targets, I will briefly consider the political dependence and relative empowerment of the Russian judicial system. Then I will move on to see how the organizational and moral costs associated with its (overly) severe manipulation may influence the failure to bring about sanctions. Maybe the most important reason that legal sanctions are not imposed on some occasions, however, is the one suggested in the previous section: selective enforcement works effectively even without engaging the judicial branch.

8.2.1 The Relative (In)dependence of the Russian Judiciary

To the extent that the issue of judicial independence was discussed in my interviews, interviewees tended to assess the courts extremely negatively. Judges were, in the same way as all other legal actors, regarded as pawns in the hands of the regime: “Absolutely, absolutely. One hundred percent. It’s not even a question for the courts of first instance. They are completely subordinated” (Godunin 06.09.2011). Indeed, that Russian courts are vulnerable to pressure when handling politically salient cases must be considered conventional wisdom among observers of the country.

Despite the interviewees’ harsh judgment of the Russian courts, however, the judiciary has not only refused to convict some of the targets but also granted them compensation. Interestingly, this judicial action is part of a growing tendency in Russia (see Trochev 2012). Administrative justice has even been called one of Russia’s “great success stories” (Solomon 2008b, 279), and Hendley’s (e.g. 2009) research indicates that selective law enforcement is of little relevance to common people’s use of the legal system. In Putin’s early years much was done to strengthen the legal system, including efforts to limit corruption within the judiciary

(Smith 2010). In non-political cases, at least, the Russian legal system has greatly increased its role as arbiter.

While this fact is true, two additional factors must be taken into account when we consider cases of selective law enforcement. First, cases that are seen as important for the regime may fall out differently because of the informal awareness among judicial actors. Cases with political significance do not automatically take on similar patterns as those without. Second, it is exactly in politically salient cases that external actors may add the most pressure through informal channels. Partly for this reason, we see a distinction in how political and ordinary cases are dealt with. As I will argue in the next chapter, this duality is a crucial feature of legality in Russia. In the words of Hendley (2007, 99): “Justice is possible and maybe even probable, but cannot be guaranteed”.

An important factor in understanding the regime’s grip on judicial decision making lies with the strongly hierarchical judicial system. A strong hierarchical judiciary may at first glance seem appropriate to Russia, considering the high level of corruption. As the argument goes, securing bureaucratic accountability within the organization will protect the judges from extraordinary pressure from local interests. At the same time, individual judges within the organization lose most of their independence to actors higher up in the hierarchy. Partly because of a non-transparent system dominated by unclear procedures and vague criteria for appointment, promotion, and disciplinary measures, the careers of ordinary judges in Russia are highly dependent on chairpersons, who are in turn dependent on their superiors (Schwartz and Sykiainen 2012). The hierarchy is reinforced by the fact that rulings reversed by higher court instances are seen as errors on the part of the lower court judge (Popova 2012, 137). The incentives are very much present, therefore, for the judges to make an all-things-considered evaluation of the situation and base their ruling on what they believe their superiors would have done, instead of considering the legal issue independently (see Scheppele 2010).

The strong dependence within the organization is presumably a part of why judges reportedly lean on advice from court chairpersons in politically salient cases (Popova 2012, 137). A report from 2009 concludes that these chairpersons are political animals that “have the know-how and are able to intercept and interpret hints dropped by the Kremlin, the local administration, the local administration, or an influential official, politician or businessman” (Centre for Political Technologies in Ledeneva 2013, 151). In this way, political questions move up the hierarchy for decisions. At the higher level of politics, the federal executives

influence the judiciary through the appointment of judges and various special departments in the Presidential Administration that are closely connected to the judiciary's leadership (Popova 2012, 139-143). In Popova's view, the result is a mechanism through which political input at the top of the pyramid may result in politicized justice at the bottom:

In Russia, the Kremlin could impose its preferences on individual case outcomes through the following mechanism – the Kremlin's position would be communicated to the higher echelons of the judiciary through the close informal ties between politicians and the judiciary's leadership, then these preferences would get passed down to the lower courts through the highly effective hierarchical relationship with the judiciary. (Popova 2012, 146)

The political dependence is also formally constituted. By taking the most important decisions on judicial careers and monitoring the performance of individual courts, the Judicial Qualification Collegiums may be said to serve as the guardians for the judicial hierarchy. Until 2002, these collegiums consisted exclusively of judges, but after the legal reform that year they became a direct channel for ulterior influence on the judicial system. Since 2002, one-third of their members are representatives for "the public," that is, appointed by the regional legislatures. Also the President of the Russian Federation is entitled to one representative in both the federal collegium and in every regional collegium (Schwartz and Sykiainen 2012, 977-979). As a consequence of this system, Popova (2012, 135) argues, the collegiums "actually serve as monitors for the federal executive of judicial behavior at the district court level".

Powerful individuals within the regime also possess informal channels to influence judicial decision by approaching judges directly. The combination of an informal political culture and a tradition of legal manipulation may strongly impact judicial independence when political pressure is added in individual cases. My research documents all too clearly that life is by no means easy for Russian "dissenters" who fail to cooperate with authorities and refuse to subordinate themselves to the system. There is little to indicate that such dissent would be any easier for judges (see e.g. Ledeneva 2013, 152-159). The Russian legal system does little to limit the vulnerability of judges to officials who express their preferences in informal conversations, which in Russia reportedly is seen as "an acceptable practice, even when it involves judges and politicians" (Popova 2012, 133). In this regard, Schwartz and Sykiainen note that Russia has a long way to go. While a formal ban on such contact can be made (and should be, the two authors argue), "the emergence of truly independent and effective courts

require changes in the broader culture and in the formal practices which connect to the work of the courts” (Schwartz and Sykiainen 2012, 1061).

Finally, it may be worth pointing out an aspect related to the role judges play in selective law enforcement in particular. Because ordinary judges in the Russian system seldom apply the constitution directly (Solomon 2008b, 227), they will need to refer to more narrowly applicable laws when handling politically motivated cases. As I have stressed repeatedly, claims to selective law enforcement and questions of legal guilt are in principle separate issues. Therefore, even an unbiased judge may contribute to sanctioning what originated from political motives. In other words, even if the Russian judiciary had been living up to the highest ideals of neutrality and was able to work in isolation from all external influence, the legal sanctions imposed by the state would have been statistically biased in favor of regime insiders and against regime challengers. A judge without the possibility of challenging the political selection has no means to entirely eradicate the upstream law enforcement bias. One exception is of course if the judge is willing to ignore the legal question in an attempt to actively *counter* a politically motivated case. Such judges will hardly live long within the Russian legal system, however, unless of course they have informal clearance for their decisions.

8.2.2 Capacity, Willingness, and Cost of Interference

The analysis above suggests that the Russian judiciary is autonomous up to a point, yet very vulnerable to political pressure through both the judicial hierarchy and direct intervention from politically powerful forces. When these two channels of pressure operate in concert, the local judge will have an incredibly hard time opposing them. The laws that are frequently utilized in selective law enforcement are too opaque to serve as a powerful counterforce to political pressure. In other words, powerful actors within the state structure have considerable capacity to interfere in legal cases to influence judicial output.

That certain actors have the *capacity* to intervene, however, does not mean that they have the *willingness* to do so. In a revealing study of politically sensitive cases in Russian and Ukrainian courts in the years 2002 and 2003 respectively, Popova (2012) found a significantly greater bias in the judicial *output* of the Ukrainian cases. Because there is little in her study to indicate that Ukrainian incumbents had greater capacity to interfere with judicial decision-making than had the Russian incumbents, Popova suggests that the reason for the difference

must be sought elsewhere. In Ukraine, the period was marked with great political strife and huge political stakes, providing actors with strong incentives to manipulate courts in order to tilt the balance in their favor. In Russia, on the contrary, the authorities had less interest in interfering much (or often) in legal processes because their political dominance was more consolidated. There is a long way from *capacity* to interfere with judicial decision making to actually doing so. Both capacity and willingness are relevant in explaining bias in judicial output.

In cases of selective law enforcement, the willingness to interfere with legal processes is implicit in the definition. At first glance, then, willingness may seem irrelevant to explain variations of judicial outcome in cases of selective law enforcement. While the willingness to initiate a case on political basis is implicit in the practice, the *degree* and *level* of interference, however, is not:

The relative marginalization of the courts as a tool of political competition is that during Putin's second term in office and during the Medvedev-Putin tandem term, the Kremlin has been able to neutralize and sideline political opponents through means other than politicized justice. ... In short, incumbents in Russia's authoritarian regime simply do not need to resort to using the courts to achieve their ends. (Popova 2012, 166)

This point may be particularly relevant in a situation in which the judiciary shows some degree of autonomy. Because the Russian judiciary has a certain level of autonomy and because the law is far from unimportant in Russia, pushing a poor case through the legal system may be possible but would imply significant costs. These costs include organizational resources but also the risk of scandalizing the regime, which after all is not immune to popular sentiment. To let flagrant falsifications pass is *in general* not acceptable within the current regime and would require considerable political will (Mendras 2012, 147).

Compared to the courts, it is both easier and less controversial to control law enforcement agencies through formal and informal incentive structures. The upstream law enforcement is more directly subordinated to the executive branch and more readily accessible. The very fact that observers so often speak about interference with judicial independence presupposes that there indeed is something to interfere with. The independence of law enforcement and

administrative agencies is less of an issue in academic or political discourse because their political dependence is largely taken for granted.⁷⁹

Not only are the law enforcement agencies of the executive branch easier to access for actors within the state administration, they are also more flexible in use. They may initiate investigations or raids on vague suspicions and have manpower and a broad mandate that makes it easy for them to engage in harassment. Moreover, these types of acts have a relatively low potential to mobilize protests. While harassment may lead to some negative publicity now and then, it is criminal proceedings and severe sentences that produce the international headlines. When confronted by critics, accusations of selective investigations, interrogation, or otherwise soft reactions will presumably be easier for initiators to publicly dismiss as paranoia than would a sentence. The less tangible the harassment, the less potential it has to scandalize the regime.

At the same time, small but multiple incidents may still influence the choice of a politically interested public not to engage in oppositional activities. We have already seen how the law enforcement agencies are capable of imposing substantial punishment upon their targets without enacting legal sanctions. We have also seen that their harassment successfully restrains the targets' abilities to conduct activities that are unwanted by the regime. The court proceedings may possibly be as much of a nuisance as an eventual sanction would be.

Finally, when the Russian judiciary acknowledges cases of prosecutorial misconduct and awards compensation, this makes cases less likely to end up with international embarrassment at the Human Courts of Human Rights (ECHR), an issue which has been taken quite seriously by the Russian leadership (Bowring 2005; Solomon 2008b). Rather frequent appeals to the ECHR, not least by human rights activists, may in part explain why authorities seem hesitant to pressure courts to make decisions with no legal backing. Ledeneva (2013, 251) even sees the ECHR as a possible source of change to the deeper dynamics of the current system of governance – an external challenge to pervasive quasi-legality.

⁷⁹ On the dependence of Election Committees upon the state administration, see fn. 43

8.3 The Predictability of Quasi-Legal Coercion

In this study, I have treated informal rules as analogous to formal rules. This decision is not to deny there are serious differences between the two notions.⁸⁰ Informal rules are by definition opaque, always rules of thumb, and by necessity in flux even though the core principles are usually highly resistant to change. For this reason, the interpretation of informal rules will always be a matter of context. Informal rules will always be formulated either on a high level of abstraction or alternatively explained through their implications in individual cases.

Yet, throughout the study I have also shown how a conceptualization of informal rules as analogous to formal rules may be beneficial for purposes of concept building. I have suggested that informal rules can (or must) be promulgated and that they may or may not guide behavior, be complied with, or followed in the same way as formal rules. Moreover, we have seen that the analogy between formal and informal rules may help explain how the practice distorts and deflects criticism (section 4.4). Finally, we have seen how the conception of informal rules as analogous to formal rules conforms to the interviewees' explanation of selective law enforcement as intended to block or deter unwanted activity.

For the above-mentioned reasons, however, it makes little sense to talk of the enforcement of this or that particular informal rule, as if they were formal. Instead, I prefer to talk of the enforcement of informal rules in the plural, alternatively of rule sets. I also use the notion of (a) core rule(s) as a broad generalization for the rules' implications. For the purposes of this chapter, the idea of informal rules serves to illustrate how the cases of selective law enforcement have certain commonalities that Russians interpret within an existing understanding. It is the sum of these commonalities in the logic of *predicates* and *consequents* that constitutes the informal rules as observable entities. It is the entrenchment of these generalizations and their ability to guide behavior that constitutes the institutionalization of selective law enforcement.

In themselves, institutions always increase predictability. Indeed, to increase predictability is essentially what institutions have in common, regardless of their otherwise different attributes (North 1990). For this reason, we should not assume that when institutionalized selective law enforcement makes the ruling of Russia more arbitrary or unpredictable. Or to be more

⁸⁰ For a critique of the analogy, and of the notion of informal rules in general, see Ledeneva, 2006a, 14-22.

precise, the degree of arbitrariness and unpredictability must necessarily be seen as relative to other arrangements. In a dysfunctional legal system, selective law enforcement may indeed increase the level of predictability. After all, selections are done according to a pattern.

Friedman (1975, 43) illustrates this point through a hypothetical example reflecting his time:

Even if rules were meaningless or totally ignored, it would not follow that chance and caprice would govern the courtroom. It would mean only that something other than the official rules –the judge’s attitude and values, for example –would determine decisions. Imagine a secret, fanatical Marxist taking office as a judge in a non-Marxist country ... his ideology would decide his cases for him. The outcomes would not be random or accidental; once one cracked his code, they might be easy to predict.

Certainly, the outcome may differ from that of the other judges in the same country. Yet, for an expert on Marxism at least, the sentences would be no less predictable. A person not acquainted with Marxism will need some time to predict the rulings of the “fanatical Marxist” above. In the same way, an observer would have to be acquainted with the ordinary jurisprudence in the country if he were to predict the behavior of a more conventional judge. In the case of selective law enforcement, this fact is germane. The informal rules that guide Russian politics are non-transparent to us and may therefore appear as more unpredictable than they actually are for insiders (see also Hendley 2009). Something *not* expressed by the interviewees of this study is surprise.

8.4 Putin’s Twofold Consolidation of Repressive Capabilities

As we saw in the previous chapter, selective law enforcement takes a great variety of forms, and we can identify subcategories within most conceptual components. It was also clear from the findings, however, the way the interviewees across cases and legal issue areas tended to generalize from the informal background to the same core rules. The interviewees see punishment as consciously brought about in order to hit political dissidents: those “not agreeing,” “not pleasing,” “unwanted,” and “critical to the authorities” (section 7.1). Selective law enforcement is seen as a message that the ruling elites are at the wheel and that their prerogatives are not to be challenged. Selective law enforcement all over Russia is hardly the result of a grand conspiracy, it is not unreasonable then to suggest that the Kremlin *allows* for the practice to be replicated and used for personal or group benefits in the regions.

With regard to the core rule of authoritarianism, the interests of the various insider actors are well aligned. The core rule of political obedience by necessity favors those in power. The central authorities are left with the task to make sure that actors further down the hierarchy do not overextend their mandates and make moves that either challenge the regime or create scandals that are not worth the efforts. As it seems, Putin's policies have approached this task in a twofold consolidation of repressive capabilities. First, the political regime's cohesion has been boosted by means such as of formal institutional reform, but also unofficial recruitment policies and coercion against dropout and powerful outsiders. In a second and related move, the access to law enforcement capabilities has been centralized.

To produce a loyal and subservient bureaucracy, the regime under Putin has been increasingly recruiting new members to key positions based on loyalty rather than professional skills (Ledeneva 2011a; 2013). The earlier so fragmented elite groups with oligarchs dominating politics from outsider positions have either been chased out of politics or consolidated within the state structures. Even the "Russian shadow spheres are formed not next to and contrary to the state but, instead, within the state's own functioning machinery and in collaboration with it" (Pastukhov 2002, 66). When Putin rebuilt state power vertically, this was not only in an effort to strengthen the state *vis-à-vis* regional networks and make governmental policies more effective. The centralization of power is in part an attempt to centralize corruption and access to exploits (see e.g. Yakovlev and Zhuravskaya 2009; Gans-Morse 2012). Today, therefore, the formal hierarchies and the most prominent power networks are both headed by the current president (Kononenko 2011; Hale 2010).

As is conventional wisdom, one of Putin's greatest projects was to centralize the state to consolidate the regime and increase stability. This was achieved partly through reform, such as the doctrine of a "Unified Legal Space"; the establishment of seven Federal Districts under the President's administration; new fiscal policies; and the abolition of gubernatorial elections. In part, the centralization was also unofficially constituted for instance by the "deoligarchization" and subsequent amassment of economic capabilities within the regime (Yakovlev and Zhuravskaya 2009; Gans-Morse 2012). Also, Putin and Medvedev's presidential terms saw a consolidation of a centrist party of power to coordinate the regime's activities.

An important aspect of the centralization process under Putin was the increased control of the Kremlin over the broader legal system (Petrov 2011). According to Taylor (2011, 143-144),

the political abuse of police, FSB, and the procuracy were all centralized in this period.⁸¹ The new cadre policies for the state administration in the regions also strengthened central control over the operation of regional power networks (Petrov 2011).

While the control over law enforcement under Putin was centralized under the justification of centralizing control and reducing abusive practices, it did not make the agencies more accountable to the population (Ledeneva 2013, 179-210). Instead, the access to abuse their power shifted. In the words of Arkadii Vaksberg (in Ledeneva 2006a, 24), the law enforcement agencies were transformed under Putin “not only into simply obedient but into zealous executors of political orders”. As a result of these developments, the law enforcement agencies have gradually shifted from being loose cannons to be subordinated the interests of the executives (figure 5).

The effect of such broadly constituted centralization may be seen in selective law enforcement as well. One of the interviewees (Anon. human rights activist 2010) notes how copyrights had earlier been used as pretext in extortion schemes and between rival businesses. Only recently, she contended, had the scheme been rediscovered as a political tool. The corrupt actors were the same, she believed, but they now served new masters. Put in the naked rationality of Douglas North (1990, 59): “if the state has coercive force, then those who run the state will use that force in their own interest at the expense of the society.”

Also with regard to judicial developments, we can identify similar tendencies of moving power away from corrupt elements outside the state structures and hoarding it among the executives. Instead of increasing the judges’ independence, the dependence has in part been shifted. The answer to how independent Russian judges are today compared to earlier will greatly depend on what we mean by the question. Most importantly for our purposes, we must ask: independence from *what* and independence from *whom*? Although formal insulation, demands for transparency, and increased wages may have reduced the judges’ dependence upon illegal sources of income, one may argue that both formal and informal mechanisms have simultaneously made them more dependent upon the political regime. One outcome may be that courts are harder to privatize for outsiders, yet at the same time accessible for political heavyweights within the regime.

⁸¹ On the political use of the Russian procuracy, see also Burger and Holland, 2008.

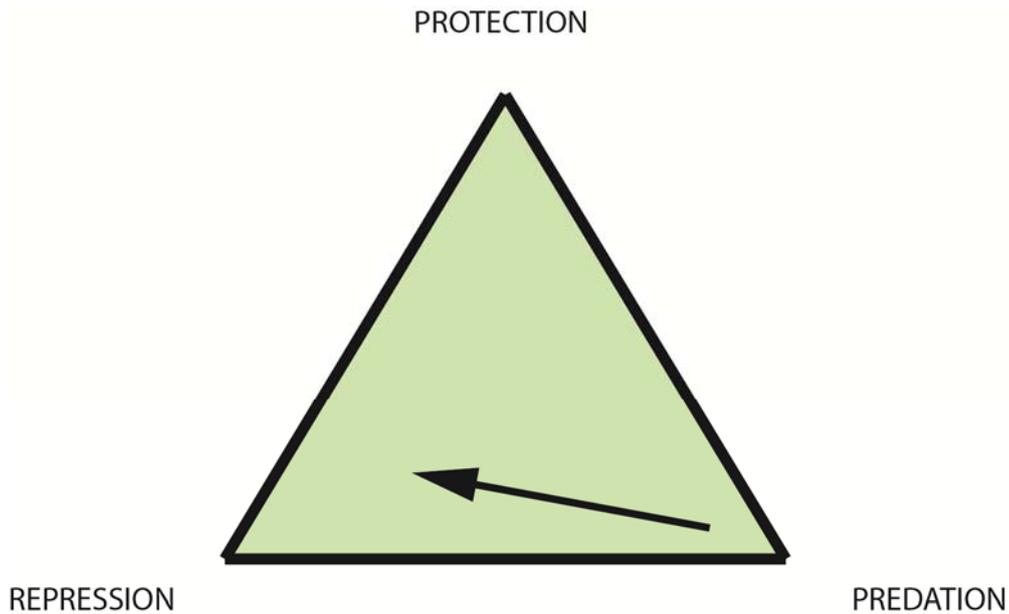


Figure 5: Tendency of law enforcement under Putin/Medvedev administration
(Adapted from Taylor 2011, 179)

As much as restraining these elites, the formal institutions provide channels for their informal influence. The state apparatus of suppression also works to suppress legal dissent against its leaders. Instead of increasing state quality, Taylor argues, Putin has increased central control and strengthened the state capacity to harass opposition and critics (ibid). For the political leadership in Russia, the formally democratic and law-based state thus turns out to be their main guarantee for authoritarian and quasi-legal control. The result, in the words of Ledeneva (2013, 240), is a bureaucracy in which the lower level individuals “are keen to seek [commands], read signals and display compliance before the command is even given.” This willingness to serve the regime’s bidding is important to greasing the machinery of selective law enforcement.

8.5 A Regime of Repression

Despite their indisputable importance, the coercive features of authoritarian systems are reportedly underrepresented in research on regime trajectories (Levitsky and Way 2010, 54-57). One explanation for this lack of representation may lie in the stabilizing role of effective coercion: Who wants to do research on something that *does not* happen? To a considerable

degree, the difference between dissatisfaction with a regime and open revolt against it may lie in the effectiveness of the coercive apparatus. “If the state’s coercive apparatus remains coherent and effective, it can face down population disaffection and survive significant illegitimacy”, Eva Bellin (2004, 143) observes, paraphrasing Theda Skocpol’s (1979) seminal work on revolutions. As noted above, the ability and willingness of the coercive apparatus to serve the regime is not only needed to crack down upon mass protests. Just as important in many contemporary authoritarian regimes is the ability to deter protest or “nipping it in the bud” (Levitsky and Way 2010, 58).

In consolidating the enforcement apparatus and intensifying suppression of dissent, the political leadership under Putin gradually strengthened a *regime of repression*, as coined by Mark R. Beissinger. According to him, the regime of repression is

... a set of regularized practices of repression and the internalized expectation about the ways in which authority will react punitively toward challenging acts that result from these practices. Repression exercises its effect in part because it functions as habitus. That is, part of the effect of repression occurs because individuals “have internalized, through a protracted and multi-sided process of conditioning, the objective changes they face”⁸² in challenging authority and what types of penalties they would most likely suffer on the basis of prior responses of authority to challenge. (Beissinger 2002, 326)

As I argued in section 7.6, the two-fold promulgation to both law enforcers and subjects of selective law enforcement is an important requirement for selective law enforcement to be institutionalized. For a regime of repression to be established, Beissinger (2002, 327) contends, the practices involved need to be institutionalized so that they may reproduce shared expectations of how the system will react to challenges. We have seen that selective law enforcement takes many different forms, yet that it is still marked by a level of “consistency, regularity, and predictability with which repression occurs, the internalized discipline that emerges as a result, and the institutional resources necessary to produce such patterning” (ibid). A pointed summary of how selective law enforcement institutionalizes and impacts Russian society, then, comes from the unlikely source of a study of nationalist mobilization.⁸³

⁸² Here Beissinger quotes Bourdieu and Wacquant (1992, 130).

⁸³ The use of Beissinger’s term for contemporary Russia is an idea I borrow from Taylor (2011).

By means of systemized and consistent distribution of preventive and punitive acts, the activities of the opposition movement and other activists are suppressed, but the movement is also radicalized. The harsh suppression of dissent leaves little space on the barricades for ordinary people. To be active in the protest movement in Russia is therefore no longer possible as a side activity, but turns into a lifestyle. A regional GOLOS coordinator, for instance, claimed that the FSB had blocked his opportunities to pursue his academic career, and he did not see any other options than to keep fighting for democratic elections and cross his fingers for change (anon. representative GOLOS 2013).

In this way, the regime's way of dealing with criticism as if it were extremism has in a way become a self-fulfilling prophesy – criticism *is* extreme in Russia because of how it is dealt with. As Robert Horvath (2013, 207) remarks, it takes a serious narrowing down of political space to “lend revolutionary pathos to the opposition's demands for the unshackling of the mass media, the observance of the constitution, freedom to demonstrate, and the return of free and fair elections.”

While some societal elements may be radicalized, many more will be deterred by the systematic crackdown on attempts to hold the regime accountable. Selective law enforcement may also be part of the explanation for the so-called political apathy in Russia. The lack of political initiatives from below is not exclusively a cultural phenomenon but is also policed from above by a regime that discourages such initiatives unless they happen to fit with its informal agendas. It has been pointed out that a key to the survival of Putin's regime (and his relative popularity) has been the lack of alternatives. While this is true, the dearth of alternatives is not a product of chance. What is sometimes attributed to loyalty is at least in part “a form of submission stemming from the fear of trouble” (Mendras 2012, 195).

This reminds us that while the informal institutions are often contingent on cultural specificities, they *are* not culture themselves. For externally enforced rules to survive through time, their enforcement through punishment cannot halt. The fact that the rules of political conduct are indeed enforced by quasi-legal (and other) means suggests that they are in no way self-enforcing or “natural” to Russia. The institutionalization of selective law enforcement “embod[ies] the interests and preferences” of the ruling elite (Nee 1998, 87).

9 New Perspectives on Political and Legal Dualism

At the time when the research was carried out Russia had a consolidated authoritarian regime that was to a significant degree in control of both the legislative process and the networks responsible for legal manipulation. Considering the considerable amassment of power within the Kremlin, it is pertinent to ask why the regime employs such intricate schemes of repression as selective law enforcement. Why did the regime not amend the constitution to formalize its rules so that political dissent could be cracked down upon more effectively and in a more systematic fashion? Or alternatively, why did it not simply ignore legal aspects when suppressing political dissent? It was exactly the coexistence of the conflictive rule sets of authoritarianism and formal democracy that spurred theories of transitions and façade politics. In this chapter, I provide an alternative interpretation to explain the logic of contradictions in today's Russia with particular attention paid to selective law enforcement.

Readers should note that my approach to this task is instrumentalist. I do not focus on the origins of the existing tensions but attempt to see how what appear to be contradictions make sense when seen from the perspective of authoritarian or neo-patrimonial governance. Instrumentalism also see the actors and their interests as separate from the institutions and structures that they can utilize, manipulate or circumvent in order to reach their goals.

Selective law enforcement, I will argue, can be seen as a way to *organize political and legal exceptionalism*⁸⁴ in a state of institutional tensions. By means of a Dual State perspective, we may incorporate both the *tensions* and the *exceptionalism* of selective law enforcement within one broader framework. With these building blocks, I seek to explain the duality in Russian politics in terms of *pragmatic dualism*, focusing on the instrumental benefits of the Dual State but acknowledging its historically contingent genesis.

As a launching pad for my discussion, I use Ernst Frankel's (1941) model of the Dual State, to which I will refer frequently below. Because of the controversy inherent in any references to

⁸⁴ Note that I use the term exceptionalism not in the common cultural sense (like Russian exceptionalism or American exceptionalism) but to denote cases that are dealt with according to special rules. See especially section 9.3 below.

the Third Reich, which provides the background for Frankel's research, I must underscore that I use the comparison purely to explore theoretical issues of dual jurisdiction and draw *no* moral or ideological parallels between the regimes in Nazi Germany and today's Russia.

9.1 The History and Chief Characteristics of the Dual State

The model of the Dual State was introduced by Ernst Fraenkel in the book bearing the same name and published for the first time in English translation in 1941. The theory was based on his research on pre-war Nazi Germany after the Reichstag-decree in 1933 until about 1938. In this period, Fraenkel was himself practicing as an attorney at the Berlin Court of Appeals (Guardze 1942, 603). In 1938, Fraenkel emigrated to the U.S. but returned after the war to become one of the founding fathers of political science in Germany. Much of the appeal in his work stems precisely from the ability to explore the issues of politics and law in concert and interaction.

In brief, Fraenkel's work deals with how the Nazi regime in the 1930s eliminated the *Rechtsstaat* in Nazi Germany and did so with the legal⁸⁵ system that was to take its place. In this new system of *dual jurisdiction*, the Nazis enjoyed uncontested prerogatives unchecked by legal principles. At the same time, certain spheres of administration were *de facto* exempted from this arbitrariness. Fraenkel dubbed these pockets of rational-legal control the Normative State and accredited their continued existence to the self-restraint of the Prerogative State and the necessity to keep the German capitalist economy afloat.

In 1977, Fraenkel's work was picked up by Robert Sharlet in a study on legality and legal culture under Stalinism. Sharlet (1977) was careful to point out several important differences between the forms of dual legality under the two regimes, but convincingly explained why the parallel is illuminating. Stalin's regime reserved the right to execute control over legal cases that were found to be of political importance. In a way comparable to Nazi Germany, the increasing scope of what could be regarded "political in the broad sense" had tragic consequences. In the regime's effort to "normalize" the Soviet Union from the mid-1930s, however, Stalin also headed a large-scale reform program to strengthen the rationality,

⁸⁵ The degree of legality to this system was a major topic of debate within legal philosophy after the war. Most well-known perhaps are the so-called Hart-Fuller debates that still resound in legal philosophy today. For a recent collection of articles on the relevance of the debate today, see the collected articles in Cane (2010).

professionalism, and functioning of the legal system. The state that emerged, Sharlet (1977, 155) argued, was “a dual system of law and terror.”

While the elements of change in between Stalinism and Putinism are obvious, “the division between politicized and non-politicized cases has continued” (Hendley 2009, 261). The Dual State, I will argue, has reemerged in a new form. I am not the first to point this out. Hendley (2007, 99) explicitly refers to Fraenkel and Sharlet’s works and contends that “the legal system [under Putin] is best conceptualized as a dual system, under which mundane cases are handled in accordance with the prevailing law, but under which the outcomes of cases that attract the attention of those in power can be manipulated to serve their interests.” Hendley (2010, 24) is for the most part eager to show how the non-political part of the legal system works and makes no attempt to hide her revisionist project to counter the “steady drumbeat of the media”. For her, a frequent reference to legal dualism thus becomes a framework within which she can examine the functioning of the Russian legal system bottom-up, without rejecting that a very different logic prevails in political cases.

A quite different approach to connect Fraenkel to Putinist Russia resulted in the theoretical framework of Richard Sakwa’s (2011) book on the “crisis of Russian Democracy.” In his adaptation of Fraenkel and Sharlet’s thoughts, Sakwa (2011, esp. 37-45) makes a series of quite wide reaching changes to the key terms. While the parallels to Fraenkel’s work in Sakwa’s very broad and open-ended approach may sometimes seem unnecessary, Sakwa’s reconceptualization also produces some valuable insights that I will pick up on below. Finally, Geert Jan Alexander Knoops and Robert R. Amsterdam (2007) may be mentioned for their use of the Dual State model to characterize Putinist Russia and the prosecution of Khodorkovsky in particular.

In Fraenkel’s original model the Dual State was constituted by a Normative and a Prerogative State. By the Normative State, Fraenkel (1941, xiii) understood “an administrative body endowed with elaborate power for safeguarding the legal order as expressed in statutes, decision of the courts and activities of the administrative agencies.” The Prerogative State, by sharp contrast, is “that governmental system which exercises unlimited arbitrariness and violence unchecked by any legal guarantees” (ibid). After the implementation of the

Reichstag Fire Decree⁸⁶, the Prerogative State gradually secured the exclusive jurisdiction to decide what were to be considered political threats and thus exempted from the ordinary legal system. At the same time, “insofar as the political authorities do not exercise their power, private and public life are regulated either by the traditionally prevailing or the newly enacted law” (Fraenkel 1941, 57). It is the coexistence of these two jurisdictional spheres, their conflictive logics yet complementary outcomes for the political project, which in a nutshell constitutes the idea of the Dual State.

The model of the Dual State provides a promising perspective for the purposes of conceptualizing selective law enforcement within a broader theory of legality and politics. In Russia, we have seen that there is a considerable gap between formal laws and the informal rules of authoritarianism that both contribute to regulate political life. These *tensions* between different components have provided various theories on contemporary authoritarian regimes and not least on Russia (see section 1.3.5). Whether we conceptualize these tensions as tensions between state and regime, democracy and authoritarianism, patrimonial and rational-legal governance, or the rule of law and the rule of men, these dichotomies seem to deal with largely overlapping issues. The Dual State not least deals with tensions between two spheres of jurisdiction and between the rational-legal order and arbitrary forces in the political leadership.

It is undoubtedly the aspect of tensions in the Dual State that Sakwa seeks to incorporate in his model. His project can thus be seen as an effort to integrate the Dual State model with current mainstream approaches to Russian politics. Sakwa’s (2011, viii) explicit goal is to create a more dynamic framework to read Russian politics from within. He is ambitious in his approach: “The tension between the two pillars is the matrix through which the Russian political landscape can be understood.” Following the same lines as in earlier chapters, I will primarily address the tensions within the conception of partly contradicting *rule sets*. My approach to the dualism is thus the coexistence of partly contradicting formal and informal rules under the same political leadership. Compared to Sakwa, my contribution is considerably closer to Frankel’s original instrumentalism, looking at how the dual components both contribute to the political project.

⁸⁶ “Decree of the President of the Reich for the Protection of the People and the State ... of February 28, 1933.” The full decree is provided as an appendix in Fraenkel’s (1941) book.

There are several theories that address tensions in Russia, but the Dual State model also provides a point of departure for examining political and legal *exceptionalism*. As in Fraenkel's original model, the tensions in Russia have given birth to two distinct subsystems. To be sure, the clear-cut separation of two spheres of jurisdiction in Nazi Germany was quite different from the muddier institutional landscape of today's Russia. Yet, as I will argue, the idea of dual jurisdiction is appropriate to illuminate exceptionalism also in Russia.

9.2 Dual State Building in Putin's Russia

As suggested in the previous chapter, state-building under Putin and Medvedev may seem paradoxical. In the first decade of the century, Russia again rose in power and both state capacity and quality increased in many ways. This development, however, went hand in hand with an increasing authoritarianism and lack of tolerance for everything that vaguely threatened the incumbents' grip on power.

With regard to legal reform, many steps were taken to improve the ability of the legal system to provide justice to the common citizen of Russia. The Russian legal system has changed greatly over the last two decades, and the positive developments should not be neglected. Many of these reforms are of Putinist origin, while others were sufficiently funded only under Putin's presidency. In fact, the decision to invest in the judicial system depended largely on the personal initiative of the President, if we are to believe Solomon (2008a, 3). Especially Putin's first term of Presidency saw major legal reforms.

Maybe most significantly, the Russian state has poured considerable resources into strengthening the financial situation of its judiciary, both to increase its independence from corrupting interests and to raise the prestige of judges. Salaries have increased appreciably, court buildings have been improved, and courts have been allocated better "staff support, facilities and equipment in order to enhance their independence, effectiveness, and prestige" (Smith 2010, 144).

Among other positive developments are greater computerization of the courts; measures to increase transparency and give observers open access to databases on the Internet; initiatives to improve juvenile justice; and attempts to reduce the system's dependency on harsh prison sentences. A large-scale reform moved much of the total caseload over to Justice-of-the-Peace courts, which relieved the pressure on the courts of general jurisdiction and boosted

efficiency. In 2010 the Justice-of-the-Peace courts dealt with almost all administrative claims, three-quarters of civil claims, and half of all criminal claims (Hendley 2012a, 377). Thanks to their efficiency and not least their accessibility, Hendley (2012b, 337) has even called these courts “the unsung heroes of the Russian judicial system.” Solomon (2008a, 31) also praises the efficiency of the court system, claiming that even before the computerization program “the bulk of cases were processed more quickly in Russia than in Western countries.” Recent research on legal professionalism in Russia also indicates clear changes for the better (Panina and Bierman 2013).

Moreover, while the trust in legal institutions remains low in the population, the citizens are nonetheless willing to use them to an increasing extent. In the first decade of this century, the number of civil cases dealt with in Russian courts more than doubled (Hendley 2009, 241). The chances of winning when litigating against the state are also high, not least for firms (Trochev 2012). In addition, the compensation awarded to these litigants has increased sharply over the last decade (ibid).

The rule of law, Gordon B. Smith (2010, 151) concludes, “appears finally to be taking root” in Russia:

In recent years we have witnessed not only the enactment of new laws and efforts to bring laws and rules enacted by regional governments into conformity with the Constitution and federal legislation, we have also observed progress toward improving the functioning of the judiciary and enhancing its independence. (Smith 2010, 141)

Against the backdrop of my analysis, these conclusions may seem close to absurd. Rather than being absurd, however, they point to the other subsystem of the dual legality we can see in Putin’s Russia.

Despite this bombardment of positive initiatives, the authoritarianism and neglect for constitutional freedoms have not come to a halt.⁸⁷ On the Freedom House index, for instance, Russia’s ratings have declined *every single year* since the organization started the reporting project “Nations in Transit” in 2003 (Orttung 2013). Although legal abuse was rife in the 1990s, its current role in a regime of repression seems to be a Putinist phenomenon (Taylor 2011). As my analysis in the previous chapter suggested, the political leadership has

⁸⁷ For a discussion on the link between regime type and legal system, see Root and May (2008).

increasingly subordinated and centralized law enforcement agencies, and judicial independence has also been seriously compromised.

The coexistence of strengthening and undermining tendencies are rarely missed even in positive evaluations like those of Solomon, Smith, and Hendley referred to above. The success stories and the scandals, then, seem to be operating side by side. All of these researchers acknowledge the problems of judicial independence that I identified in the previous chapter. Yet, as Hendley observes:

“Telephone law” [telephone justice] has been a reality in Russian life for decades, if not for centuries. Yet, it has not resulted in a full-fledged “rotting” of the entire legal system. Instead, this Russian version of “rule by law” has peacefully coexisted with the “rule of law” in more mundane cases. (Hendley 2010, 258)

Taylor explains the duality in terms of “routine” and “exceptional” law enforcement tasks:

Routine ones are those that are the core functions of an organizations as set out in laws and regulations, whereas exceptional ones are set by superiors but are extra-legal or even illegal ... Russian law enforcement agencies were much better at implementing exceptional tasks than the routine ones established by law. (Taylor 2011, 3)

In this way, the state administration works part-time for the regime and part-time for the state. Russia’s coercive apparatus enforces not only formal rules, but also the informal rules dictated by the interests of their patrons. In this way, the informal interests carve out an exclusive space for themselves within the state. This is the Dual State in Russia, and the arrangement gives rise to a certain blur between state and regime, between the public and the private sphere. The two subsystems, however, are still distinct and evident not least in the output of the system.

Whereas in Germany the Prerogative State was superimposed on a pre-existing legal order, the two subsystems have under Putin been strengthened at the same time. On the one hand, Russia has witnessed legal reform, legalistic rhetoric, arguably also a more genuine rational-legal operation, and certainly a great expansion of the legal system’s capacity. On the other hand, the same period was also marked by more prerogative power to crack down on opposition. In this way, the dualism in Putinist Russia has been in a process of intensification. The contradictions between the two rule sets have not been solved by formalizing separate jurisdictional channels as in Germany. Instead, the two rule sets have produced a form of hybrid governance that continues to confuse observers.

9.3 The Importance of Exceptions

Selective law enforcement as defined in this study is *not* “how Russia works.” Selective law enforcement is merely how Russia works in exceptional circumstances. The vast majority of Russians are *not* selected. That selection is limited to the few is arguably implicit in the term “selection” itself. Selection is also *out of the ordinary*. In selective law enforcement, cases are taken out of the ordinary legal system and dealt with somewhere else (according to different rules). The selection, then, presupposes a notion of normality and itself constitutes an exception to this normality.

The degree of importance we give this limited number of cases is crucial for how we evaluate the functioning of the legal system, judicial independence, or rule of law. Importantly, if we employ a pragmatic outcome perspective and look at the bulk of “produced justice,” Russia will score increasingly well thanks to the strengthening of the Normative State and of administrative justice in particular. As Russians increasingly come to use the legal system for solving their disputes with both each other and the state, the picture is increasingly becoming one of a modern country. If we look at the exceptional cases, however, our judgment will be different.

The exceptional cases show that constitutional guarantees are not guarantees after all, but merely rules of thumb. Moreover, we can see that the state itself is actively involved in undermining its supposed cornerstone of constitutionalism. It is in these cases, when the two rule sets are in sharp conflict, that their interaction provides good indications of their relative empowerment. If the exceptional cases tell us little about how the legal system is experienced by the common Russian or how it contributes to keeping law and order in society, they are very good indications of the *potential* of informal interests to penetrate the rational-legal logic.

When Russian citizens observe a case of selective law enforcement, they often interpret it as political repression. Within the logic of rule enforcement, this indication of a *potential* is exactly what is needed to create a *threat perception* that can influence the rational risk calculation among concerned parties (Friedman 1975, 82-84). Because the Russian citizens understand that the political cases are *exceptional*, their occurrences will not scare people away from the legal system in fear of telephone justice (see Hendley 2009; 2010). As Hendley (2009, 261) has convincingly argued, the division between political and ordinary cases,

although “opaque to outsiders, is clear to Russians.” Because the population interprets the exceptional cases as *political*, however, they are given incentives to keep a low *political* profile. For this reason, and as argued in the previous chapter, we should not consider the exceptional cases to be marginal just because they are aberrations. Quite the contrary, the exceptional cases deserve attention because they are a barometer of the underlying mechanisms and power relations in society.

9.4 Tensions and Exceptions in the Dual State

Fraenkel devotes a considerable part of his book to describing the years leading up to the establishment of the Dual State (1933-1937). This rather detailed study of jurisdictional struggle is not least a story of clashes between the old legal order and the new logics of the time, a logic of “material justice”⁸⁸ that demanded political expediency above everything else. In this period of internal jurisdictional strife, the tensions between the two rule sets were more visible than later: The old order put up several fights as it was gradually forced to retreat.

However, also after these years, when the Dual State was fully established and the *Rechtsstaat* eradicated, the tensions were still present even if tamed under the political will. These remaining tensions, however, did not take the form of a power struggle since the Prerogative State was firmly in the lead. Rather, the tensions stemmed from two different rule sets with different *ultimate reasons* for legitimacy.⁸⁹ Whereas the Prerogative State played the role of a demiurge with the right to administer the deeper “material justice,” the Normative State was tied to the logic of rule-based administration and “formal justice.” The two coexisted and were allowed to coexist because the political leadership was dependent upon both subsystems to support its political ambitions.

The Nazi regime solved the contradictions this coexistence created by establishing two separate jurisdictional spheres, which became the two counterparts of the Dual State. To solve

⁸⁸ Logic in a broad sense. Fraenkel sees the basis and operation of the Prerogative State as fundamentally irrational and compares National Socialism to an inquisitorial church, “a theocracy without a god” (Fraenkel 1941, 48).

⁸⁹ The use of conflictive rule sets is not inconsistent with Fraenkel’s interpretation. Although Fraenkel conceptualized the Prerogative State as *de jure* arbitrary, he contended it was *de facto* taking on (more or less) predictable patterns in the same way as the informal rules in my conceptualization.

the issue of what question belonged within what sphere, the jurisdiction of jurisdiction was curiously given to one of the subparts. In other words, the Prerogative State could itself define what cases it had jurisdiction over. Cases which the Prerogative State did not declare as politically relevant were decided upon in the ordinary legal system, by the Normative State. In this way, one of the subsystems became completely subordinated, yet was by the political leaders *allowed* to function more or less unblemished in whatever cases the Prerogative State did not take an interest. After the political regime had secured this mechanism of political control, it could safely leave normal life to rational-legal procedures. The machinery of rational legal governance thus continued to work, but was disarmed and politically emasculated.

In post-Soviet Russia, by sharp contrast, the extra-legal prerogative power never came to be formalized. In Russia, this power does not take the form of legally constituted prerogatives but of mechanisms such as selective law enforcement. From the Constitution of 1993 it is clear that the state should guarantee the freedoms of speech and association as well as equality before the law. In practice, however, the political leadership suggested in its doublespeak that political dissent, be it legal or not, must be contained. The Normative State stipulates the right for everyone to stand for elections, but the incumbents seemed bent on suppressing competition. Not only do the interviewees often claim that legal cases against them are fraught with all sorts of manipulation, they also claim that there is a *selection* process. In this process, as I have argued, certain targets are subjected to exceptional attention based on a rule set in which political obedience is key.

Most importantly for our use of the Dual State model, Russian courts enjoy full jurisdiction over politically sensitive cases, formally speaking. In Russia, in other words, there is no Prerogative State: “Instead we have informal behavior ... that fulfils some of the functions of the prerogative state but has no independent legal or institutional status of its own” (Sakwa 2011, 42).

Selective law enforcement became a solution to solve the above contradictions, weaving together the fabrics of formal and informal politics. It was also a solution that reflected the ambivalence of governing Russia. On the one hand, it shows the relative autonomy of the Normative Order and its ability to shape the strategies of the ruling elite. Even in exceptional cases, the political leadership cannot easily step out of the legal sphere entirely. At the same

time, selective law enforcement is also a manifestation of the political leaders' refusal to bow to the constitutional order.

9.4.1 Organizing Exceptionalism in the Dual State

In Fraenkel's (1941) model, the Prerogative State defines its own jurisdictional platform to be whatever it sees as important enough at the present time. The method to achieve this was a highly speculative juggling of legal principles (see fn. 85). In the formulation of a Nazi legal scholar of the Gestapo:

The task of combating all movements dangerous to the state implies the power of using all necessary means, provided they are not in conflict with the law. Such conflicts with the law, however, are no longer possible since all restriction have been removed following the Decree of February 28, 1933. (Werner Best quoted in Fraenkel 1941, 25)

The instrument to concretize the dual jurisdiction in Nazi Germany system was the legal concept *Konflikt*, a term which allowed the authorities to transfer any case they saw as significant enough to its own sphere of legally unbound jurisdiction (Fraenkel 1941, 29-30). The jurisdiction of the Prerogative State was by definition one of exceptions, because the cases it did not actively interfere with by default fell under the jurisdiction of the Normative State. In other words, the Dual State developed two *modes* of rule – one for cases in which the regime was not a major stakeholder, and one for the *exceptions* (figure 6)

In Fraenkel's Germany, as well as in many other regimes ranging from the *ancien regime* in France and military regimes in Latin America to the anti-terrorist regime under George W. Bush, exceptional cases are dealt with in parallel court systems (Pereira 2008). It is not least with regard to the organization of exceptionalism that selective law enforcement is a crucial element of Russian politics. Unlike in some other roughly comparable regimes (with regard to real civil freedoms), there are no political courts to deal with political issues in Russia. The boundaries between the two subsystems of the Dual State in Russia are therefore non-transparent, at least to outside observers. Post-Soviet Russia “has been in a permanent state of exception,” Sakwa (2011, 42) notes, but the exceptions are “exercised not through constitutional provisions and some sort of defining a state of emergency, but through an informal and undeclared derogation from constitutional principles.”

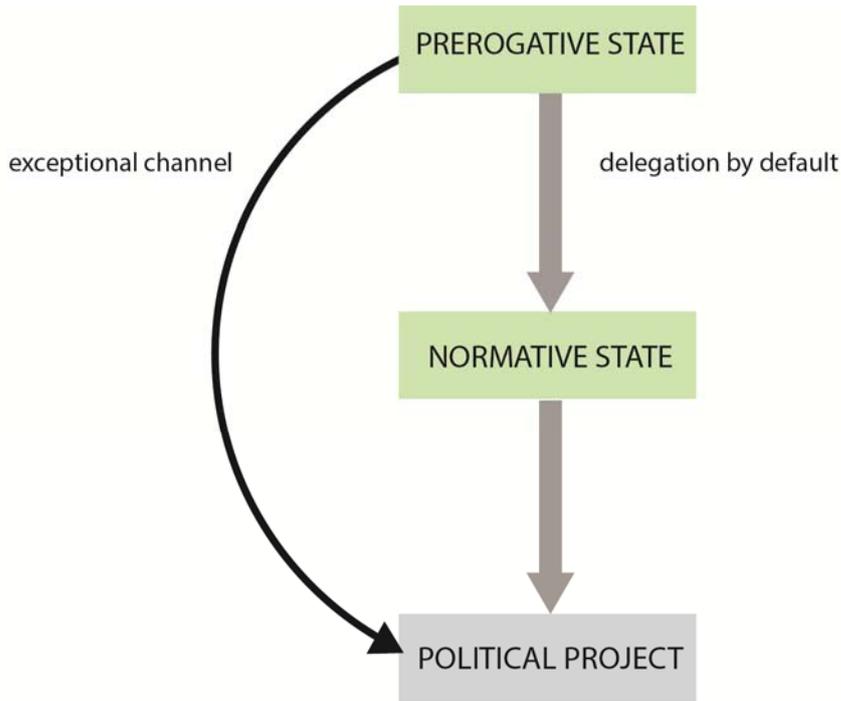


Figure 6: Organization of exceptionalism in pre-war Nazi Germany

This insight is of profound value. It implies that selective law enforcement is a solution to the same problems shared by many other authoritarian states, namely how to coordinate political control with rational-legal rule. In other words, selective law enforcement embodies the efforts to satisfy both the formal and the informal rules simultaneously. This perspective makes room for the dominating position of the political authorities to utilize the state for their own exceptional purposes, and it simultaneously also illustrates the relative strength of the legal order in Russia as pointed out by Sakwa. As he (2011, 3) observes, the most successful Russian politicians are those who are able to understand and manipulate both rule sets.

The counterparts in Russia’s dual governance “are discreet subsystems, but the two are not insulated and hence Russian politics today is a dyadic order in which the two are in constant interaction, the essence of its hybridity” (Sakwa 2011, 41). The pervasive grey-zones in coercive practices with regard to legal/illegal and formal/informal dichotomies may thus in part originate in the lack of formalized exceptional channels to accommodate the interests of those in power. I therefore propose that selective law enforcement is *an organization of exceptionalism in a state of institutional tension*.

9.4.2 The Jurisdiction of Jurisdiction and the Exceptional Switch

Similar to Fraenkel's Germany, the exceptionalism in Russia is without clear boundaries. Even though the jurisdiction in Germany was delineated through the mechanism of *Konflikt*, the Prerogative State could move the boundary between the two states at will. In Germany, the Prerogative State was paradoxically *de jure* above law. In Russia, the interference with legal processes is informally constituted and thus not regulated by a formal mechanism of jurisdiction at all. Because of the organizational costs associated with it, the actual use of the exceptional channel is much more limited in practice than what it *could* be. This is true for both Fraenkel's Germany and Putinist Russia (Fraenkel 1941, 57-58). In both cases as well, the interference in practice took the form of somewhat predictable patterns (Fraenkel 1941, 3).

Following Sakwa (2011), I have suggested that exceptionalism in Russia takes place as an unofficial derogation from legal principles. The political leadership may nonetheless (or may precisely because of this) be said to have an *unbounded* jurisdiction, although not *de jure* unbounded. While the practice is not grounded in any legal rights, the political leadership *takes* the prerogative to interfere with constitutional guarantees.

Because the informal political actors have no jurisdiction at all, their actions may take on forms of *pro forma* law enforcement and be *pro forma* resolved within the Normative State's jurisdiction. At the same time, the unbound character of Russian exceptionalism is seen in the possibility of Russian authoritarian leaders to interfere in *every* sphere of life. Since this power is not channeled through a legal mechanism similar to *Konflikt*, it may be easier for the state-connected elites to appropriate areas that were relatively undisturbed in Fraenkel's Germany, such as property rights (see Gans-Morse 2012; Ledeneva 2013, 191-194). The lack of clear borders between the two subsystems has led to a substantial spillover of state power for personal enrichment and may account for much of the grey-zone governance. As Sakwa (2011, 357) puts it: "The Putin system combined two opposed processes, which were not so easily distinguished because of their interrelated characteristics."

A consequence of the unbound (informally constituted) jurisdiction is that the political leadership may choose the rule sets according to which a case should be approached. In other words, the jurisdiction of jurisdiction allows them to switch between rational-legal and exceptional *modes* of governance at will. As we have seen, it may be enough to make a telephone call to "switch on" the exceptional system in Russia. The law enforcement

structures may even switch it on themselves as the exceptionalism becomes institutionalized. The key to the switch in either case belongs to the ruling elites, whose recruitment policy is primarily based on loyalty.

9.5 Self-Restraint and Instrumentalism

Another characteristic of the Dual State, largely omitted in the model's adaptation to Russia, is that the lack of interference by the ruling elites in the Normative State's affairs is *self-imposed*. The regime needs not only a legal administration, but also a legal administration that is (at least partly) independent of *itself*.⁹⁰ We cannot speak of a Normative State, Fraenkel contends, if it does not continue to operate according to its own legal rules when it is not hindered. To retain and support this mode of operation is what strengthening the Normative State is all about.

Selective law enforcement may be taken as an indication that political actors to some degree are restrained by empowered legal rules. At the same time, we may suspect that the normative state is functioning properly in so many cases because it is *allowed* to function properly. When the political leadership shows a sufficient determination and willingness to interfere in individual legal cases, it can make the Normative State buckle fairly easily. That leaders have the possibility of influencing every decision does not mean that they will always do so: "If one picks at random a volume of the decisions of a German civil court and examines it systematically" the existence of the Prerogative State would not be evident, Frankel claims. The rational-legal logic is by definition resistant to interference. At the political level, this resistance is a matter of effective administration to rule a country with rational-legal tools.

In Germany, the Prerogative State had *de jure* absolute power, but did not actually use it in the majority of cases (Fraenkel 1941, 57-58, 72). Issue areas like contract law, private property law, competition law, and labor law were in practice rarely (although not without exceptions) touched by the Prerogative State (Fraenkel 1941, 75-82). These issue areas were

⁹⁰ The Gestapo leader Karl Rudolf Werner Best noted that "it is essential that many of the activities of the state should be carried out according to legal rules and that they should be calculable in advance" (quoted in Fraenkel 1941, 62). In the words of Hermann Goering himself (giving a lecture in 1934 before a group of attorneys and judges): "An arbitrary deviation from the law would constitute a violation of the judge's loyalty to the Leader" (quoted in Fraenkel 1941, 74).

kept isolated from political issues because of their importance for the economic development of the country. Indeed, the pockets of rational-legal governance were also institutionalized in the so-called economic estates (*wirtschaftsstaende*) that “deprived the state of its omnipotence” (Fraenkel 1941, 97). At the same time, both subsystems served as instruments to further the political project of the Third Reich (see e.g. Fraenkel, 1941, 57). This is a key point for Fraenkel:

The limits of the Prerogative State are not imposed from the outside; they are imposed by the Prerogative State itself. These self-imposed restraints of the Prerogative State are of cardinal importance for the understanding of the Dual State. (Fraenkel 1941, 58)

This is not to say, however, that the self-imposed restrictions are not contingent on external motivations. In practice, all political actors are constrained after all, by all the complexities of incentives and norms in the elite group, society at large, or the international environment. In Russia, these constraints are certainly far greater than in Fraenkel’s Germany. From an instrumentalist perspective, however, these are not external impositions but incentives and factors influencing the choices of the actors. The point is that political leaders may choose to empower courts not (only) due to their soft hearts but also in order to extract rents and increase the longevity of their regime’s survival. Research on a variety of regimes has shown that authoritarian leaders frequently empower courts in order to reap the benefits of a functioning legal system (see the collection of articles in Moustafa and Ginsburg 2008b).

As it seems, there are too many benefits associated with a normative legal order for any modern state to simply ignore them. A well-functioning legal system may for instance make it easier for the political leadership to exercise social control and maintain regime cohesion by detecting self-interested and predatory state officials that go against its interests (Moustafa and Ginsburg 2008a, 7). Crucially, a well-functioning legal order may also protect the economy, which is the role the Normative State plays in Fraenkel’s model. Today this is a central aspect of judicial autonomy in a number of regimes (see Root and May 2008). A similar argument that stresses instrumental self-restraint is found in the research literature on so-called electoral authoritarianism. Several scholars (e.g. Gandhi and Przeworski 2007; Magaloni 2008; Gandhi and Lust-Okar 2009) have explored how authoritarian (and autocratic) leaders may favor partly free elections for reasons unrelated to “fake” democratic legitimacy.

That authoritarian courts are completely subordinated to the political regime is fundamentally a misconception. In modern states, semi-autonomous courts are paramount. This is the key aspect of the Normative State as a legal instrument – a device to extract the benefits of rational-legal governance. When we look carefully, we can see it thrives in the most unexpected places. Fraenkel’s study shows us that even a (near-) totalitarian state 80 years ago was not exempted from this rule.

In this regard, two points deserve particular mentioning. First, many of the benefits of a rational-legal order are *not* associated with democratic legitimacy or Rule of Law in a broad sense.⁹¹ This does not mean that the rational-legal basis for decision-making does not bring about legitimacy (it does). The source of legitimacy, however, is Weberian and not Dahlian – it is rooted in the rational-legal principles of equality and impersonalism, not in involving the population in decision making. In addition, the economic benefits of a rational-legal order are substantial and the material wellbeing of the population is a crucial aspect of securing legitimacy for the type of regimes that Putin’s Russia falls under.

Second, we should mention that the relative autonomy is real and must be (or at least appear to be) real in order to yield the favorable outcomes.

Commitments to property rights are not credible unless courts have independence and real powers of judicial review. Administrative courts cannot effectively stamp out corruption unless they are independent from the political and bureaucratic machinery that they are charged with supervising and disciplining. (Moustafa and Ginsburg 2008a, 13)

Importantly, this autonomy may seem (and is) real to individual actors. If each and every one could penetrate the rational-legal logic, the rational-legal order would simply cease to be. With regard to selective law enforcement, we have seen how self-restraint may be explained in terms of costs to use this exceptional channel. The relative empowerment of the normative state explains why a sounds legal basis is favored, but also why it is not necessary in all cases.

The liberal foundation for the Normative State in Russia in part may be seen as genuine but “suppressed” (Sakwa 2011): the remains of a “reversed democratization” (Solomon 2008b, 263) or a product of the international order after the end of the Cold War. The semi-

⁹¹ To state one of many examples, Gordon Smith argues “true rule of law” can only exist when both citizens and law enforcement authorities “internalize the values of the supremacy of law, due process, justice, impartiality, and equality before the law.”

autonomous legal order is *allowed* to retain its form, however, because the benefits that the system provides the regime exceed the threat the autonomy poses. I contend that the balance between the two subsystems of the Dual State is not a balance between a regime and the state as Sakwa (2011) suggests. Rather, it is a balance *within* the regime – a balance that *constitutes* it. For this reason, I suggest that the original model of the Dual State may be used in its original instrumentalist meaning when discussing contemporary Russia. Even if the Normative State has a far greater impact on political life in Russia than it had in Nazi Germany, it is also forced into an “unholy alliance” (Hendley 2010, 4) in Russia with political leaders exploiting it. The study of Knoops and Amsterdam (2007), for instance, serves as a good illustration of this point.

9.5.1 The Normative State as Gatekeeper

In Chapter 4, I suggested that politicians may depend on existing formal institutions in part to reflect and distort criticism by instrumentalizing the ambiguity of overlapping rules. In addition to this ability, however, we should not forget the most straightforward reason to employ the state for particularistic interests. The state is after all a massive power-wielding apparatus, internally organized, fuelled with state money, and readily available. In other words, the broader legal system and especially the law enforcement system is also an organization with violent capacities (see also Volkov 2002). While legal measures may seem soft, low intensity coercion is ultimately founded on violence or the threat of such. Although it is low intensity, it is still coercion. The state apparatus is obviously an immensely powerful tool for those who control it. It should thus be expected that the incumbent regime delimits access to the state power, and also that it exercises exactly state power in doing so.

The organization of exceptions *through* the state is an important aspect of Putin’s system. As the control over legal actors has been centralized, selective law enforcement increasingly becomes a tool for the few. In section 8.5, I showed how Russia under Putinism has consolidated control over the means of repression within the regime. We saw that access to the ruling networks has increasingly been based on loyalty (in the broad sense) instead of professionalism (Ledeneva 2011a), and that the ruling elites have also taken other steps to align the interests of their various constituencies in the regions (Petrov 2011). Even if the interviewees see selective law enforcement as often initiated on regional initiatives the practice will tend to benefit the ruling elites as a group because of the common interest in the

status quo. To monitor and deal with regime insiders who overextend their mandates and step out of line, the regime has “its inner channels of checks and balances” (Ledeneva 2013, 249).

Because of its relative (in)significance in political cases, the normative state may paradoxically work as a mechanism to *delimit and simultaneously support* exceptionalism. The reason for this apparent contradiction is the exclusive nature of exceptionalism itself. If the Normative State was too weak (and exceptionalism informally constituted), the country would basically be lawless as exceptionalism would be pervasive and in the final consequence become the norm. In today’s Russia, as well as in other countries, the Normative State is due to its relative empowerment being able to withstand many attempts to influence its modus operandi.

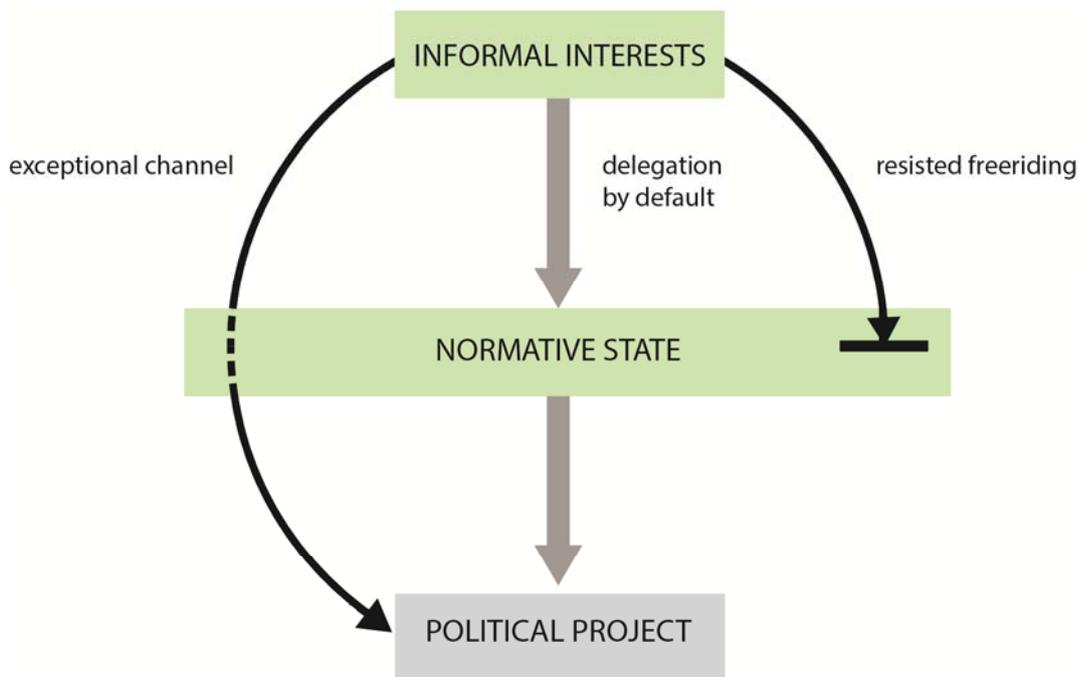


Figure 7: Organization of exceptionalism in Putinist Russia

At the same time, it is exactly this resistance to interference that makes the exceptional channel *exclusive*. The Normative State is to a degree able to resist localized or otherwise weak pressure upon it. Precisely because of its relative empowerment, it limits free riding in

the exceptional lane and ensures that nobody gains more access than his or her position within the regime's informal structure would allow. As the severity of the repressive acts increases, so do the organizational and moral costs to push them through. The higher the cost of the project, the fewer will have the necessary prerogatives to see their initiatives through (and tackle the consequences). In this fashion, the perks of the exceptional system is paradoxically regulated by the relative empowerment of the Normative State (figure 7). The power to *direct* the state machinery against its own constitution is in this way centralized in a limited access order.

9.6 Pragmatic Dualism – A Cautious Instrumental Approach

The Russian constitutional order does not function according to the books. An important reason for this fact lies with the lack of willingness of the ruling elites to be subordinated to the constitution. The ruling elites are constantly exempting themselves from the validity of legal rules, and they circumvent and manipulate them for their own benefit. Nonetheless, it would be wrong to say that the informal and formal parts of the political system are simply in conflict. As noted elsewhere, the legislators and the primary manipulators belong to the same elite group, a group for which the state is their primary source of power. Instead of seeing the contradictory rule sets as necessarily problematic from a practical governance perspective, I see them as parts of a dualistic political system that works. The insistence on working according to both reflects the fact that benefits may be reaped even without completely satisfying either. In the words of Zimmer (2008, 305), the “selective and power oriented applications or circumventions of legal rules ... establish parallel formal and informal logics of action according to which the actors operate.”

I am of course not the first to point this out. Indeed, Sakwa (2008, 879) has also observed how “the contradictions themselves became a source of Putin’s power.” As he (ibid) asserted, the ambiguities gave Putin the ability “to act in several different political and discursive spheres at the same time”. Within the literature that employs neo-Weberian approaches to Putinist Russia, several scholars have reached similar conclusions. Sarah Whitmore (2010, 1000), for instance, argues that the tensions of neo-patrimonial Putinism “helped to reinforce and reproduce the existing regime.” Neil Robinson (2012, 304) also reflects on the neo-Weberian term and suggests that the contradictory system came into being “because the complex needs

of Russia as a state and a society that demanded a more complex administration that could be provided by personalist presidentialism.” Conversely, one may argue that the complexities of the severe crisis of the late 1990s created a need for the legitimacy associated with personal governance. Putin’s dual state building may be seen to address both these challenges simultaneously.

In Robinson’s (2012, 300) words, the neo-patrimonial regime “pushes a part of the state away from personal relations toward more enduring hierarchies based on impersonalism” (ibid). Robinson’s formulation illustrates the “split” in Putinist rule, an element that may sometimes be forgotten when we focus on quasi-formality, quasi-legality, and grey-zones. While the line between the state and the regime is not always easy to discern, the *separateness* of the two is still evident.

As noted in the section on institutional interactions (section 4.3), Russian authoritarianism is attached to the formal legal system like a parasite – borrowing both its muscle and its legal cover. In the process, the formal system gets weaker, unable to take care of all of its core duties (Taylor 2011) and suffers an appallingly low support in the population. And yet, the parasite remains totally dependent on its host and cannot survive long without it. If a parasite does not kill its host, that is not a sign of the parasite’s weakness. On the contrary, the parasite can in this way continue to extract benefits from its host over the longer term. Sakwa (2011, vii) points out that neither subsystem “in present conditions can gain uncontested dominance over the other.” Yet this balance should not be interpreted as a balance between equals. While formal rules may partly restrict the political leaders’ conduct, it is still the informal interests that call the shots.

In conclusion, today’s Russia is not just hybrid, grey, and quasi-, it is also a dual state in terms of its parallel logics. This duality takes the form of separate, yet interacting, impersonal and exceptional channels to get things done. In a way, selective law enforcement solves some of the problems that stem from the lack of formalized exceptional channels under a regime that insists on prerogative powers. The exceptional channel is not void of legal elements, and the impersonal state is tainted with corrupt practices. Even if much selective law enforcement seems to be clustered around certain issues such as anti-extremism or election registration, the legal system hinges on the relative weakness of the normative system – its penetrability. The two modes of Putinist rule are thus not fully insulated from each other, yet the exceptionalism is distinct and observable.

This is not to say that either selective law enforcement or political dualism in general is a thoroughly brilliant regime design. The genesis of the current system tells a different story. Solomon (2008b, 276) for one, argues that the “court system was designed for a democratic political order in the making. That is, it is a judicial system meant to produce independent courts and impartial adjudication, and one invested it with responsibility for important decisions.” Today, he (2008b, 262) claims, the courts “represent a legacy of incomplete, failed, or revered democratization and [has] become an awkward institution in a competitive authoritarian environment.” While this is at least partly true with regard to the system’s origins, the Dual State still carries out instrumental functions for its current masters and is reproduced and only gradually amended for their benefit. Even if the ruling elites did not create the rules of the game by themselves, they are utilizing the enabling aspects of these rules to considerable effects. Within these frames, practices like selective law enforcement may be seen as the improvisation upon existing institutional constraints with the effect of gradually amending these to make the most out of the system.

9.7 Conclusions on Legal and Political Dualism in Russia

Instead of focusing on “real” democratic elements in the governance in Russia, in this chapter I have elaborated on the functional and instrumental benefits of the Dual State to its rulers. My basic argument has been that the political leadership is dependent upon the legal order for regulating everyday affairs, yet that informal interests insist on their prerogatives to define exceptions, without which it would risk losing its grip on the country. The regime is willing to empower courts in order to reap the benefits of a legal order, but only to the degree that extra-constitutionalism may still be exerted when political expediency demands it. Within this system, selective law enforcement becomes a solution to the contradictions that appear in cases where the formal and informal rules disagree over constitutional freedoms

Because the Normative State is relatively weak, the rules can be bent and circumvented when the political leaders are willing to pay the political cost, including reduced trust in the legal system and the citizens’ antagonism towards the ruling elite (see Sharafutdinova 2010). Selective law enforcement also makes clear what rule set that in the end of the day call the shots, and how easily constitutional guarantees can be sacrificed. Since the Normative State is also relatively strong, however, the system is one of *limited access*. To some degree, the entry

costs to interfere with the Normative State project may insulate the exceptional channel from pervasive free riding by actors not within the fold.

In my conception, the interaction between the two subsystems of the Dual State is not a balance between the state and the regime (cf Sakwa 2011), but a balance that embodies the regime: “the Prerogative and Normative States constitutes an interdependent whole” (Fraenkel 1941, 71). The paradox of *complementary contradictions* is at the heart of Putinist rule, and selective law enforcement is an important part of this picture.

10 Conclusions

My project to conceptualize selective law enforcement turned out to be like opening a can of worms. I believe the reason for this is at least threefold. First, the practice is inherently slippery and hard to grasp. When a colleague first commented on an early draft of a theory chapter to this dissertation, he compared it to nailing jelly to the wall and went on to contend that I basically did two things in my concept development. First, he maintained, my work on selective law enforcement was an effort to explain something very simple in complicated terms. At the same time, he added, he also saw it as an attempt to describe something incredibly complex in very simple terms. I have increasingly come to think of this remark as an excellent description of the research project.

Second, researching selective law enforcement in Russian politics is tricky due to its political sensitivity and the authoritarian aspects of the regime. The high tensions generated by the issue may have lead interviewees to point their statements and have also made it problematic for me to collect information on both sides of the conflict.

Third, any effort to build an academic concept more or less from scratch necessarily requires a broad approach to be successful. For me, this has involved a genuinely multidisciplinary approach and required examination of a host of different topics. Through this dissertation, I have not only presented and analyzed the interviewees' perceptions of what goes on behind the scenes, but also discussed formal institutional arrangements, laws, resolutions, and court rulings; I have reviewed issues of legal culture and informal practices; I have extended the theories of institutional interactions, legal dualism and various other regime theories; and I have touched upon issues of jurisprudence and the power of weak rules.

10.1 Summary of Main Findings

In the introduction to this dissertation, I claimed that selective law enforcement is a practice that highlights and reflects the tensions between formal and informal institutions in Russian politics. Through a methodology of concept development, I have attempted to answer how its hybridity may be grasped, and I have presented a concept of selective law enforcement as *a mechanism of repression aimed at enforcing informal rules of political conduct through selective legal acts* – in short a mechanism to enforce informal rules. Chapter four especially

tried to get under the skin of this peculiar interaction of formal and informal elements. The result of these complex patterns of interaction is a fundamental non-transparency surrounding legality and coercion in Russia.

To recapitulate the key findings of my study, I want to use my above definition of selective law enforcement as a point of departure. This definition is the epicenter of the analysis. It is also its conclusion, a condensed answer to my question of what selective law enforcement *is* and a hint towards how it *works*. Below, I will make three claims as to why this provides a good answer. First, the dissertation indicates that my concept of selective law enforcement provides a good *fit* with observed reality. Second, my answer is useful to explore more complex theories of how selective law enforcement works. Third, the concept provides a useful point of departure for further research.

- **To define selective law enforcement as a mechanism to enforce informal rules provides a good fit with the observed data.**

My initial approach to selective law enforcement presupposed a number of conceptual components that I identified for purposes of empirical observation (figure 1). By systematically exploring these subcomponents and adjusting the more abstract analytical level of the concept along the way, I achieved a degree of coherence in the concept – an *internal* consistency between the various conceptual levels and an *external* coherence with the observed data on the ground. Although this observed reality will appear different to different observers, an apparently good fit between the concept's categories and actual observations on a number of issues is certainly a promising sign if we seek a robust concept. The involvement of the broader legal system and the state monopoly on legitimate violence to impose punishment gives us strong reason to interpret what is going on as rule enforcement. The behavior of the law enforcers, the interviewees' perceptions of the practice, and the actual outcomes, however, all suggest that the rules enforced are informal.

Especially with regard to the interviewees' perceptions, the fit with a rule enforcement perspective is striking. The same is true with cases I only know from second-hand sources. The similarity in how the cases are framed indicates that we are really confronted with a genuinely distinguishable phenomenon. Many and probably most new stories of politicized justice from Russia that find their way to the media's spotlight carry many of the same characteristics: A *pro forma* use of laws, claims to a *conscious selection* upon *informal*

criteria, the *prevention* of effective work and (more often) the *detering* effect upon others, often suggested at through an overarching narrative of repressors and repressed. Notably these characteristics are also presupposed by my concept (see section 2.3).

The concept is also coherent in a third meaning, namely in relation with authoritative existing approaches to Russian politics and legality. To some degree it is also able to serve to bridge different perspectives. The proposed approach to selective law enforcement also seems in agreement with authoritative literature on Russian legal culture, including its instrumentality, formality and disconnection between law and morals. Clearly the concept agrees with the premise that law is subordinated to men in Russia, but at the same time does not close the door on a parallel existence of a relatively empowered and increasingly modern legal system. Similarly, selective law enforcement as a mechanism to enforce informal rules also takes into account the strong elements of informal politics and clientelism in the governance of Russia without neglecting the strong tendencies of centralization and statism. We can see that the duality and tensions on the level of more abstract theories are reflected in the concept of selective law enforcement itself.

For all these reasons, I find that the suggested concept of selective law enforcement has certain *structuring* qualities: it provides a by-and-large coherent framework for describing these aspects of social reality.

- **To define selective law enforcement as a mechanism to enforce informal rules is useful to explore more complex theories of how selective law enforcement works.**

While I have pointed out a significant degree of coherence both internally and with regard to existing theoretical frameworks, this is not to claim that the concept does not stir up certain theoretical difficulties. Most acutely visible in my dissertation is the lack of fit with mainstream theoretical perspectives on institutions, at least within comparative political science.

Instead of circumventing the apparently conflictive relation with some existing categories, by for instance referring to loosely defined grey-zones in Russian politics, I have attempted to deal with the difficulties head on, with regard to both the quasi-formality and the quasi-legality that one hardly can deny are present. In my conception, selective law enforcement is a complex entanglement of formal and informal components and of legal and extra-legal elements. It is not a quagmire, a fog, or a blur, however; with due care the entanglements can

be disentangled. Indeed, my effort to do so has brought about some insights on how selective law enforcement works to fulfill the function by which I have defined it (enforcing informal rules).

My definition of selective law enforcement entails a separation between formal and informal rules, and along the same line it also entails a separation between the issue of political selection and an issue we can call the legal concern. Readers should note this, as it seems the two are very often confused in public discussions of possible selective law enforcement. The confusion arises, I suggest, because the two rule sets are overlapping – and intentionally so.

To quickly recap the argument presented towards the end of chapter 4, selective law enforcement plays upon the overdeterminacy of a rule's *consequent* that appears when two rules are enforced by the same means: When the enacted punishment in retrospect can be explained by reference to either formal or informal rules, what rules have actually been enforced becomes a question of controversy. The resulting situation of non-transparency is exploited by those who utilize selective law enforcement. The benefits to the manipulators are several, even if observers do not always believe in the assurances that political concerns have not been involved in the law enforcement process. Because of the ambiguity of the two rule sets, the informal selection is hard to prove legally and the issue of selectivity is not explicitly dealt with in Russian courts. The technical employment of, and insistence on, formal rules not only distort and complicate criticism, but also protect the initiators against legal backlash. In chapter 4, I suggest this way of playing upon two rule sets simultaneously as an *instrumentalization of ambiguity*.

This explanation of how selective law enforcement works should be a more than viable challenger to more simplistic façade theories built upon implicit or explicit notions of deceptions. If we interpret selective law enforcement as an attempt to make repression look apolitical, this will impute an incredible clumsiness to the actions of Russian authorities and law enforcement officials, who are often generously providing hints of the ulterior motives. Façade interpretations have considerable problems in explaining the rather overt political motives that we can see in many of the cases and in explaining the double-speak in informal conversations. In other words, façade interpretations never really get much further than to explain one aspect of double-speak, namely the official denials of political interventions – in other words “speak” pure and simple.

My conceptualization of selective law enforcement tentatively unties the knot of the double-speak. I have recapped how the instrumentalized ambiguity serves as a possibility for the political leaders to deny the political motives and the repressive character of the prosecution. At the same time, my conceptualization utilizes deterrence theory, a relatively uncontroversial aspect of rule enforcement. Deterrence theory predicates a promulgation of the rules enforced and thus explains the need to double-communicate the political content of the cases. Considering the communicative aspects of rule enforcement, it is not unreasonable to assume that the smoking gun may in fact have been purposefully being left on the scene. Again, this explanation provides a good fit with what we can see on the ground; how the cases are so easily recognizable as political, how the concerned targets' perceive the motives behind the acts, and how they react to them.

While my concept of selective law enforcement implies a *conscious* selection (or at least the perception of one), it leaves open the question to what degree selective law enforcement is an outcome of contemplated regime design. The research finds indications that selective law enforcement is not the result of a coordinated campaign to suppress all the challengers of the regime. At the same time, I have explored the functionality of indirectly managing the use of the mechanism by means of aligning incentives and centralizing access.

Part of the reason as to why regime insiders can simply point to formal rules when they prosecute critics through selective law enforcement lies with the outlook of the utilized rules. As I have argued, many provisions used in selective law enforcement have been subjected to heavy criticism for how they open up a possibility to punish more or less anyone for some violation or another. In chapter 6, I discussed this important element of how the self-perceived targets of selective law enforcement interpret their cases under the heading of “catch-all theory”. In the same chapter, I also discussed the plausibility of interpreting laws as legislated *intentionally weak* (in a Fullerian sense) to exploit their potential of distortion without abandoning the formal platform of law enforcement.

If taken to the extreme, this form of governance is not based on legal rules as empowered by legislators. Rather it is dependent on the regime's indirect control over the implementation of these weak rules. By means of controlling legal actors and centralizing access to them, a political regime may fill the legal vacuum left by weak laws in a more or less coherent and predictable fashion. In this way, the ruling elites carve out an informal channel for political exceptions *within* the state machinery. It seems that some of the requirements of this form of

social control are in place in Putinist Russia, but the evidence is at the moment too thin for further speculation about the intentionality on regime level. As noted towards the end of chapter 6, there are also reasons to question whether the rules are indeed as catch-all as some of the interviewees claim.

The final chapter on legal dualism adds another layer of complexity to the system we now see the contours of. Substantial efforts to modernize Russia and initiate legal reform have coexisted with the ruling elites' *insistence* on prerogatives to define *exceptions* to constitutional constraints. In this fashion, the political regime operates according to two conflicting rule sets without completely satisfying either. On this level, selective law enforcement is a solution to the contradictions inherent in the formal and informal rule sets. In contrast to many other authoritarian regimes, post-Communist Russia never formalized a separate channel for politically salient cases (like special courts), but deals with them in part by selective law enforcement. Under Putin the access to this channel has been centralized, and the gradual strengthening of semi-autonomous courts have made legal abuse easier to *direct* and *structure* in a fashion compatible with the interests of the incumbents.

My concept of selective law enforcement as a mechanism to enforce informal rules makes the informal interests stand in a *parasitic* relation to the formal system. The parasitic notion is fitting because it illustrates how the informal interests not only *exploit* the formal system but also are entirely *dependent* upon it for survival. The practice of selective law enforcement, moreover, to some degree undermines the system it preys upon. Interestingly, the metaphor of the parasite fits equally well on the level of abstract institutional interactions as it fits the analysis on the level of the regime.

- **Selective law enforcement as a mechanism to enforce informal rules is a useful instrument for further research.**

The concept of selective law enforcement that I advance also has the benefit of being easy to (in)validate and expand on, even if it deals with rather non-transparent matters. This is of no small importance, as concepts serve to link empirical data with broader theories. As noted in the introductory chapter, we have been lacking a concept that facilitates the accumulation of knowledge about selective law enforcement and a concept that communicates this complex practice to the research community and other relevant actors.

Selective law enforcement is also more intuitive to non-Russians than more esoteric terms derived from Russian colloquial language. It is too early to make any explicit claims as to which parts of my study may be *transferable* to other cases and which may not, which elements of selective law enforcement are the result of particular Russian developments and which may also be expected elsewhere. It is fair to assume, however, that at least parts of the insight would be valid for other regimes and to other times.

I have suggested through theory and illustrated through practical research how the concept may be disassembled and investigated in empirical cases. The many contact points with reality on the operational level of the concept serve to anchor the more theoretical analysis to real experiences and observable facts. This is of particular importance with regard to topics such as selective law enforcement, arguably prone to anecdotal evidence and speculation. That being said, my concept is certainly not immune to the non-transparency associated with repression in partly closed regimes. In this research project, I have left behind considerable blank spots for others to fill, some of which are only with difficulty accessible. In particular some of the informal criteria discussed in chapter 7 may with benefit be explored with different research designs. The most obvious weakness of the concept in this regard is how it hinges on the ulterior *motives*; the *intentional* selection. Because *intentions* are hard to examine directly, a certain restructuring of the concept may be advisable for some purposes. Some aspects of selective law enforcement would, for instance, be easier to explore from an outcome perspective (cf Shields 2010), temporarily setting the issue of intentions aside.

In a short article, Morse and her colleagues (1996) observe a considerable gap between the need for good concepts in social science and the lack of criteria to identify these concepts. In an effort to mend this problem, they point to four basic “indices” to evaluate whether a concept is “mature” or in need of further development. A developed concept should (1) be *well-defined*; (2) have specified *characteristics*; (3) its preconditions and *outcomes* should be “described and demonstrated”; and (4), the boundaries of a well-developed concept should be clearly delineated (Morse et al 1996, 388-389).

I dare say that I have contributed to improve the concept of selective law enforcement with regard to all four indices of maturity. I did spot conceptual borderlands, however, when analyzing claims to selective anti-extremism in the period. In this legal issue area, it seems, the formal and informal rules became so similar that the concept of selective law enforcement was not necessarily preferable. The *legal* concept of extremism and the undefined notion of

criticism both turned out so broad and diffuse that their difference at times could be regarded one of legal interpretation.⁹² Also with regard to outcomes of, and not least preconditions for, selective law enforcement, further research would be well-advised. Finally, as Gerring notes, a concept's usefulness can at the end of the day only be evaluated in competition with other concepts that aspire to explain the same aspects of reality. To date, there have been few if any comparable attempts to explore the phenomenon in a structured fashion. In a horse race without competitors even a blind old mare can win.

10.2 Institutionalization, not Immobility

Another red line through my work concerns patterns and institutionalization. Rules become rules when their generalizations get *entrenched* and influence human conduct by their very capacity of being rules. A mechanism that has been institutionalized has independent weight and has an element of regularity that shapes actors' expectations that makes the mechanism run more smoothly. The institutionalization of selective law enforcement makes legal actors aware that they should take informal agendas into account and makes them more willing to bend when powerful actors interfere and voice their preferences directly. That powerful individuals even consider this tool as a means to solve their problems is also a product of its institutionalization. Because law enforcers, targets of the practice, and society as a whole share roughly the same expectations of politicized justice, the institutionalization of the practice also lubricates the promulgation of informal rules. I have argued that the practice in its institutionalized form resembles what Beissinger (2002) called a "regime of repression," a smoothly functioning system where repression has gradually become routine and operates in a more or less "automatic" fashion.

Some core aspects of this system are intimately connected with legal culture and have arguably been in place through several political regimes. Russians have a mutual understanding that ordinary and exceptional cases are dealt with according to different logics. Because Russian citizens understand that political cases are exceptional, the rational-legal functions of the system as a whole are not seriously hurt. In addition, because they understand that the exceptional cases are political, the informal rules are effectively enforced. Selective

⁹² Which would of course not change its possibly extra-constitutional character.

law enforcement stabilizes the regime, at least in the short term, by enforcing the status quo and reproducing existing power relations.

What we need to remember, however, is that while institutions are associated with regularity, stability and predictability, they do not imply stagnation or stalemate. On the one hand, the very definition of selective law enforcement as a rule enforcement mechanism implies that the rules need to be enforced. In other words, if the willingness or capability to employ force diminishes, so will selective law enforcement as a coercive tool. On the other hand, the longevity of the practice is also threatened from the “opposite side”. Tendencies in recent years indicate that some rules that were enforced by means of selective law enforcement are now beginning to become formalized.

When I started to take interest in selective law enforcement in about 2008, Russian NGOs financed from abroad complained being harassed by means of an extra-ordinary high level of scrutiny with regard to all sorts of formal requirements, by means of frequent inspections, and by speculative claims of more serious violations. The informal criteria that triggered the legal acts, many NGOs then claimed, were not least the Western sources of finance. In 2012, however, the situation was changing as a separate legal category was established for these organizations, which were now required to register under the label of “foreign agents” (*inostrannye agenty*, see Federal Law 121-FZ of 20 June 2012). Similarly, when I started my research on selective law enforcement, gay parades were also suppressed by quasi-legal means. Gay parade participants knew they should never cross the street on red lights, for instance, because the Russian police had been known to use this infringement as a pretext to crack down on such events. Only a few years later, the parades are simply forbidden by law (Federal Law 135-FZ of 30 June 2013).

The combination of strong statism and bureaucratic formalism on the one hand, and clientelistic politics and low trust in formal institutions on the other, create fertile grounds for selective law enforcement. Because these conditions so resistant to change, there are no reason to believe that the problem will disappear overnight. At the same time, the practice is contingent on a much more complex set of factors that are yet to be clearly indentified as necessary and sufficient conditions.

Another screw has been tightened in the Putinist machinery since the 2011 elections. While cases of selective law enforcement continue to resurface, some anti-liberal policies that would

seem politically impossible to formalize a decade ago have now found legal form. We may expect that selective law enforcement will continue to evolve, yet we need more research on its preconditions to predicate how. While legal abuse was rife in the 1990s, and while quasi-legal rule was prominent also under the Soviet regime, selective law enforcement became a symbol of Putinism. A new standard was set with the prosecution of several oligarchs in Putin's first term of presidency, and later selective law enforcement became a tool against less distinguished targets. It ran parallel to and partly overlapped with the fight between protestors and police on the streets that followed the growth of a protest movement after the so-called colored revolutions (Robertson, 2011, Horvath, 2013). By means of selective law enforcement, the authorities could touch spots that neither the contemporary legislation nor batons could reach. Not only street protestors, but also journalists, bloggers, editors, human rights organizations, ecologists, and other critics fell victim to the practice.

In a stage of siege, imagined or real, the regime spent large amounts of resources on this form of censorship. Not only were alternative views and oppositional voices restrained, but also information on what crimes had been committed by individuals within the incumbent regime. On a broader scale, the impact of this repression is hard to measure; the number of opinions that were never publicly voiced is literally speaking uncountable.

Assertions of non-involvement in legal affairs in Russia have become a ritual few believe in. In the words of the human rights veteran Sergei Kovalev (in Myagkov et al. 2009, 9): "Everybody knows everything. The very lie no longer aspires to deceive anyone, from being a means of fooling people it has for some reason turned into an everyday way of life, a customary and obligatory rule for living." We recall from the first chapter (section 1.3.5) how scholars invoked such metaphors as fig leaves, theaters or Potemkin villages to describe Russian formal institutions. From the perspective of my research, the metaphor of the theatre may accurately describe selective law enforcement after all: both actors and audience understand that what is shown on stage is merely a play. The same may also be said of the Potemkin democracy. Contrary to popular myth, the Russian 18th century statesman never pretended that his decorations were anything but ornamentation (Panchenko, 1999).

List of Interviewees

(Only interviewees explicitly referred to are listed)

ANONYMIZED. activist	2010 (anon.)
ANONYMIZED. journalist	2010 (anon.)
ANONYMIZED. political party United Russia and regional Central Election Committee	2011 (anon.)
ANONYMIZED. NGO leader	2008 (anon.)
ANONYMIZED. political advisor	2011 (anon.)
ANONYMIZED. NGO GOLOS	2013 (anon.)
ANONYMIZED. activist	2011 (anon.)
AVERKEIV, Igor. activist	15.11.2011 (Perm)
BELOBORODOV, Vyacheslav. political scientist	13.11.2011 (Perm)
BUNDINA, Lyudmila. Communist Party of the Russian Federation	05.09.2011 (Vladimir)
CHERKASOV, Yurii. Communist Party of the Russian Federation	05.09.2011 (Vladimir)
CHIKOV, Pavel. NGO AGORA	22.06.2010 (Moscow)
DENISOVA, Anastasia. NGO Eth(n)ics	17.12.2010 (Moscow)⁹³
DMITRIEVSKII, Stanislav. NGO Tolerance Foundation	16.12.2010 (Nizhniy Novgorod)
ESHANU, Lyudmila.	05.09.2011 (Vladimir)

⁹³ The interview was followed up on Skype 24.05.2011.

newspaper Vladimirskaya Gazeta and NGO GOLOS	
GARIFULLIN, Damir. Yabloko	09.06.2011 (Sterlitamak)
GASKAROV, Aleksei. activist	02.06.2011 (Moscow)
GIRIN, Nikita. Novaya Gazeta	01.06.2011 (Moscow)
GODUNIN, Sergei. political party Just Russia	06.09.2011 (Vladimir)
GUSAK, Nikolai. independent activist	10.06.2011 (Tuimazy)
KARASTELEV, Vadim. NGO Novorossiysk Human Rights Committee	03.06.2011 (Moscow)
KHRUNOVA, Irina. NGO Kazan Center of Human Rights	13.12.2010 (Kazan)
KOTOVA, Lyudmila. Volgainform News Agency	18.11.2010 (Samara)
KURT-ADZHIEV, Sergei. newspaper Novaya Gazeta Samara ed.	18.11.2010 (Samara)
KUZMINA, Lyudmila. NGO GOLOS	19.11.2010 (Samara)
LYUBAREV, Arkadii. NGO GOLOS	02.06.2011 (Moscow)
MILOSLAVSKAYA, Daria. NGO International Centre for Not-for-profit Law	16.11.2010 (Moscow)
NOVRUZOVA, Emilia. newspaper Novaya Gazeta Nizhniy Novgorod ed.	16.12.2010 (Nizhniy Novgorod)
PODVINTSEV, Oleg. political scientist	13.11.2011 (Perm)
PRUSENKOVA, Nadezhda. newspaper Novaya Gazeta	22.06.2011 (Moscow)
SIMAK, Sergei. NGO Socio-Ecological Union	22.11.2010 (Samara)
SITDIKOVA, Lesyan. wife of journalist Irek Murtazin	13.12.2010 (Kazan)
SLAUTINA, Galina.	13.11.2011 (Perm)

political party Yabloko

STARKOV, Andrei.

independent politician

15.11.2011 (Perm)

URAL, Khazmin.

lawyer of journalist Robert Zagreev

08.06.2011 (Ufa)

VERKHOVSKY, Alexander.

NGO SOVA

12.11.2010 (Moscow)

VISHNEVSKII, Boris.

political party Yabloko and Newspaper Novaya Gazeta

26.08.2011(St. Petersburg)

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<http://legislationline.org/documents/section/criminal-codes/country/7>, [accessed 01.10.2013]

EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, as amended by Protocols nos. 11 and 14. *Council of Europe*.

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FEDERAL LAW NO. 78-FZ OF 29 DECEMBER 1994 "O biblioteknom dele".

FEDERAL LAW NO. 67-FZ OF 12 JUNE 2002 "Ob osnovnykh garatiyakh izbiratel'nykh prav i prava na uchastie v referendume grazhdan rossiiskoi federatsii".

FEDERAL LAW NO. 114-FZ OF 25 JULY 2002 "O protivodeistvii ekstremistskoi deyatelnosti".

FEDERAL LAW NO. 148-FZ OF 27 JULY 2006 "O vnesenii izmenenii v stat'i 1 i 15 Federal'nogo zakona 'O protivodeistvii rktremistskoi deyatelnosti'".

FEDERAL LAW NO. 211-FZ OF 24 JULY 2007 "O vnesenii izmenenii v otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii v svyazi i sovershenstvovaniem gosudarstvennogo upravleniya v oblasti protivodeistviya ekstremizmu".

FEDERAL LAW NO. 121-FZ OF 20 JUNE 2012 "O vnesenii izmenenii v otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii v chasti regulirovaniya deyatelnosti nekommercheskikh organizatsii, vypolnyayushchikh funktsii inostannogo agenta".

FEDERAL LAW NO. 135-FZ OF 30 JUNE 2013 "O vnesenii izmenenii v stat'yu 5 Federal'nogo zakona 'o zashchite detei ot informatsii, prichinyayushchei vred ikh zdorov'yu i razvitiyu' i otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii v tselyakh zashchity detei ot informatsii, propagandiruyushchei otritsanie traditsionnykh semeinykh tsennostei".

PERM KRAI LAW NO. 766-PK OF 21 APRIL 2011 "O vyborakh deputatov zakonodatel'nogo sobraniya permskogo kraja".

SUPREME COURT OF THE RUSSIAN FEDERATION 2010 Postanovlenie plenuma Verkhovnogo suda Rossiiskoi Federatsii No16 ot 15.06.2010. O Praktike primeneniya sudami Zakona Rossiiskoi Federatsii "O sredstvakh massovoi informatsii".

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