

Resistance, Indifference or Ignorance? Explaining Russians' Nonuse of Mediation

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Russia is a late developer as to mediation. In contrast to the United States, Western Europe, and the Far East, where mediation has been available for decades,¹ legislation authorizing mediation in Russia went into effect only at the beginning of 2011.² Although Russian law scholars greeted this institutional innovation with enthusiasm, ordinary Russians paid little attention.³ Few have taken advantage of it. The leaders of the Moscow-based Center for Mediation and Law argue that “[a]bsolutely all experts agree that the development of mediation in Russia has been very weak.”⁴ The Russian scholarly literature is replete with explanations for the nonuse of mediation. Most focus on the shortcomings of the legislation, with an occasional nod to the potential role of legal culture. Given the historical preference for doctrinally-driven research, the failure to ground theory in empirical data is not surprising.⁵ This article, which analyzes Russians’ views of mediation gleaned through a series of 2014 focus groups, begins to fill that gap.

The focus group discussions confirm that the introduction of mediation passed unnoticed by the general public in Russia. None of the ninety-nine participants in the six focus groups in Moscow, Novosibirsk, and Voronezh was aware of the availability of mediation. This might suggest that the answer to the question posed by my title is simple. Russians can hardly be expected to use an institutional tool of which they are unaware. While not discounting the importance of this finding of universal ignorance, fully understanding Russians’ attitudes requires us to probe more deeply. The focus group format facilitated this. Once the participants were made aware of the existence of mediation, we encouraged an open discussion of its potential for Russia. Their reactions provide an intriguing window into Russian legal culture. What emerges is more of a kaleidoscope than a neat and tidy picture. Not only did participants’ attitudes evolve during the discussion, but they were far from a mirror image of the views attributed to them by scholars. This serves to remind us of the importance of engaging with potential litigants and integrating their actual opinions into our analysis and policy proposals.

¹ Carrie J. Menkel-Meadow, *Mediation, Arbitration, and Alternative Dispute Resolution (ADR)*, in 15 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 70 (James D. Wright ed., 2d ed. 2015).

² “Ob al’ternativnoi protsedure uregulrovaniia sporov s uchastiem posrednika (protsedure mediatsii)”, Federal’nyi zakon ot 27 iuliia 2010, No. 193-FZ, http://www.consultant.ru/document/cons_doc_LAW_103038/.

³ Iuliia Vasil’eva, *Neizbezhnoe primirenie*, ROSSIISKAIA GAZETA (Apr. 23, 2012), <http://rg.ru/2012/04/23/mediacia-site.html>.

⁴ Tsisana Shamlikashvili et al., *Analiz prognozov i ekspertnykh otsenov razvitiia mediativnoi praktiki v Rossiiskoi Federatsii*, in BIULETEN’ FEDERAL’NOGO INSTITUTA MEDIATSII 113 (Tsisana Shamlikashvili ed., 2014).

⁵ S.I. Tiul’kanov, *Stanovlenie mediatsii v Rossiiskoi Federatsii*, PSIKHOLOGICHESKAIA NAUKA I OBRAZOVANIE no. 2, 2014 at 34.

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In order to set the stage for this analysis, I begin with an overview of how mediation came to Russia and how it is supposed to work. This is followed by a summary of what we know about its use (or nonuse). I then synthesize the diagnoses of the problem by the Russian scholarly community as well as their prescriptions for curing it. The remainder of the article concentrates on the focus groups, starting with a description of how they were organized and who participated. This segues into an analysis of the participants' discussions of mediation.

I. THE INTRODUCTION OF MEDIATION IN RUSSIA

Russia would seem to be an ideal candidate for mediation. Russians' preference for working out problems on their own ought to have created a welcoming environment. Moreover, its courts are straining under an ever-increasing caseload. Between 1995 and 2015, the number of cases resolved by Russian trial courts more than quadrupled.⁶ Alla K. Bol'shova, the former chairman of the Moscow city *arbitrazh* court, fears that the current burden on the courts is not sustainable.⁷ The VII All-Russian Congress of Judges in December 2012 agreed that the introduction of mediation "will permit the improvement of the quality of justice and provide a reliable guarantee to citizens of access to justice within a reasonable time."⁸ Thus, much as in Western countries,⁹ mediation was adopted in Russia with the dual goals of

⁶ They grew from 5.2 million in 1995 to 23.4 million in 2015. Although the number of criminal cases actually decreased by about ten percent over this twenty-year period, both civil and administrative cases grew by over 500 percent. *Rassmotrenie del i materialov po I instantsii sudami obshchei iurisdiktsii razlichnykh urovnei po godam 1995-2007 gg.* (on file with author); *Rassmotrenie del sudami obshchei iurisdiktsii po I instantsii, 2010-2015*, <http://www.cdep.ru/index.php?id=79&item=3008>.

⁷ Stenogramma "kruglogo stola" Komiteta po grazhdanskomu, ugovnomu, arbitrazhnomu i protsessual'nomu zakonodatel'stvu na temu: "Federal'nyi zakon 'O mediatsii – odin god pravoprimereniia, perspektivy razvitiia zakonodatel'stva o mediatsii.'" *Zdanie Gosudarstvennoi Dumy, Moscow*. May 14, 2012.

⁸ Spravka "O praktike primeneniia sudami Federal'nogo zakona ot 26 iuliiia 2010 g., No. 193-FZ, 'Ob al'ternativnoi protsedure uregulirovaniia sprovov s uchastiem posrednika (protsedure mediatsii)' za period s 2013 po 2014 god. Utverzhdena Prezidiumom Verkhovnogo Suda Rossiiskoi Federatsii 1 apreliia 2015 goda.

⁹ For an overview of the motivations for embracing mediation in the West, see Menkel-Meadow, *supra* note 1. For a U.S.-specific analysis grounded in empirical research, see Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1981). Mediation flourished in the Far East as a way to maintain social harmony. See generally Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CAL. L. REV. 1284 (1967). Its expansion in more recent years has been encouraged as a way to lessen the workload on courts. In recent years, upwards of two-thirds of all civil and commercial disputes have been resolved through mediation. Xiong Hao, *Two Sides of Court Mediation in Today's Southwest Grassroots China: An Empirical Study in T Court, Yunnan Province*, 1 ASIAN J.L. & SOC'Y 367, 368 (2014).

ameliorating judges' workload and improving the quality of litigants' experiences.¹⁰

Legal scholars served as the catalyst for the law on mediation. As I have detailed elsewhere¹¹ a working group headed by Professor Elena Nosyreva of Voronezh State University law faculty was created under the auspices of the Moscow Chamber of Commerce.¹² They toiled in obscurity for many years, circulating drafts based on the UNCITRAL Model Law on International Commercial Conciliation among themselves and publishing them in trade journals.¹³ The Duma, the lower house of the Federal Assembly of Russia, first took up the draft law in 2006, but it languished unexamined and was withdrawn from consideration. With the backing of then-President Dmitri Medvedev, a substantially revised draft was submitted to the legislature in 2010. The members of the original working group took issue with many of the changes. Nosyreva commented that “it is unlikely to facilitate the use and dissemination of mediation in Russia.”¹⁴ After being introduced in March 2010, it was passed in July 2010, with an effective date of January 1, 2011.¹⁵ In the words of Veniamin F. Iakovlev—who in addition to being an advisor to Russian presidents since he stepped down as the chairman of the Higher *Arbitrazh* Court¹⁶ in 2005, has been a champion for mediation—the law “was

¹⁰ Bol'shova was realistic in her expectations, noting that “[m]ediation can never be a panacea and can never save our courts from the huge volume of cases.” Stenogramma, *supra* note 7.

¹¹ See generally Kathryn Hendley, *What If You Build It and No One Comes?: The Introduction of Mediation to Russia*, 14 CARDOZO J. CONFLICT RESOL. 727 (2013).

¹² The working group also included Bol'shova.

¹³ Proekt. Federal'nyi zakon, *O primiritel'noi protsedure s uchastiem posrednika (posrednichestve)*, TRETISKII SUD no. 4, 2005, at 14; Proekt. Federal'nyi zakon, *O primiritel'noi protsedure s uchastiem posrednika (posrednichestve)*, TRETISKII SUD no. 5, 2005, at 6; Proekt. Federal'nyi zakon, *O primiritel'noi protsedure s uchastiem posrednika (mediatsii)*, TRETISKII SUD no. 5, 2006, at 14.

¹⁴ E.I. Nosyreva, *Spetsial'noe pravovoe regulirovanie posrednichestva (analiz zakonoproekta)*, TRETISKII SUD no. 2, 2010, at 39. For additional critiques of the new draft by the Russian scholarly community, see O.V. Allakherdova, *Kommentarii k zakonoproektu*, TRETISKII SUD, no.2, 2010, at 62; D.L. Davydenko, *Kommentarii na zakonoproekty, vnesennye Prezidentom RF*, TRETISKII SUD no. 2, 2010, at 48; M.E. Morozov, *Otzyv na projekt Federal'nogo zakona “Ob al'ternativnoi protsedure uregulovaniia sporov s uchastiem posrednika (protsedure mediatsii)”*, TRETISKII SUD no. 2, 2010, at 56.

¹⁵ “Ob al'ternativnoi”, *supra* note 2.

¹⁶ At the urging of President Putin, the Higher *Arbitrazh* Court was merged with the Russian Supreme Court in 2014. The Supreme Court was reconstituted to include panels devoted to hearing claims from lower level *arbitrazh* courts. See generally Sergei Zaikin, *Arbitrazhnyi Sud: Dannye udaleny. Chast' 1: Molchanie i sograsie*, SRAVNITEL'NOE KONSTITUTIONNOE OBOZRENIE no. 3, 2015 at 54. For more on the post-merger Supreme Court see Aleksandr N. Vereshchagin, *Mezhdru Stilloi VAS i Kharabdoi VS.*, VESTNIK EKONOMICHESKOGO PRAVOSUDIIA ROSSIISKOI FEDERATSII no. 10, 2015, at 15; Peter B. Maggs et al., LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION (6th ed. 2015); Jane Henderson, *Developments in Russia*, 21 EUROPEAN PUBLIC LAW 229 (2015).

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born in great agony. You cannot imagine how much effort by many people it took.”¹⁷

A. *How the Law is Supposed to Work*

The law opens the door to mediation in most civil cases, regardless of whether they are brought in the courts of general jurisdiction or the *arbitrazh* courts.¹⁸ Its use is forbidden in cases involving third parties or in collective labor disputes.¹⁹ It also prohibits its use in criminal or other cases of public concern. This has been interpreted to preclude mediation in disputes with the state.²⁰

In Russia, as elsewhere, settlement is distinguished from mediation. This makes sense. Settlement generally involves the parties finding a compromise on their own, whereas mediation assumes this has proven impossible and contemplates bringing in a mediator to help the parties. Disputants are permitted and encouraged to settle at every stage, including before coming to court. Along similar lines, the language of the law would seem to open the door to trying mediation both in the lead up to the lawsuit and after it has been filed.²¹ But pretrial mediation is allowed only if it is contemplated in the agreement that establishes the parties’ relationship.²² This is rarely found. As a practical matter, therefore, mediation is possible only after a lawsuit has been initiated.²³ When judges accept a case for trial, they send an order (*opredelenie*) to the litigants detailing the time and place for the hearing and laying out their rights and duties. Among those is the right to bypass the

¹⁷ Stenogramma, *supra* note 7.

¹⁸ “Ob al’ternativnoi”, *supra* note 2, at art. 1. *Arbitrazh* courts hear economic disputes, most of which involve legal entities. See, e.g., Kathryn Hendley, *Remaking an Institution: The Transition in Russia from State Arbitrazh to Arbitrazh Courts*, 46 AM. J. COMP. L. 93 (1998). The courts of general jurisdiction hear all other civil cases, as well as all criminal cases. See, e.g., PETER H. SOLOMON JR. & TODD FOGLESONG, *COURTS AND TRANSITION IN RUSSIA: THE CHALLENGE OF JUDICIAL REFORM* 183 (2000). Cases that raise questions about the constitutionality of the underlying laws or regulations are handled by the Russian Constitutional Court. See, e.g., ALEXEI TROCHEV, *JUDGING RUSSIA: CONSTITUTIONAL COURT IN RUSSIAN POLITICS 1990–2006* (2008).

¹⁹ “Ob al’ternativnoi”, *supra* note 2, at pt. 5, art. 1.

²⁰ P.M. Voronetskii, *Nekotorye prichiny nepopuliarnosti instituta mediatsii v Rossiiskoi Federatsii*, ROSSIISKAIA IUSTITSIIA, no. 3, 2016 at 62.

²¹ “Ob al’ternativnoi”, *supra* note 2, at art. 7.

²² The statutory provision stating that mediation “is carried out on the basis of an agreement between the parties on the use of mediation” has been interpreted narrowly to require a mandatory mediation clause. KOMMENTARIJ K FEDERAL’NOMU ZAKONU “OB AL’TERNATIVNOI PROTSEDURE UREGULIROVANIIA SPOROV S UCHASTIEM POSREDNIKA (PROTSEDURE MEDIATSII)” 98 (S.K. Zagainova, and V.V. Iarkov, eds., 2011).

²³ “Ob al’ternativnoi” *supra* note 2, at art. 4.

court for mediation.²⁴ When the parties appear before the judge, the procedural codes obligate her to remind them of this option. If they are amenable, then the case is stayed for up to sixty days while the parties work with a mediator.²⁵ If the parties are able to resolve their dispute, they emerge with a “mediation agreement” (*mediativnoe soglashenie*) that is reviewed by the court. Judges do not pry into the merits of the resolution; so long as it is within the bounds of the law, they approve it, thereby terminating the lawsuit.²⁶ If a resolution proves elusive, even with the help of a mediator, then the parties return to court and resume their adversarial stances.²⁷ Much like mediation the world over, the proceedings are deemed confidential.²⁸ The parties cannot rely on what they learned to bolster their cases, nor can they call mediators as witnesses.²⁹

B. *The Use (or Nonuse) of the Law*

Iaroslav B. Zhelobov, the chairman of the Pushkin district court in St. Petersburg, speaks for the judicial corps generally when he argues that “from the point of view of the judicial community, mediation is needed.”³⁰ Iakovlev buttresses these sentiments. Not only does he see value in the potential to divert cases away from the courts, but he also believes that helping parties to find a way through their problems creates more stable solutions. He recognizes that leaving parties to their own devices can often devolve into screaming matches, where neither side is truly listening. He sees mediation as a way of “helping people to enter into negotiations and talk with each other normally in human (*chelovecheskii*) language. And try to understand each other.” He describes this as a “high art” (*velikoe iskusstvo*).³¹

Litigants, on the other hand, have mostly given the cold shoulder to mediation. Beginning in 2014, national-level data on the use of mediation has been included in the annual statistical report on the activities of the courts of general jurisdiction. As Table 1 documents, less than one tenth of a percent of all civil cases were resolved via mediation.³² Mirroring Western

²⁴ GRAZHDANSKII PROTSESSUAL'NYI KODEKS ROSSIISKOI FEDERATSII [hereinafter GPK RF] of 14 noiabria 2002 goda, No. 138-FZ, arts. 150, 172, available at http://www.consultant.ru/document/cons_doc_LAW_39570/.

²⁵ *Id.* at art. 169.

²⁶ “Ob al'ternativnoi” *supra* note 2, at art. 12; see generally Spravka, *supra* note 8.

²⁷ GPK RF *supra* note 24, at art. 173.

²⁸ “Ob al'ternativnoi” *supra* note 2, at arts. 3, 5; see generally A.K.C. Koo, *Confidentiality of Mediation Communications*, 30 CIV. JUSTICE QUARTERLY 192 (2011).

²⁹ GPK RF, *supra* note 24, at pt. 3 art. 69.

³⁰ Stenogramma, *supra* note 7.

³¹ *Id.*

³² Unfortunately, the available data do not reveal the number of cases in which the parties availed themselves of mediation. As a result, we cannot know how often mediation succeeds. Even fewer cases are resolved with the help of mediators at the *arbitrazh* courts. According to the official statistics, only 29 of 1.15 million civil cases decided by

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experience, litigants tend to be more open to trying this alternative approach when tussling with those closest to them. Almost a quarter of all cases mediated involve inter-familial disputes. When we look at the number of cases mediated as a percentage of all similar cases, inheritance disputes, which also typically pit family members against one another, emerge as being friendly to mediation. In both categories of cases, just over 0.02 percent of disputes were resolved through mediation. A similar level of usage is visible for consumer disputes. Unlike family and inheritance squabbles, consumer claims involve parties operating at arms' length. Some Russian retail establishments have begun including mandatory mediation clauses in their form documents, which helps explain the higher than average propensity to resort to mediation.

Table 1: Use of Mediation in the Russian Courts of General Jurisdiction, 2014-2015.³³

	Number of cases	As percentage of all civil cases	Number of mediated cases	As percentage of all cases in that category	As percentage of all mediated cases
Family law					
2014	1,115,987	8.04	331	0.0296	24.81
2015	1,088,949	6.88	251	0.023	22.5
Labor					
2014	569,583	4.11	91	0.016	6.82
2015	628,727	3.97	59	0.009	5.29
Inheritance					
2014	110,826	0.8	25	0.023	1.87
2015	109,289	6.91	27	0.025	2.42
Housing					
2014	2,935,516	21.16	137	0.005	10.27
2015	3,531,451	22.32	125	0.0035	11.21
Consumer					
2014	394,658	2.84	108	0.027	8.1
2015	456,943	2.89	108	0.023	9.69

these courts in 2015 involved mediators. Otchet o rabote arbitrazhnykh sudov sub"ektov Rossiiskoi Federatsii v 2015 godu, *available at* <http://www.cdep.ru/index.php?id=79&item=3423>.

³³ Otchet o rabote sudov obshchei iurisdiktsii o rasmotrenii grazhdanskikh del po pervoi instantsii za 12 mesiatsev 2015 [hereinafter Otchet 2015], <http://www.cdep.ru/index.php?id=79&item=3417>; Otchet o rabote sudov obshchei iurisdiktsii o rasmotrenii grazhdanskikh del po pervoi instantsii za 12 mesiatsev 2014 [hereinafter Otchet 2014], <http://www.cdep.ru/index.php?id=79&item=2884>.

Tax						
	2014	2,807,179	20.2	0	0	0
	2015	3,589,711	22.69	0	0	0
All cases						
	2014	13,872,685		1334	0.0096	100
	2015	15,819,942		1115	0.007	100

These data do not break down mediation use by region or by courts within regions. Russian scholarship occasionally provides a glimpse of this reality. The limited data does suggest that the use of mediation is concentrated in a few regions where local administrators have embraced it wholeheartedly. Training judges helps. Judges who have received formal training on mediation are more likely to encourage parties to try it.³⁴ In several regions, such as St. Petersburg, Voronezh, Ekaterinburg, and Pskov, mediation centers have been created and have secured funding to pay the costs of mediation for interested litigants as part of limited-time pilot projects.³⁵ In these regions (as well as several others), mediators are available in the courthouse, thereby eliminating the need for litigants to seek them out independently. All of these incentives have boosted the use of mediation, but even with them, very few parties have been willing to try it. For example, in the Pushkin district court of St. Petersburg, where the chairman is an unabashed cheerleader for mediation, only 52 cases were mediated from October 2011 to October 2012.³⁶ This accounted for less than 2 percent of its 2012 civil caseload.³⁷ Mediation was successful in 40 of these cases (77 percent).³⁸ The bulk of these cases were family disputes (68 percent). The remainder were fairly evenly divided between labor disputes and consumer claims. Judges reported that even when mediation failed to produce concrete results, they nonetheless observed behavioral changes. Parties who had tried mediation were more willing to listen to each other and to restrain their

³⁴ In 2013, I collaborated with staff members of the Higher *Arbitrazh* Court to survey trial-level *arbitrazh* judges about their attitudes and behavior regarding mediation. Regression analysis confirms that having been through training was a significant predictor of openness to recommending mediation. So too was being acquainted with mediators. Kathryn Hendley, *Judges as Gatekeepers in Mediation: The Russian Case*, 16 *CARDOZO J. CONFLICT RESOL.* 423, 449, 454 (2015); see also Shamlikashvili et al., *supra* note 4, at 117–18.

³⁵ See generally Hendley, *supra* note 11. This use of experimental programs to spur interest in mediation is similar to efforts in the U.S. in the 1970s. See, e.g., McEwen & Maiman, *supra* note 9, at 242.

³⁶ M.A. Alekseeva, “Praktika utverzhdeniia mediativnykh soglashenii v sudakh obshchei iurisdiktсии Rossiiskoi Federatsii” (n.d.), available at <http://buryatia.arbitr.ru/files/doc/Alekseeva.docx>.

³⁷ For the caseload data for the Pushkin district court, see *Otchet o rabote sudov obshchei iurisdiktсии po rassmotreniu grazhdanskikh del po pervoi instantsii za 12 mesiatsev 2012 g.*, available at http://psh.spb.sudrf.ru/modules.php?name=docum_sud&id=269.

³⁸ Alekseeva, *supra* note 36.

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emotions in court. More importantly, they were better able to clearly formulate their arguments which allowed their cases to proceed more quickly.³⁹ Such comments echo the observations of Western judges.⁴⁰

Vasilii Nechaev, Deputy Chairman of the Russian Supreme Court, argues in favor of parties, themselves, resolving disputes. He bemoans the “adversarial nature of trials. There is always a dissatisfied party. Practice shows that if a decision is reached through mediation, then, as a rule, the parties will respect it.”⁴¹ Along similar lines, Zhelobov told of a family transformed through their participation in mediation. He strong-armed former spouses into trying mediation in a contentious child custody case in which the husband had been stalking his ex-wife. With the help of the mediator, they came to better understand each other’s positions and found a mutually acceptable resolution. The judge said that, even though they remained divorced, he sometimes sees them walking together with their children near his courthouse in St. Petersburg.⁴² According to those who have tracked mediated cases, no one has yet recanted an agreement made through mediation or tried to reopen the dispute.⁴³

II. RUSSIAN SCHOLARS’ EXPLANATIONS FOR THE NONUSE OF MEDIATION

The failure of Russian litigants to use mediation has not gone unnoticed by the Russian scholarly community. Much ink has been spilt in an effort to explain the failure of mediation to take hold.

A. *Flaws in the Legislation*

Given its civil law legal heritage, Russian legal scholars tend to focus on the letter of the law. As one analyst cogently argued: “The essential shortcomings of the legal regime constitute the basic explanation for the unpopularity of mediation today.”⁴⁴ Others agree.⁴⁵ Of course, no law is ever perfect. Russia’s mediation law is no exception.

³⁹ *Id.*

⁴⁰ Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 603–04 (1997).

⁴¹ Vasil’eva, *supra* note 3. At a 2015 Saratov round-table, a local judge told of a dispute over property rights that was resolved in a single day with the help of a mediator. The parties then enforced the decision themselves; the court did not have to take any action. Kruglyi stol “Mediatsiia: Perspektivy razvitiia.” Held at Saratov Oblast Court on May 22, 2015, http://oblsud.sar.sudrf.ru/modules.php?name=press_dep&op=1&did=809. U.S.-based research likewise shows fewer problems with compliance when the parties have mediated their dispute. *See, e.g.*, McEwen & Maiman, *supra* note 9, at 241.

⁴² Stenogramma, *supra* note 7.

⁴³ Kruglyi stol, *supra* note 41; Alekseeva, *supra* note 36; Spravka, *supra* note 8.

⁴⁴ *See generally* Voronetskii, *supra* note 20.

A critique that has consistently dogged the law is its terminology.⁴⁶ There are several words that can be used for mediation. The somewhat awkward title given to the law reflects an effort at compromise: “On an alternative procedure for regulating disputes with the use of a *posrednik* (the procedure of *mediatsii*).” The first italicized word can be translated as intermediary, mediator, or go-between.⁴⁷ The second is translated as mediation. Each carries its own baggage. *Posrednik* is a longstanding Russian word. It was the term used to describe individuals (often thugs) who collected debts from recalcitrant customers in the 1990s. For many Russians, its pejorative connotation lingers on. The drafters of the law tried to make a fresh start by using the English cognate—*mediatsii*—as a parenthetical explanation. But this is a new word that is completely unfamiliar to Russians. Not surprisingly, there is no entry for *mediatsii* in dictionaries that predate the law.⁴⁸ It is also absent from 2016 dictionaries.⁴⁹ By contrast, *posrednik* is included in both dictionaries.

Many scholars believe that *mediatsii* is off-putting and confusing to ordinary Russians.⁵⁰ Given the hostility of Putin’s regime toward the West, and the United States in particular, its English heritage is not helpful. Even after the law was passed, Iakovlev proposed substituting *primiritel’*.⁵¹ The root for this word comes from the verb for conciliating or settling—*primirit’*. Hence, the technical translation would be a conciliator. Clearly this only opens yet another can of worms by potentially conflating mediation with settlement.

The legislators’ choice to limit mediation to relatively simple civil cases is a commonly voiced criticism. Scholars uniformly advocate for allowing mediation in multi-party civil cases as well as criminal and administrative cases. They point out that mediation was used successfully in criminal cases in the 2008 St. Petersburg experiment with mediation that predated the law.⁵²

⁴⁵ See, e.g., Shamlkashvili et al., *supra* note 4, at 122–25; Spravka, *supra* note 8; Tiul’kanov, *supra* note 5.

⁴⁶ E.I. Nosyreva & I.A. Sternin, ‘*Posrednichestvo*’ ili ‘*mediatsiia*’: *k voprosu o terminologii*, TRETEISKII SUD, no. 1, 2007, at 9-14; Tiul’kanov, *supra* note 5, at 35.

⁴⁷ See A. I. Smirnitsky, COMPREHENSIVE RUSSIAN-ENGLISH DICTIONARY (O.S. Akhmanova eds. 27th ed. 2006). *Posrednik* serves as the root for *posrednichestvo*, which can be translated as mediation.

⁴⁸ See, e.g., *Sovremennyi tolkovyi slovar’ russkogo iazyka* (S.A. Kuznetsov, ed., 2001).

⁴⁹ See, e.g., *Bol’shoi universal’nyi slovar’ russkogo iazyka* (V.V. Morkovkin et al. eds., 2016).

⁵⁰ Stenogramma, *supra* note 7.

⁵¹ *Id.*

⁵² The St. Petersburg pilot program operated for three years (2008-2011). About half of the 138 cases that were mediated were criminal. Without exception, these were *chastnoe obvinenie*, a kind of private prosecution, involving minor injuries that the police and prosecutors have declined to pursue. In their stead, the victim serves as a private prosecutor. Hendley, *supra* note 11, at 748. See generally A.S. Krasnopevtsev, *Opyt primeneniia mediatsii v mirovykh sudakh Sankt-Petersburga*, TRETEISKII SUD, no. 3, 2011 at 144–45.

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The limited legislative history of the law provides no clues as to why legislators did not include criminal cases. Perhaps they were concerned about the inevitable power differential between criminal defendants and prosecutors. This might also explain why they forbade mediation in cases involving the state. Yet top state officials are open to mediation. For example, the head of the federal tax service believes that mediation could be “extremely useful” in handling disputes with taxpayers.⁵³

Scholars also fault the law for a lack of clarity on who can serve as a mediator. The requirements under the law are threefold: (1) at least 25 years of age; (2) university degree; and (3) training as a mediator.⁵⁴ The scholarly literature focuses largely on the third prong. There seems to be a yearning for more specificity as to the approach and content of the training. At present, a number of mediation centers have established training programs and each pursues its own path. At a public round-table, several judges expressed concern over the lack of regulation, suggesting that some sort of accreditation process for mediators would be welcome.⁵⁵

Another sticky issue is whether public officials—especially judges—should serve as mediators.⁵⁶ The law establishes a default rule prohibiting state officials from serving as mediators, though it opens the door to exceptions.⁵⁷ A draft law that would create such an exception for retired judges and other courthouse personnel was floated in 2012, but came to naught.⁵⁸ Russian judges are keen to carve out this exception, pointing to the success in Belarus and Japan of judicial mediators.⁵⁹ In support, they point to the Russian past. Nineteenth-century Russian justices of the peace were encouraged to conciliate among litigants.⁶⁰ My own observational research in Russian courts documents that judges frequently intercede with parties to help them find mutually acceptable compromises.⁶¹ In doing so, they skirt

⁵³ Shamlkashvili et al., *supra* note 4, at 140.

⁵⁴ “Ob al’ternativnoi” *supra* note 2, at art. 16.

⁵⁵ Stenogramma, *supra* note 7.

⁵⁶ In China, judges serve as both mediators and decision-makers. See Hao, *supra* note 9; Chen Yongzhu, *The Judge as Mediator in China and its Reform: A Problem in Chinese Civil Justice*, 10 J. COMP. L. 106, 106-07, 109-12 (2015). Some have framed the official push for mediation over courts as a rejection of formal institutions. See, e.g., Carl P. Minzer, *China’s Turn Against Law*, 59 AM. J. COMP. L. 935, 951 (2011). But non-court-based community mediation also flourishes. See generally Ahahla Ali, *The Jurisprudence of Responsive Mediation: An Empirical Examination of Chinese Peoples’ Mediation in Action*, 45 J. LEGAL PLURALISM & UNOFFICIAL L. 227 (2013); We Yuning, *People’s Mediation Enters the 21st Century*, 10 J. COMP. L. 25 (2015).

⁵⁷ “Ob al’ternativnoi” *supra* note 2, at pt. 5, art. 15.

⁵⁸ Hendley, *supra* note 11, at 750–51.

⁵⁹ Irina Reshetnikova, *Skonit, k miru*, ROS. GAZ. (Nov. 5, 2013), <http://rg.ru/2013/11/05/primirenie>.

⁶⁰ Stenogramma, *supra* note 7; Joan Neuberger, *Popular Legal Cultures: The St. Petersburg Mirovoi Sud*, in *RUSSIA’S GREAT REFORMS, 1855–1881*, 132–46 (Ben Eklof et al. eds., 1994).

⁶¹ Kathryn Hendley, *Assessing the Role of the Justice-of-the-Peace Courts in the Russian*

the line between judge and mediator, though both allow them to maintain their neutrality.

Scholars actively debate the mechanics of paying for mediation. The law requires the disputants to cover the costs of mediation.⁶² In an effort to stimulate use, the privately-funded pilot programs in St. Petersburg, Ekaterinburg, Rostov, and Pskov shouldered this burden, rendering mediation free, at least from a financial perspective. Although the take-up rate was lower than had been hoped, more litigants were willing to try mediation under these conditions, leading some commentators to advocate shifting the costs of mediation onto the state.⁶³ Alternatively, they recommend returning some portion of the filing fees (*gosposhlina*) to parties who conclude mediation agreements.⁶⁴ Doing so would make it analogous to the practice for settlements, following which half of the *gosposhlina* paid is returned as an informal quid pro quo for liberating the court from the obligation to resolve the dispute on its merits.⁶⁵ An alternative proposal would subsidize the costs for certain kinds of cases or parties.⁶⁶

B. *Institutional Incentives*

Western experience suggests that disputants turn to mediation when the costs of litigation grow overwhelming. These costs are measured not just in terms of money, but also in terms of time and emotional energy. Courts in Western Europe and the United States are plagued by delays.⁶⁷ The ever-increasing cost of retaining counsel likewise discourages the disgruntled from pursuing lawsuits. The situation is remarkably different in Russia. The procedural rules are straightforward, allowing litigants to forego legal representation if desired.⁶⁸ Moreover, the procedural codes establish clear deadlines for resolving cases.⁶⁹ Judges' ability to live within these constraints is a key assessment factor. As a result, violations are few.⁷⁰ *Gosposhlina* has

Judicial System, 37 REV. CENT. & E. EUR. L. 377, 390 (2012).

⁶² "Ob al'ternativnoi" *supra* note 2, at art. 10.

⁶³ Vasil'eva, *supra* note 3.

⁶⁴ Shamlikhailshvili et al., *supra* note 4, at 138.

⁶⁵ NALOGOVYI KODEKS ROSSIISKOI FEDERATSII CHAST' 2 ot 5 avgusta 2000, No. 117-FZ, art. 333.40, available at http://www.consultant.ru/document/cons_doc_LAW_28165/; ARBITRAZHNYI PROTSSESSUAL'NYI KODEKS ROSSIISKOI FEDERATSII ot 27 iul'ia 2002, No. 95-FZ, art. 141, pt. 7 [hereinafter APK RF], available at http://www.consultant.ru/document/cons_doc_LAW_37800/.

⁶⁶ Vasil'eva, *supra* note 3.

⁶⁷ Jacqueline M. Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation?*, 37 N.C. J. INT'L L. & COM. REG. 981, 982-84 (2012).

⁶⁸ Hendley, *supra* note 11, at 731.

⁶⁹ Most civil cases are required to be resolved within two months of the filing date. GPK RF, *supra* note 24, at art. 154.

⁷⁰ The deadlines were violated in less than 1.5 percent of all civil claims in 2014 and 2015. Otchet 2015, *supra* note 33; Otchet 2014, *supra* note 33.

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been kept low as a way of ensuring widespread access to justice.⁷¹ Reflecting on the impact of these institutional incentives on the use of mediation, Irina V. Reshetnikova, the influential chairman of the Ural okrug cassation *arbitrazh* court, commented: “The speed with which Russian courts resolve cases is the envy of all of Europe: from ten days to three months. In fact, our [judicial] processes are both cheap and quick. In the eyes of the public, this eliminates the need for mediation.”⁷²

An insufficient supply of qualified mediators has also been cited by several scholars as a deterrent to the use of mediation.⁷³ Though training centers have sprung up, there is little doubt that the system could not cope if litigants began to opt for mediation routinely. But to claim that a shortfall in mediators lies at the root of the nonuse of mediation would seem to put the cart before the horse. After all, as one group of Moscow scholars acknowledged, “most [Russian] citizens know nothing about mediation.”⁷⁴

C. Legal Culture

Although Russian scholars’ prescriptions for spurring greater use of mediation rely primarily on institutional reforms, they occasionally give a nod to less concrete factors. Yakovlev, in particular, has argued that changing the atmosphere in society is also important.⁷⁵ Others have chimed in. Some point to the reluctance of litigants to take responsibility for their disputes, noting that they prefer to wait for the judge to render her decision.⁷⁶ Their disinclination to settle buttresses this argument.⁷⁷ According to the scholarly literature, an openness to settling is generally viewed as a sign of weakness.⁷⁸ They argue that proposing mediation would likewise be seen as waving the white flag of surrender.

III. METHODOLOGY: THE ORGANIZATION OF THE FOCUS GROUPS

⁷¹ See Kathryn Hendley, *Too Much of a Good Thing? Assessing Access to Civil Justice in Russia*, 72 SLAVIC REV. 802 (2013) (on the politics behind low filing fees).

⁷² Reshetnikova, *supra* note 59. See also Shamlkashvili et al., *supra* note 4, at 114 (which similarly argues that the fact that Russian courts are “rather inexpensive” and “rather quick and accessible” undercuts the demand for mediation).

⁷³ See generally Spravka, *supra* note 8; Tiul’kanov, *supra* note 5, at 36; S.K. ZAIGANOVA ET. AL., MEDIATSIIA V NOTARIAL’NOI DEIATEL’NOSTI (2012).

⁷⁴ Stenogramma, *supra* note 7.

⁷⁵ Shamlkashvili et al., *supra* note 4, at 115; Stenogramma, *supra* note 7.

⁷⁶ Judges share this view. In my 2013 survey of *arbitrazh* judges, over half (51 percent) disagreed with the statement: “Litigants in Russia are prepared to participate actively in the resolution of their disputes.” Hendley, *supra* note 34.

⁷⁷ In 2014 and 2015, less than six percent of all civil cases were terminated short of a decision, a categorization that includes settlements as well as those who decide not to proceed for other reasons. Otchet 2014, *supra* note 33; Otchet 2015, *supra* note 33. On the reasons behind Russians’ reluctance to settle, see Hendley, *supra* note 71, at 823.

⁷⁸ Shamlkashvili et al., *supra* note 4, at 115; Stenogramma, *supra* note 7.

The voices of actual litigants are notably absent from Russian scholars' analysis. Studying non-events, such as the nonuse of mediation, is never easy.⁷⁹ One approach might have been to haunt the halls of Russian courthouses, querying litigants about their choices. My approach is different. With the help of Russian colleagues, I organized nine focus groups in 2014 that brought ordinary Russians together to discuss their reviews on resolving disputes, with an emphasis on their openness to alternative dispute resolution. They were divided equally between Moscow, Voronezh, and Novosibirsk. These sites were chosen strategically. Each has a different profile regarding mediation. Voronezh is the home base for Elena Nosyreva who, as I noted earlier, chaired the working group that drafted the 2010 law on mediation. She has established a center at Voronezh State University that is active in mediating disputes and training mediators. Novosibirsk, by contrast, has no such center. Moscow lies somewhere in the middle. It is home to mediation activists and mediation centers, but is not known for this.

Hypothesizing that attitudes towards dispute resolution would be colored by prior court experience, I divided the groups accordingly. In each locale, one group was composed of court veterans, another was composed of those who had never been to court, and the third was mixed. Almost all of those with experience had been through civil processes.⁸⁰ Most (87%) had been the instigators of their court cases. Reflecting the docket of Russian courts, the most common types of cases were housing (33%) and family (27%) disputes, with cases involving labor claims, personal injury, business problems, and debt collection also represented.

The focus groups were held in the evenings and on weekends because most of the participants had full-time jobs. They lasted about two hours. Each group included 8-12 participants.⁸¹ An effort was made to ensure diversity in terms of gender, employment, and education. The participants were almost evenly divided by gender with 46 men and 45 women. Their ages ranged from 23 to 66, with an average age of 41. From a financial point of view, the participants were comfortable. Two-thirds said that they could easily afford big-ticket items, such as refrigerators and televisions, while the

⁷⁹See generally KATHRYN HENDLEY, *EVERYDAY LAW IN RUSSIA* (2017); Rebecca Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in *TRANSFORMING LIVES: LAW AND SOCIAL PROCESS*, 112 (Pascoe Pleasance et al., eds., 2007).

⁸⁰The only exception was Vera, a 40-year-old Muscovite who worked in a technical capacity at a university, who had been the victim of a crime. She represented her own interests at the subsequent trial. Like most European countries (*e.g.*, Bron McKillop, *Anatomy of a French Murder Case*, 45 AM. J. COMP. L. 527 (1997)), victims are parties to criminal cases in Russia, where they can weigh in on the treatment of the defendant and seek civil damages. PETER MAGGS ET AL., *LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION* (6th ed. 2015).

⁸¹The names of the participants have been changed to protect their anonymity.

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remainder said that such purchases would be a struggle for them, but that they had no trouble covering their daily expenses.

The discussions centered on three hypothetical scenarios that posed mundane problems that could, but need not, be solved through litigation. Cards on which the details were printed were distributed and participants were given time to study them. Using these stylized fact patterns put everyone on the same page. Participants were encouraged to share their own experiences. Many had endured similar problems (although they were not recruited on this basis) and related their reactions to them.

The first problem involved a recently purchased cell phone that had stopped working.⁸² The second posited a residential water leak.⁸³ The third explored a sticky inheritance dispute.⁸⁴ The goal was to increase the complexity of the problem as the discussions proceeded, in terms of both substance and emotion. As she worked through the scenarios, the moderator⁸⁵ periodically asked the participants whether bringing in a third party might be helpful.

I have elsewhere analyzed the participants' reactions to these problems, looking at their propensity to take their claims to court.⁸⁶ In this article, I

⁸² Irina Ivanovna, 44-year-old teacher, bought a new cell phone in the "Evroset" store near the school where she teaches. She is not tech savvy. Previously, she had a very basic mobile phone, which she lost. The salesman persuaded her to buy a smartphone for \$150, assuring her that if problems arose, she could easily trade the phone for a new one. He also convinced her to buy a two-year extended warranty for \$50. Two weeks after the purchase, her phone stopped working. When she brought it back to the store, she was told that she would have to buy a new phone. The manager explained that the problem with her phone arose due to improper use, invalidating the warranty.

⁸³ Boris Mikhailovich, a 35 year-old doctor, lives in two-room apartment on the second floor of a five-story building which he had inherited from his parents. He lives with his wife and 8-year old son. One night Boris was awoken by what sounded like rain in his apartment. He investigated and discovered that water was leaking from the ceiling in his kitchen. He went upstairs, but no one was home in the apartment above him. He called the management company. They sent a representative, who opened the third floor apartment and discovered that the water had been left running. By the time the leak was stopped, the wallpaper and parquet flooring in the kitchen had been badly damaged. The owner of the third floor apartment refused to pay for the repairs.

⁸⁴ Daria Nikolaevna is a 20-year old secretary. She spent her summers in the countryside at her grandparents' summer house (*dacha*). Her own parents died tragically when she was young, so her grandparents brought her up. In addition to her father, they had two other children, each of whom had a child. None of them lives nearby, and so have not recently visited the *dacha*. Her grandmother died a few months ago. Her aunts and uncles and cousins are keen to sell the *dacha*. It is located near a river and real estate developers have already bought up adjacent properties. Daria is determined to keep it. Although she does not yet have children, she wants the *dacha* to be there when she has a family.

⁸⁵ The moderator was a Russian social scientist with extensive experience leading focus groups.

⁸⁶ Kathryn Hendley, *To Go To Court or Not? The Evolution of Disputes in Russia*, in *A SOCIOLOGY OF JUSTICE IN RUSSIA* (Marina Kurkchiyan & Agnieszka Kubald eds.)(forthcoming 2017).

explore their attitudes towards the possibility of resolving them with the help of neutral third parties. I also analyze their reactions to the idea of mediation more generally.

IV. ORDINARY RUSSIANS' ATTITUDES TOWARDS MEDIATION: INSIGHTS FROM THE FOCUS GROUPS

A. *Lack of Knowledge*

The most striking finding that emerges from the focus groups is the profound lack of popular knowledge of mediation. Even though over 60 percent of the participants had court experience, not a single person was aware that they could have opted for mediation.⁸⁷ This reality upends my initial hypothesis that having court experience would matter because it would bring a familiarity with mediation. Both neophytes and court veterans were equally ignorant. It also confirms Russian scholars' intuition that the unfamiliarity with mediation constitutes a significant constraint on popular use.

Court veterans' obliviousness reveals that judges are either failing to inform them about their right to mediate or are doing so ineffectively.⁸⁸ As I noted earlier, the procedural codes require judges to educate litigants on this score, both orally and in writing. But the written notification is far from conspicuous. It is buried in a sea of legalese in a small font on the back side of the document that notifies parties of the time and place of their hearing. My observational research in Russian courts reveals that judges' recitations of parties' rights and duties are often rendered in a rapid monotone that

⁸⁷ When the idea of mediation was raised by the moderator, a few participants in each locale indicated an awareness of the process thanks to a television program, "Before The Court" (*Do suda*), that focuses on resolving disputes before they get to court with the help of neutral third parties. The participants had no idea that a similar service existed in reality. DO SUDA (BEFORE THE COURT), (NTV 2010-).

⁸⁸ In 2010, the Moscow-based Institute of Law and Public Policy undertook a study that monitored the activities of justice-of-the-peace courts in Perm krai and Leningrad oblast. L. O. Ivanova, *Predlozheniia po povysheniiu dostupnosti pravosudiia dlia maloimushchikh i sotsial'no nezashchishchennykh grazhdan—uchastnikov grazhdanskogo protsessa*, (OOO "Informpoligraf", Moscow, 2011); V. M. Voronkov & L. V. Ezhova, *Provedenie monitoringa sudebnykh zasedanii mirovykh sudei i oprosov uchastnikov sudebnykh protsessov: Metodologiya, instrumentarii, protsedury realizatsii i kontrolya* (Moscow: OOO "Imformpoligraf," 2010). Trained monitors observed over nine hundred civil cases in each locale, paying close attention to the extent to which justices of the peace lived up to their legal obligations. Their study predated the introduction of mediation, but did explore the propensity of judges to tell parties of their right to settle, which is analogous to mediation. They found that, while these judges complied with most procedural requirements, they explained the settlement process in less than 15 percent of the monitored cases. Olga Sidorovich, *Proekt: Povyshenie dostupnosti pravosudiia dlia maloimushchikh i sotsial'no nezashchishchennykh grupp naseleniia Rossiiskoi Federatsii*, presentation at round-table held in St. Petersburg, Russia (June 30, 2011).

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leaves litigants more confused than educated.⁸⁹ Few ask clarifying questions, preferring to let the unfamiliar language wash over them.

The focus group participants were not surprised or angered by this gap in their knowledge of the Russian legal environment. Much like the participants in my earlier Russian focus groups,⁹⁰ they cheerfully described themselves as “legally illiterate.”⁹¹ Their reactions to learning of mediation were varied. Non-Moscow participants assumed that it was available only in the capital.⁹² Voronezh residents were uniformly surprised to find out that they had a well-respected and centrally located mediation center. Several assumed that the failure of news to spread meant that it was not helpful. As Nadia, a 33-year-old Voronezh doctor put it: “It seems to me that there must be few positive results [from mediation] because if the pluses outweighed the minuses, then I think information about it would have been shared more widely.” All participants agreed that “word of mouth” (*serefanoe radio*) would be the most effective way to stimulate knowledge and use.

Much as the legal experts predicted, the focus group members were flummoxed by the terminology of the law. No one had positive associations with the word *posrednik*. Vladimir, a 45-year-old Muscovite, spoke plainly on this score: “Who are these *posredniki*? We all know who they are. These are the bandits from the 1990s who would arrive and announce: ‘You are going to pay and we will provide a roof (*krysha*).’⁹³ They then went to others

⁸⁹ The experiences of the court veterans among the focus group participants varied. Tatiana, a 29-year-old Novosibirsk manicurist who went to court in the aftermath of an auto accident, was dismissive of her judge’s interest in promoting a settlement. She explained: “Do you know how a court hearing proceeds? ‘Defendant, plaintiff, what complaints do you have against each other?... Maybe you can amicably settle this somehow. Go into the corridor—I’ll give you five minutes—you can negotiate, then come back in and give me your answer.’ That’s it. That’s how it works in court.” By contrast, Irina, a member of the same focus group who was 49 years old and worked as a pension department official, reported a different experience. She felt that her judge had been very encouraging of a settlement in the case she brought against her bank. For a broader overview of how Russian judges treat litigants, see Hendley, *supra* note 86.

⁹⁰ See Kathryn Hendley, *Resolving Problems Among Neighbors in Post-Soviet Russia: Uncovering the Law of the Pod’ezd*, 36 LAW & SOC. INQUIRY 388 (2011). See also Hendley, *supra* note 86.

⁹¹ Anna, a 66-year-old self-described consultant from Voronezh, spoke for many when she said: “People aren’t legally literate. We don’t fully understand our rights.”

⁹² Maria, a 54-year-old Voronezh technician, commented that, “Probably this exists in Moscow. We don’t yet have it.”

⁹³ *Krysha* is the Russian slang word for protection. “Since the Soviet Union collapsed, *krysha* refers to protection against ordinary criminals and ‘unprofessional’ racketeers, unruly business partners, and competitors.” FEDERICO VARESE, *THE RUSSIAN MAFIA: PRIVATE PROTECTION IN A NEW MARKET ECONOMY* 59 (2001). See also VADIM VOLKOV, *VIOLENT ENTREPRENEURS: THE USE OF FORCE IN THE MAKING OF RUSSIAN CAPITALISM* (2002). In more recent years, the need for *kryshi* has diminished as Russian businesses have turned to more sophisticated and less violent methods of imposing their will on others, such as corporate raiding. See generally Thomas Firestone, *Criminal Corporate Raiding in Russia*, 42 INT’L LAWYER 1207 (2008).

and said: ‘You can’t do business here because this is our territory.’” This understanding of a *posrednik* as a goon or enforcer was consistent across the focus groups, raising doubts as to whether the word can be rehabilitated and repurposed. *Mediator*, by contrast, had no negative connotations, but was simply unknown to the participants. Many of them correctly surmised that it was a foreign word, which was a mark against it. In time, it may come to be part of the popular vernacular. No one brought up *primiritel’*, Iakovlev’s suggestion as a substitute for these contested terms, suggesting that it was also a non-starter.

B. Critiques of the Law

Needless to say, none of the participants had read the law. The moderator explained its terms in broad strokes. Their biggest criticism was one that was absent from the scholarly literature. To a person, they could not understand why the law authorized mediation only after a lawsuit had been filed. Iulia, a 34-year-old Voronezh accountant, succinctly expressed the views of her colleagues when she commented: “Well, then, what’s the point?” They argued that mediation would make more sense before disputes were brought to the courts. In their view, filing a lawsuit tended to harden the parties’ positions, complicating compromise. As Aleksei, a 28-year-old Moscow bank manager commented: “the mentality of those who litigate—on principle, they don’t want to talk...; they’re not interested.”

Unlike the scholars, who are aware of the battles and compromises that lay behind the law, the focus group participants came to mediation with fresh eyes. They questioned its institutional structure, which scholars accepted as a given. The participants’ first reaction was that the moment for mediation has passed once the lawsuit has been filed. Their logic is compelling, but falls victim to political realities. Had legislators opted for this more informal structure, it would have opened a Pandora’s Box of problems of enforcement. In its current form, judges act as the guarantors of the process; they will not endorse a mediation agreement that violates the law. Moreover, a court-endorsed mediation agreement has the same legal force as a judicial opinion, allowing parties to seek a court order (*ispolnitel’nyi list*) without having to return to the merits of the case.

C. Need for Mediation

But the participants’ critiques go deeper. They are generally satisfied with the court as the default venue to resolve vexing problems and are dubious as to the need for mediation. Some—mostly court veterans—saw the potential for mediation to ease the burden on courts. They recognized that mundane cases could be diverted to mediation. But the majority of participants were more resistant to the charms of mediation. Maksim, a 36-year-old Voronezh taxi driver, described it as “completely superfluous.”

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David, a 32-year-old dispatcher at a Moscow transportation company, expressed a commonly felt frustration: “This is simply puzzling. So, this mediator gets involved at the court. But the trial is already underway and I retained a lawyer (*advokat*) from the outset, to whom I already paid money and signed a contract so that I can win the case. So why is [mediation] needed? If I already have an *advokat*?”⁹⁴ David’s comment reveals two sources for this skepticism, namely the cost and the function of mediators.

D. *Cost of Mediation*

Cost was the most common objection to mediation raised by the focus group participants. As a rule, they recoiled at the prospect of having to pay for mediators’ services. The response of Klavdia, a 41-year-old Moscow insurance agent, was telling. She said: “We already paid for the complaint, we already showed up in court and paid for the case. Is this free?”⁹⁵ There was a consensus that the filing fees (*gosposhlina*) ought to cover any and all expenses related to the dispute. When the moderator explained that the services of mediators was not included, the displeasure was palpable. The participants saw this as paying twice for the same service.⁹⁶ Even more troubling to them was the uncertainty as to the cost (which stands in contrast to *gosposhlina*, which is calculated as a percentage of the amount sought).

Once reconciled to paying mediators, participants argued in favor of a results-based payment scheme. Put more bluntly, they believe that mediators should only be paid if they are successful in bringing the parties together, thereby averting lawsuits. As Mikhail, a 51-year-old Voronezh engineer, put it: “It’s ok if it’s expensive, but there should be a small advance payment. The remainder should come from the person at fault.”

E. *Function of Mediation and Mediators*

Mikhail’s comment illustrates his lack of understanding of the mediation process. He sees it as being a battle where someone emerges as victorious.

⁹⁴ Like many European countries, Russia has a divided bar. *Advokaty* tend to be litigators; they are the only subunit within the Russian legal profession that has an entry exam akin to a U.S. bar exam. Only *advokaty* can represent criminal defendants, but there are no restrictions on who Russians can hire to represent them in other types of cases. Lawyers who regularly go to court, but who have not passed the exam to become an *advokat* are referred to as *iuristy*. See generally PAMELA A. JORDAN, DEFENDING RIGHTS IN RUSSIA: LAWYERS, THE STATE, AND LEGAL REFORMS IN THE POST-SOVIET ERA (2005).

⁹⁵ In every location, several participants pushed back against free mediation services. They worried that such services might have hidden costs that reveal themselves at an inconvenient moment.

⁹⁶ Others saw mediators as duplicating the function of their lawyers. Olga, a 39-year-old Muscovite who managed an advertising agency, asked: “And who will gather and submit the documents to the court? The *posrednik* or the *advokat*? Do you end up having to pay both a *posrednik* and an *advokat*?”

But the beauty of mediation is that it allows parties to abandon this construct and work through their problem collaboratively. Egor, a 65-year-old Muscovite who, as the chairman of a housing committee, was an experienced litigator, resisted the idea that a mutually acceptable solution could emerge through mediation. He remarked: “This simply couldn’t happen—that both sides are content.” Although a few participants recognized that the non-adversarial nature of mediation potentially allowed disputants to maintain a cordial relationship,⁹⁷ most shared the confusion of Mikhail and Egor. Many saw the mediator as replicating the function of their lawyer, as David’s earlier remark reflects. For example, when the idea of asking a third party to intercede in a dispute was first raised by the moderator in the Moscow group with court experience, Nadezhda, a 48-year-old housewife responded with several questions: “When you say intermediary (*posrednik*), do you have in mind an *advokat*?...An *advokat* is, in principle, a *posrednik*.”

She and her fellow participants had trouble trusting in the neutrality of any third party. They were suspicious that he would inevitably favor one of the parties. Indeed, Evgeniia, a 42-year-old Novosibirsk municipal official, dismissed the very idea as a “fairy tale.” To some extent, their misgivings tap into their view of human nature, which has been colored by Russia’s long struggle with corruption. Many saw judges as inherently venal and assumed that the same would be true of mediators.⁹⁸ Nadezhda summed up this position: “Someone is paid off and then you are left with nothing.” The participants struggled to wrap their minds around the role of mediators; their instinct was to put them into the familiar boxes of decision-makers or lawyers. They could not see that the very fact that a mediator lacks a dog in the fight ought to ensure his neutrality and ought to eliminate any incentive for under-the-table payoffs.⁹⁹

⁹⁷ Echoing the Western literature, these participants saw a role for mediation in disputes among family members or in other situations where the parties needed to preserve their relationships.

⁹⁸ In a 2010 survey of Russians on their attitudes towards the courts fielded by the Levada Center, over half of the respondents believed that judges accept bribes very often or somewhat often. It is worth noting that 31 percent of respondents took no position on this question. Kathryn Hendley, *Justice in Moscow?*, 32 POST-SOVIET AFFAIRS 491 (2016). Bol’shova has argued that the evidence of judicial corruption is weak. She points to a price list for bribes published by a Russian magazine, *Sliianie i pogoloshchenie*. When she confronted the magazine’s editor, she learned that the report was based on what one *babka* (a contemptuous term for an older woman) had heard from an acquaintance. Moreover, the report was about payments made to lawyers; it did not document whether these payments were forwarded to judges. Stenogramma, *supra* note 7.

⁹⁹ In the 2012 round-table discussion of mediation, Iakovlev acknowledges the “dense prejudices” of the public about judicial corruption. He concedes that judges have a tendency to side with those who have more power, which is often judged in monetary terms, especially when they have been paid to do so. But because mediators are not authorized to resolve disputes, he believes this eliminates the possibility of corruption. When referring to mediators, he uses *primiritel’*, which can be defined as a conciliator.

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The focus group participants' bewilderment over the role of mediators led them to wonder who could and should serve as a mediator. No consensus emerged. Some thought legal training was critical, while others felt that training as a psychologist would be useful.¹⁰⁰ Several advocated for psychologists with legal education, though presumably these are few and far between. In most groups, the discussion quickly moved away from formal educational prerequisites to the personal qualities that a mediator ought to have. Harkening back to the concerns over corruption, all agreed on the need to be able to stand up to intimidation. Putting it more colorfully, Fedor, a 25-year-old Novosibirsk worker, cautioned against having a "meek dandelion" serve as a mediator. Just as important was an ability to work with people of all stripes¹⁰¹ and to convince them to shift their positions. Many were skeptical that a mediator could effect a settlement. They pointed out that people who end up in court tend to be intransigent. Iulia summarized this position regarding the second scenario dealing with a home repair: "If I don't agree to an amount, then no one can force me. If I decide on 5,000 rubles and they propose 7,000, I will tell them to get lost.... They'll tell me to take it to court. The situation will remain conflictual." Others questioned whether a mediator would be able to win the confidence of the parties. Anna said that many of her neighbors would simply "shut the door in your face and refuse to talk." Not everyone was so dismissive. Some saw the potential value to having a neutral third party who can break down the barriers between the parties. But everyone agreed that the impetus for mediation would have to come from the disputants. The consensus was that forcing it on the parties would be counterproductive.

Just as problematic was the question of mediator accountability. A lively debate arose in most groups over whether mediators ought to work under the auspices of the state or whether they ought to operate independent of the state. Fedor advocated state control. Like many others, he saw *advokaty*, who have to pass something akin to a bar exam, but then are independent to pick their clients, as a good model. An equal number expressed concern over contributing to the ever-increasing size of the state bureaucracy. A few veered into a conspiratorial view of mediation as a way of providing sinecures for the children of the political elite.¹⁰²

Stenogramma, *supra* note 7.

¹⁰⁰ Psychologists remain somewhat controversial in Russia. One Voronezh participant belittled their potential contribution, asking whether going to a psychic might be better.

¹⁰¹ As Ivan, a 51-year-old Novosibirsk construction worker, reminded his group: "We're forgetting something important. Every person has a different psyche. Let's say I'm a vicious man and the partner with whom I am negotiating is reticent and taciturn."

¹⁰² According to Marina, a 44-year-old Novosibirsk bookkeeper, the precinct where her policeman-husband works recently hired the daughter of a top official who had just finished her education. Others agree that nepotism is a perennial problem in Russia. Marina says that such inexperienced but well-connected young people will be unable to succeed as mediators. In a sarcastic tone, she says, "What's the use?... You'll have some

F. *Legal Culture*

When I visited Russian courthouses and talked to judges about mediation, the common refrain was that “parties are not ready” (*storony ne gotovy*).¹⁰³ Legal scholars generally agree. The evidence from the focus groups is more mixed.¹⁰⁴ In some of the groups, participants parroted this line, saying that Russians are not ready for mediation. Nikolai, a 36-year-old Voronezh construction worker, expanded on this argument.

[Mediation] is a long-term process. Sooner or later we’ll come around to it. We become more civilized as society develops.... [The law] appeared only in 2011 and we haven’t heard about it. Our state is only 20 years old.... We are not yet mature enough; we are like little children.

Larisa, a 35-year-old worker who was part of the same group as Nikolai, put it more succinctly, saying that for mediation to take hold in Russia, “our mentality will have to change completely.”

Perhaps this self-flagellation is overkill. After all, many of the questions raised by the participants are legitimate. They echo concerns raised by the experts who have studied mediation carefully. Both groups puzzle over the appropriate qualifications and accreditation for mediators. Both agree that the failure of mediation to take hold is driven in part by the unfamiliarity of the terminology.

But the argument that “litigants are not ready” has more traction when it comes to the willingness to accept that mediation brings value to the dispute resolution process. Many of the focus group participants were not prepared to concede this point. They saw mediators as duplicating the functions of attorneys or judges, and could not understand why they should have to pay twice for the same service. More generally, most of them could not understand why anyone would voluntarily opt for mediation over a court-based process, especially one that is likely to be expensive. The reaction of Gennadii, a 31-year-old Voronezh entrepreneur, illustrates the resistant attitude:

In my opinion, I personally don’t consider myself more stupid than this mediator,

kind of young girl (*devochka*) sitting there. Are people going to spill their guts to her? This won’t be of any help.”

¹⁰³ Hendley, *supra* note 34, at 437.

¹⁰⁴ *E.g.*, Spravka, *supra* note 8; Tiul’kanov, *supra* note 5, at 35.

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therefore I will not go to him and will not pay him money. I will resolve this question myself.... If needed, I would be better off hiring a *iurist* and not a mediator. A good *advokat*. And I will pay them two times more, but will be more certain that everything will be normal.

Not everyone was as recalcitrant. Some were cautiously optimistic for the prospects of mediation, but these were the minority. This group agreed that the chances for mediation were greater in the hypothetical disputes with neighbors and family than in the disagreement with an outlet of a retail chain store over a malfunctioning cell phone.

V. WHAT IS TO BE DONE?

This leaves us with the eternal lament of Russians, what is to be done (*chto delat'*)?¹⁰⁵ More specifically, what can be done to spur the use of mediation by ordinary Russians? The scholarly literature emphasizes the need for legislative changes. While these might be helpful at the margins, the reactions of ordinary Russians leave little doubt that their skepticism about mediation is not driven by the technical language of the law. Instead, much like Tom Hanks' character in the film *Big*, they just don't get it. They cannot see why mediation is preferable to litigation.

Making mediation mandatory in some or all cases might help close this gap. Comparative experience indicates that mediation is slow to integrate itself into the legal culture when it is entirely voluntary.¹⁰⁶ Yet voluntariness is a foundational principle of mediation, which Russia has endorsed.¹⁰⁷ Other countries have mandated mediation in some or all cases as a prerequisite to bringing a dispute to court.¹⁰⁸ Because parties are not required to persevere through a mediated settlement, but can walk away at any time, they reason that this requirement does not compromise the voluntariness of the

¹⁰⁵ This phrase was the title of two books, both of which had a profound impact on Russian political history. See NIKOLAI G. CHERNYSHEVSKII, *CHTO DELAT'?: IZ RASSKAZOV O NOVYKH LIUDIAXH* (1863); VLADIMIR I. LENIN, *CHTO DELAT'?* (1902).

¹⁰⁶ See generally, Lukas Wiget, *Compulsory Mediation as a Prerequisite Before Commencement of Court Proceedings—Useful Requirement to Save Resources or Waste of Time and Money?* (UNSW Law Research Paper No. 2012-47, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2157385; Wissler, *supra* note 40, at 565; McEwen & Maiman, *supra* note 9, at 241. For a comparative assessment of the use of mediation, see Carrie Menkel-Meadow, *Variations in the Uptake of and Resistance to Mediation Outside of the United States*, in *CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2014* (Arthur W. Rovine, ed., 2015).

¹⁰⁷ “Ob al'ternativnoi”, *supra* note 2, at art. 3.

¹⁰⁸ Nolan-Haley, *supra* note 67, at 988–1006; Wissler, *supra* note 40, at 572.

process.¹⁰⁹ Although making mediation mandatory has sometimes backfired,¹¹⁰ the evidence shows that many parties who are railroaded into mediation find it helpful, even when it fails, and that they opt for mediation on their own volition when other problems arise.¹¹¹

Russian scholars are aware of the positive effect elsewhere of mandatory mediation.¹¹² Some wonder whether Russia ought to require mediation as a prerequisite to litigation in some or all cases. The law is silent on this question.¹¹³ At a 2012 round-table discussion, Bol'shova, a former *arbitrazh* judge, argued that Russia has a historical legacy to draw upon.¹¹⁴ She reminded her colleagues of the requirement for industrial enterprises to send a letter laying out their grievances, known as a *pretenziia*, before initiating a lawsuit during the Soviet era and the early post-Soviet years.¹¹⁵ She claimed that this *pretensionnyi* system forestalled upwards of 90% of disputes from proceeding to court. While not advocating a return to the past, she favors making pre-trial mediation mandatory for economic disputes.¹¹⁶ Reshetnikova, a current *arbitrazh* judge, likewise supports mandatory mediation for such disputes.¹¹⁷ Others are less confident that the principle of voluntariness can be maintained if mediation becomes a requirement. Valerii S. Seleznev, the chairman of the Duma's property committee, spoke for many when he dismissed the idea of mandatory mediation as "something absolutely incomprehensible."¹¹⁸ The courts are only beginning to weigh in. When a retailer tried to have a case dismissed because the disgruntled consumer failed to live up to a mandatory mediation clause, the Irkutsk court invalidated the clause, arguing that mediation is inherently voluntary, so cannot be compelled.¹¹⁹ Of course, courts would quickly change their tune if the law itself was amended to require mediation.

¹⁰⁹ Nolan-Haley, *supra* note 67, at 985–1007.

¹¹⁰ See, e.g., Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272, 272 (1992)

¹¹¹ See, e.g., Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 CARDOZO J. CONFLICT RESOL. 479, 482 (2010); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 695 (2002).

¹¹² Anna Mikhailova, *Obiazatel'naia mediatsiia: poisk kompromissa*, VESTNIK GOSUDARSTVENNOGO GUMANITARNOGO UNIVERSITETA, NO. 3 (2013) at 138; Stenogramma, *supra* note 7.

¹¹³ Mikhailova, *supra* note 112, at 139.

¹¹⁴ Stenogramma, *supra* note 7.

¹¹⁵ For more on how the *pretensionnaia sistema* worked, see Kathryn Hendley, *Beyond the Tip of the Iceberg: Business Disputes in Russia*, in ASSESSING THE VALUE OF LAW IN TRANSITION COUNTRIES (Peter Murrell ed., 2001).

¹¹⁶ Stenogramma, *supra* note 7.

¹¹⁷ Reshetnikova, *supra* note 59.

¹¹⁸ Stenogramma, *supra* note 7.

¹¹⁹ Alekseeva, *supra* note 36.

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The prospect of mandatory mediation was not addressed systematically by the focus group participants. A few participants predicted that trying mediation might eventually become a prerequisite for filing a lawsuit. But this was put forward as a worst-case scenario that might result from the ever-encroaching nature of Russian bureaucracy. No one championed this sort of development. Although the participants did not know the lore of mediation, they seemed to instinctively recognize that voluntariness lies at its core. Liubov, a 61-year-old Novosibirsk pensioner, analogized the situation to helping addicts: “This reminds me of the therapy for alcoholics. Clinics that take people say: ‘Yes, yes, we will cure you, but only if you yourself want it.’ And he doesn’t want it. And the relatives can do nothing.... How do you persuade someone who doesn’t want it?” Liubov has put her finger on the Achilles heel of mandatory mediation. If the parties are resistant, then it potentially turns into a delaying tactic.¹²⁰

Russia stands at a crossroads. If the law remains as is, then mediation will likely drift off into obscurity.¹²¹ Russians’ ignorance will doom it to irrelevance. But if the incentives are reconfigured, either by reimbursing some part of the filing fees when disputes are resolved via mediation or by making mediation a prerequisite for initiating certain types of cases, then it could become a vibrant part of the legal landscape.¹²² Only time will tell which path Russia will take. Even if Russia takes a more activist approach to mediation, there is no guarantee that ordinary Russians will take notice. The

¹²⁰ Mediation was made mandatory for home foreclosures in Florida in the wake of the 2008 financial crisis, but the Florida Supreme Court terminated the program at the end of 2011. One reason was the lack of interest of both homeowners and lenders and the unwillingness of lenders to offer concessions. See Amy Loftsgordon, *Florida’s Foreclosure Mediation Program*, NOLO, <http://www.nolo.com/legal-encyclopedia/floridas-foreclosure-mediation-program.html>. For an overview of such programs, see generally Shana H. Khader, *Mediating Mediations: Protecting the Homeowner’s Right to Self-Determination in Foreclosure Mediation Programs*, 44 COLUM. J.L. & SOC. PROBS. 109 (2010).

¹²¹ A good example is the introduction of lay assessors into the *arbitrazh* courts in the 2002 revision of the *Arbitrazh* Procedural Code. APK RF, *supra* note 65, at art.19. They are industry experts that, at the request of litigants, can sit alongside judges and weigh in on decisions. *Arbitrazh* judges did not support this reform and have not encouraged their use. Kathryn Hendley, *Reforming the Procedural Rules for Business Litigation in Russia: To What End?* 11 *Demokratizatsiya* 363, 366 (2003). In 2015, these lay assessors were called upon in only four of the over 1.5 million cases handled by the *arbitrazh* courts. *Otchet o rabote arbitrazhnykh sudov sub”ektov Rossiiskoi Federatsii v 2015 godu*, <http://www.cdep.ru/index.php?id=79&item=3423>.

¹²² For example, the *arbitrazh* courts introduced an accelerated procedure (*uproshchennoe proizvodstvo*) for simple debt cases in 2002. A lack of precision in the statutory language made judges hesitant to use it. Kathryn Hendley, *Accelerated Process in the Russian Arbitrazh Courts*, in 52 PROBS. OF POST-COMMUNISM 21, 27-30 (2005). When the wording was clarified in 2012, judges embraced it enthusiastically, thereby easing their workload. Hendley, *supra* note 71, at 821-22.

low costs associated with litigating may leave them indifferent or even resistant to mediation over the long run.