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Vladimir Putin and the Rule of Law in Russia

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VLADIMIR PUTIN AND THE RULE OF LAW IN RUSSIA

*Jeffrey Kahn**

TABLE OF CONTENTS

I. INTRODUCTION	512
II. CAVEATS & WARNINGS	514
<i>A. Soviet Law, Path-Dependency, and Legal Positivism</i>	514
<i>B. The Hazards of Hasty Conclusions</i>	520
<i>C. Law and the Economics of the Middle Class</i>	522
III. THREE WINDOWS INTO THE RULE OF LAW IN RUSSIA	524
<i>A. Chechnya and Terrorism</i>	524
<i>B. Russia and the Council of Europe</i>	531
<i>C. Codification and the Criminal Procedure Code</i>	542
IV. CONCLUSIONS	552

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I. INTRODUCTION

During his two terms as President of Russia, did Vladimir Putin further the net development of a legal culture in Russia? The term 'legal culture' is meant here to include not only the statutory changes and positivist legal reforms that President Putin advanced or retarded, but also to assess how his administration affected the development of the rule of law in Russia over the course of the last eight years. On May 7, 2008, Mr. Putin heard his successor Dmitrii Medvedev take the oath of office in the Grand Kremlin Palace.¹ It is therefore appropriate to begin reflecting on the Putin years.²

This Article examines three legal issues that have had the greatest impact on the development of Russia's legal culture under Vladimir Putin: (1) the Second Chechen War; (2) Russian membership in the Council of Europe; and, (3) renewed efforts under Putin at codification of law, as evidenced by the creation of a new criminal procedure code. These three windows present different views of the state of Russian law. The first is bleak, the second hopeful, and the third ambivalent. They are closely linked and expose the deep ambiguity and complexity of Putin's approach to the constitutionally professed establishment in Russia of a rule-of-law based state.

The "Putin Effect" on legal developments in Russia is worthy of consideration for several reasons. *First*, as noted above Russia now claims to be a democratic, rule-of-law state in its Constitution.³ *Second*, most serious democratic theorists argue that the development of the rule of law is a *sine qua non* for a modern, stable democracy, an independent variable that is at least as

¹ C.J. Chivers, *Medvedev Takes Oath in Russia, but Putin Dominates Much of Day*, N.Y. TIMES, May 8, 2008, at A14. Russian names are rendered in their most common English form to aid the majority of readers (e.g. Yeltsin, not Yel'tsin). Russian sources are provided in Cyrillic on the assumption that interested persons who do not read Russian would require such assistance in accessing transliterated citations to authority.

² To be more precise, it is appropriate to begin reflecting on Putin's 2000–2008 presidency. At the time of this publication, rumor and speculation about the future of Vladimir Putin was rampant and rivaled the "reading-between-the-lines" skills of the best Soviet-era kremlinologists. Among the most extreme examples was the assertion that Mr. Putin's decision to retain the pen he used while in office to sign key documents (contrary to the "tradition" established when Boris Yeltsin gave his pen to Putin at the latter's inauguration) signaled that Putin "intends to remain Russia's principal leader." Lynn Berry, *Putin Signals He Intends to Stay in Charge of Russia*, WASH. POST, May 8, 2008.

³ Конституция Российской Федерации, статья 1(1) [hereinafter Конст. РФ], translated in CONSTITUTION OF THE RUSSIAN FEDERATION 16 (Vladimir V. Belyakov & Walter J. Raymond eds., 1994) ("The Russian Federation—Russia is a democratic, federal, rule-of-law state with a republican form of government.").

important as the evolution of civil society, a free market, and contested, multi-party elections.⁴ *Third*, to the extent that Dmitrii Medvedev is expected to pursue similar legal reforms (either in partnership with, or under the shadow of, his new Prime Minister, Vladimir Putin), assessment of the activities of his predecessor is useful. *Fourth*, should Russia unquestionably falter in its transition from authoritarianism and fall back into an unabashedly non-democratic regime, it will largely be the extent to which there remains respect for rule of law that determines the shape and the duration of that new system.

This Article presents a faint-hearted endorsement of Putin's legal legacy. The conclusions reached in this Article run against the prevailing popular wisdom, which tends to characterize Putin's presidency as one that has unreservedly politicized law as a tool for state control over people and resources, much as Putin's Soviet predecessors did.⁵ The endorsement is nevertheless a tepid one because Russia's new legal culture has very shallow roots that, at the time of this writing, could easily be yanked free of Russian soil by the very man that has been tending them with faltering attentiveness. Part II of this Article, therefore, frames this analysis with three caveats that should inform any retrospective look at legal reform in Russia as near-to-term as this one. The unifying message of this cautionary *troika* is that, although the standards for assessing Russian law should be high, and indicia to measure whether the Russian government and society meets them rather inflexible, expectations in the short run should be rather low.

⁴ See, e.g., Juan J. Linz & Alfred Stepan, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 10 (1996); Jeffrey Kahn, *The Search for the Rule of Law in Russia*, 37 GEO. J. INT'L L. 353, 358 (2006) (discussing democratic theorists).

⁵ See, e.g., Editorial, *Putin the Great: The Arc of his Authoritarian Revival*, WALL ST. J., Oct. 3, 2007, at A18 ("Mr. Putin has ransacked the hopes the world once had for post-Soviet Russian democracy. He is reviving Russian authoritarianism, and the world's democracies need to prepare for its consequences."); Editorial, *Putin Takes on the Election Observers*, N.Y. TIMES, Oct. 26, 2007, at A24 ("It was only with luck, Benjamin Franklin mulled during the debates of the Constitutional Convention, that the framers would 'produce a government that could forestall, for a decade perhaps, the decline of the Republic into tyranny.' The American states had that luck. Russia has not."); Editorial, *Russia's DNA and President Bush's CYA*, WASH. POST, Oct. 19, 2007, at A20 ("Will the Russia experts also be proved wrong someday? No one can be sure. But it would be reasonable to point out that, one decade after the fall of communism, Russia had taken imperfect but impressive strides toward nurturing a free press, a vibrant political scene, a government with checks and balances, and a growing civil society. Then Mr. Putin, whose soul Mr. Bush famously vouched for, consciously chose to lead the nation in a different direction, one that resonated with his KGB past. Mr. Bush and his foreign policy advisers denied this trend long after it had become apparent to almost everyone else.")

Part III examines legal issues raised, respectively, by the Second Chechen War, Russian membership in the Council of Europe, and the reform of Russian criminal procedure. These topics are interrelated. The Chechen War has affected legal developments not just in the North Caucasus but throughout Russia. The effectiveness of the Council of Europe is revealed to be at its apex as a catalyst for the new criminal procedure code and at its nadir in its response to Chechnya. The codification drives are evidence of the value placed on law at the same time that the reflexive disregard of their provisions in political cases—whether involving cases in Chechnya or elsewhere—indicates the risk that legal codes can remain paper reforms.

Part IV concludes with a few words about the Russian presidential elections that occurred on March 2, 2008, resulting in the election of Russia's third president, Dmitrii Medvedev. To suggest, as this Article does, that Putin's presidency should be viewed as a net positive factor in the development of the rule of law, is to beg the question whether the net benefits would be greater still if he were somehow to have retained his position. A third, consecutive term for Putin as President, of course, would have constituted a violation of Article 81 of the Russian Constitution.⁶ It would also have exposed the rule-of-law claim in Article 1 to be merely an aspirational one, if that.

II. CAVEATS & WARNINGS

A. Soviet Law, Path-Dependency, and Legal Positivism

Russia today exists with a legacy of positivist lawmaking that has both pluses and minuses. A Soviet-era anecdote is illustrative.⁷ In the late 1980s, a highly accomplished but non-practicing Soviet lawyer, Vasily Vlasihin, arrived at JFK International Airport in New York City. When the immigration official saw his visa, he asked rather incredulously if there really could be such a thing as a Soviet lawyer. Upon affirmation, he replied, "Oh, how wonderful! Welcome to the United States. But is there any law in the Soviet Union?!" "There is," the Soviet lawyer replied, "and quite a lot of it."

⁶ Конст. РФ статья 81(3), translated in CONSTITUTION OF THE RUSSIAN FEDERATION, *supra* note 3, at 47 ("The same individual shall not be elected to the office of President of the Russian Federation for more than two consecutive terms.")

⁷ The following anecdote is taken from Vasily A. Vlasihin, *Towards a Bill of Rights for Russia: Progress and Roadblocks*, 17 NOVA L. REV. 1201, 1201 (1993).

Quantitatively, that was a gross understatement. In the few years preceding this then-Soviet lawyer's arrival in New York, more than 30,000 laws and sub-statutory acts had been enacted by the Soviet legislature and government.⁸ As Bernard Rudden, formerly of Brasenose College, Oxford, put it, "[d]uring the last years of its life the Soviet Union turned to law like a dying monarch to his withered God . . . and the Congress and Supreme Soviet enact[ed] and amend[ed] statutes with the fervour of one who sees in legislation the path to paradise."⁹

Qualitatively, however, the story was more complex. This mass and morass of law could hardly have been described as forming the foundation for the rule of law in Soviet life or governance. And even the genuine interest in legal reform that Mikhail Gorbachev (a lawyer by training)¹⁰ expressed in his approach to *perestroika* was not enough to radically change an institutionalized approach to law. This approach, by deliberate design, was highly instrumentalist and oppressive, denied basic individual liberties and due process, and devalued legal enactments, the institutions that the enactments created, and the personnel whose attitudes towards law these laws shaped.

November 2007 marked the ninetieth anniversary of the October Revolution.¹¹ Among the first acts of the Bolsheviks after the Revolution was the complete abolition of courts, codes, and the profession of law in all its manifestations.¹² In place of the abolished laws, lawyers and judges, the

⁸ *Id.*

⁹ Bernard Rudden, *Civil Law, Civil Society and the Russian Constitution*, 110 L.Q.R. 56, 56 (1994).

¹⁰ Gorbachev graduated from the Law Faculty at Moscow State University and was sent to his native Stavropol' Krai to serve in the procuracy (prosecutor's office), but left after only ten days to begin his rise in the Communist Party. ARCHIE BROWN, *THE GORBACHEV FACTOR* 29, 36 (1996).

¹¹ The *coup d'état* that is used by most scholars to date the "October" Revolution occurred on October 24–25, 1917, as calculated by the Julian calendar in use in Imperial Russia at that time. RICHARD PIPES, *THE RUSSIAN REVOLUTION, 1899–1919*, at 4–5 n.*, 491–92 (1990). In the nineteenth century, it trailed the Gregorian calendar by twelve days, which meant that for the rest of the world these revolutionary events occurred on November 6–7. *Id.*

¹² Decree No. 1 "on the court" of November 22 (December 5), 1917 [hereinafter Decree No. 1], translated in *IDEAS AND FORCES IN SOVIET LEGAL HISTORY: A READER ON THE SOVIET STATE AND LAW* 95–96 (Zigurds L. Zile, ed., 1992). The politics of the initial coalition government between the Bolsheviks and the Socialist Revolutionaries resulted in a slight retreat from this stark position in February 1918 in Decree No. 2 "on the court," which relied in several sections on the 1864 Criminal Procedure Code and partially reversed the previous decision to dissolve the bar by instituting a College of Advocates. E.L. JOHNSON, *AN INTRODUCTION TO THE SOVIET LEGAL SYSTEM* 30 (1969). But this slight retreat did not last long. Concessions to

proletariat was encouraged to use революционный правосознание [*revoliutsionnyi pravosoznanie*—"revolutionary legal consciousness"] to decide all cases or controversies.¹³ This nihilism was short-lived and followed by periods of rigid legal positivism, stagnation, and instrumentalist manipulation of law to serve the political and ideological interests of the state.¹⁴ The largest roadblock, according to that accomplished lawyer, Vasiliy Vlasihin, was the lack of a genuine legal culture.¹⁵ Law is more than a set of rules and regulations drafted and approved in compliance with procedural standards for how a parliament conducts its business.

It is worth emphasizing this cautionary distinction between a country full of laws—positive legislation, what could be called "law" with a lower case "l"—and a country based on the rule of law—normative legal values that determine what counts as "Law" with a capital "L." Many others have made this same distinction, and I stand on the shoulders of giants to note the enormous difference between "law" and "Law"; this is a point better made in just about any language other than English. The French have *droit* and *loi*, the Germans *gesetz* and *recht*, and the Russians закон [*zakon*] and право [*pravo*].¹⁶ Even ancient Romans made a distinction between *lex* and *ius*.¹⁷

imperial precedents were rescinded soon after the Bolsheviks began to rule on their own. *Id.* Decree No. 3, and a special instruction issued a few days later, rejected any use of the laws and procedural codes that sprang from the Great Reforms of Alexander II. With the exception of the Labor and Family Codes that were quickly drafted after the Revolution, all other law during this initial period was sporadic and ad hoc. *See generally id.*

¹³ Article 5 of Decree No. 1 directed that "[l]ocal judges shall decide cases in the name of the Russian [*Rossiiskoi*] Republic and be guided in their decisions and judgment by the laws of the overthrown governments only insofar as such laws have not been abrogated by the revolution and do not contradict the revolutionary conscience and revolutionary legal consciousness." *See* Decree No. 1, *supra* note 12. Richard Pipes has noted that this was like "[n]othing [that] . . . had ever happened anywhere: Soviet Russia was the first state in history formally to outlaw law." PIPES, *supra* note 11, at 796. Lenin "believed that one of the cardinal mistakes of the Paris Commune had been its failure to abolish France's legal system. This mistake he meant to avoid. In late 1918, he defined the dictatorship of the proletariat as 'rule unrestricted by any law.'" *Id.* P.I. Stuchka, the first President of the USSR Supreme Court and one of the commissars who had signed this decree, put it in more ideological terms: "Communism means not the victory of socialist law, but the victory of socialism over any law, since with the abolition of classes with their antagonistic interests, law will die out altogether." HAROLD J. BERMAN, *JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW* 26 (1963).

¹⁴ Kahn, *supra* note 4, at 380–87.

¹⁵ Vlasihin, *supra* note 7, at 1205. Vlasihin also quotes the words of then-U.S. Attorney General Richard Thornburgh, who reached the same conclusion following a trip to the Soviet Union in 1990.

¹⁶ William E. Butler, *Federalism or Federationism*, 100 MICH. L. REV. 1444, 1448 (2002)

What exactly is meant by the more normative “Law” is a subject of considerable theoretical study, but at the very least it has been agreed that it means that the law is not arbitrary or capricious, but rather “accessible, precise and foreseeable in its application”¹⁸ To what extent the law is just and equitable is as much a matter for the politicians to determine as for the lawyers, though each have an inextricable part to play.¹⁹

In the collapse of the Soviet Union, however, something noteworthy has often been overlooked. For all its faults, there was a value even to this law with a lower-case “l” in the Soviet Union. And when the state collapsed, it was law that remained. Collapse did not result in widespread or lasting anarchy, violence, or substantial civil unrest.²⁰ One flag was lowered and another was raised. Laws continued to be passed with the same feverish

(reviewing JEFFREY KAHN, *FEDERALISM, DEMOCRATIZATION AND THE RULE OF LAW IN RUSSIA* (2002)).

¹⁷ *Id.*

¹⁸ *Nasrulloev v. Russia*, App. No. 656/06, Eur. Ct. H.R. § 71 (2007). *See also* *Sunday Times v. United Kingdom* (no. 1), 30 Eur. Ct. H.R. (ser. A) at 31 (1979) (“In the Court’s opinion, the following are two of the requirements that flow from the expression ‘prescribed by law’. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”). *See also* Kahn, *supra* note 4, at 358–66.

¹⁹ *See, e.g.*, BRIAN Z. TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* 98–99 (2001) (drawing on the work of Joseph Raz and Lon Fuller).

²⁰ *See* BROWN, *supra* note 10, at 308; *see also* ARCHIE BROWN, *SEVEN YEARS THAT CHANGED THE WORLD: PERESTROIKA IN PERSPECTIVE* 329–30 (2007). This is not to discount the effect of nationalist violence, most notably in the South Caucasus in 1989–1990 and the Baltics in January 1991. *See* BROWN, *supra* note 10, at 262–66, 279–85; NICHOLAS V. RIASANOVSKY, *A HISTORY OF RUSSIA* 594–96 (5th ed. 1993). Nor is it to dismiss the post-collapse violence in former union republics or the extreme social and economic deterioration in Russia and elsewhere that followed the collapse of the Soviet Union, all of which is well known and amply documented. *See, e.g.*, EDWARD ACTON, *RUSSIA: THE TSARIST AND SOVIET LEGACY* 344–49 (2d ed. 1995); William Tompson, *Economic Policy Under Yeltsin And Putin*, in *5 DEVELOPMENTS IN RUSSIAN POLITICS* 171–79 (Stephen White et al., eds. 2001). But, besides the three fatalities during the failed coup against Gorbachev in August 1991, the legal end of the Soviet Union that occurred four months later was accomplished in a peaceful manner; the army stayed in its barracks, and a new leadership exchanged places with the old. *See* Martin McCauley, *From Perestroika Towards A New Order, 1985–1995*, in *RUSSIA: A HISTORY* 411–12 (Gregory L. Freeze, ed. 1997); *see generally* DAVID REMNICK, *LENIN’S TOMB: THE LAST DAYS OF THE SOVIET EMPIRE* (1993).

intensity as before. Life went on, although in a place that suffered dramatically from the displacement and shock of collapse.²¹

That is not to say that the passage of all these laws checked the feeling of lawlessness that overwhelmed the society. Even the passage of a new Constitution was marred by violence and suspicion about the legitimacy of the referendum that ratified it.²² Federal-regional relations frayed as disputes arose about the proper allocation of authority between Moscow and places like Kazan', Ufa, and Grozny.²³ Few trusted the courts. Taxes went unpaid.²⁴ Property rights were unsettled. The воры в законе [*vory v zakone*] (professional class of thieves) were emboldened and a new class of oligarchs was born.²⁵ And, as for the rule of law, in a world of up-and-coming oligarchs, the old Russian saying for many rang true: «Богатому идти в суд – трын-трава; бедному – долой голова.» [*“Bogatomu idti v sud – tryn-trava; bednomu – doli golova”*].²⁶

²¹ William E. Butler makes this general point in his review of my book, although he attributes this achievement to the underlying structure of international legal treaties by which the Soviet Union was first formed. See Butler, *supra* note 16, at 1445–46.

²² STEPHEN WHITE ET AL., HOW RUSSIA VOTES 98–100 (1997). Official statistics reported that 54.8% of the electorate participated in the referendum held December 12, 1993, and 58.4% of participants voted to approve the draft constitution, making a total of 31% of the electorate who voted in favor. By presidential decree, the constitution would be considered approved if accepted by a majority vote, with at least half of the electorate participating. This violated the October 1990 Law on Referendums, which required the approval of half of the total electorate for passage of a measure. See «О референдуме Российской Федерации», Собрание законодательство Российской Федерации, 1995 № 42, Ст. 3921, статья 37, reprinted in Б.А. Страшун, Федеральное конституционное право России: Основные источники 181 (1996). It also violated the 1978 Constitution, which required the approval of two-thirds of the members of the Congress of People's Deputies as well as the approval of the regions of the RSFSR. Конст. РСФСР (в редакции от 10 декабря 1992 г.), статья 185.

²³ See generally KAHN, *supra* note 16.

²⁴ W.E. BUTLER, RUSSIAN LAW 517 (2d ed. 2003); Alexander N. Domrin, *From Fragmentation to Balance: The Shifting Model of Federalism in Post-Soviet Russia*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 515, 521–22 (2006).

²⁵ See generally DAVID E. HOFFMAN, THE OLIGARCHS: WEALTH AND POWER IN THE NEW RUSSIA (2002); Louise Shelley, *Crime and Corruption*, in 5 DEVELOPMENTS IN RUSSIAN POLITICS, *supra* note 20, at 239–53; Peter Rutland & Natasha Kogan, *The Russian Mafia: Between Hype and Reality*, in CONTEMPORARY RUSSIAN POLITICS: A READER 139–47 (Archie Brown ed., 2001); ALENA V. LEDENEVA, RUSSIA'S ECONOMY OF FAVORS: BLAT, NETWORKING AND INFORMAL EXCHANGE (1998).

²⁶ Владимир Даль, Пословицы русского народа 169 (1957) (“If a rich person goes to court, it's all the same for him; if a poor person does, he loses his head.”).

But the fact of the matter was that there seemed to be enough law, and enough attention to law (if not respect for the rule of law), that it played a considerable part in organizing the way collapse occurred. An agreement signed by the heads of three states in Minsk in 1991 began the legal process of ending a union that a 1922 treaty between four states had created under international law.²⁷ Legal positivism also seems to have been the agreed starting point for what sort of government actions would tend to legitimize a state that was, in a manner of speaking, starting over. It mattered that the rhetoric of law and lawfulness was chosen as the motif of reform, even if not always enforced (or followed) by officials or believed by the populace.²⁸ A new Constitution has lasted without the need for substantial revision or amendment.²⁹ That feeling of lawlessness has ebbed a bit and has been replaced by views that opinion polls tell us indicate broad, if abstract, support for rule-of-law values, but an equally widely-shared despair about their practical existence in everyday life.³⁰ That general support for the rule of law

²⁷ Заявление глав государств Республики Беларусь, РСФСР, Украины (Минск, 8 декабря 1991 г.); Decree on the Denunciation of the Treaty on the Foundation of the USSR, Ведомости Съезда Народных Депутатов РСФСР и Верховного Совета РСФСР 1991, No. 51, Item 1799, translated in *RUSSIAN PUBLIC LAW: THE FOUNDATIONS OF A RULE-OF-LAW STATE 3* (William E. Butler ed. & trans., 2005)). See also Butler, *supra* note 16, at 1445; BUTLER, *supra* note 24, at 655. Mikhail Gorbachev was not invited to participate. See BROWN, *supra* note 10, at 304.

²⁸ For an interesting perspective on the “ambivalence” inherent in this motif, see Stephen Holmes, *Lineages of the Rule of Law*, in *DEMOCRACY AND THE RULE OF LAW* 19, 44–46 (José María Maravall & Adam Przeworski eds., 2003).

²⁹ The Constitution has been altered to reflect the reduction of the total number of constituent units of the Russian Federation from eighty-nine to eighty-five. Compare Конст. РФ, статья 65 (1993), and the current version Конст. РФ, статья 65. These changes are made by adoption of a federal constitutional law. See Конст. РФ, статья 137(1). Other provisions of the Constitution, concerning the fundamentals of the constitutional system, rights and freedoms of the individual and citizen, and constitutional amendments and revision of the Constitution were deliberately made exceptionally difficult to alter. See Конст. РФ, статья 135. No such substantive constitutional reform has occurred to date, although President Putin was widely held to possess ample political capital to do so. See, e.g., Hans Oversloot, *Reordering the State (Without Changing the Constitution): Russia under Putin's Rule, 2000-2008*, 32 *REV. CENT. & E. EUR. L.* 41, 41–42, 64 (2007); PETER BAKER & SUSAN GLASSER, *KREMLIN RISING: VLADIMIR PUTIN'S RUSSIA AND THE END OF REVOLUTION* 310–11 (2007). That is not to say that dramatic changes (as discussed below) have not been made to executive, legislative, and judicial branches of the Russian state. But these changes have been accomplished *within* the procedures established by the existing Constitution.

³⁰ Nationwide surveys conducted in Russia in 1996, 1998, and 2000 revealed generally strong, albeit abstract, support among citizens of the Russian Federation for rule-of-law principles at levels roughly comparable to those found in Western Europe. See James L. Gibson,

has remained in place, sometimes because of and sometimes despite Vladimir Putin's presidency.

So the first theme to keep in mind is that Russia is not *tabula rasa* when it comes to law and legislation. Russia is not starting from scratch, which certainly has advantages, but it has the disadvantage of a lot of bad legal habits. Worst of these is a historical attachment to bare legal positivism as a tool for state control.

B. The Hazards of Hasty Conclusions

The second note of caution relates to the first: beware of the timeliness of assessing Russian law now. An assessment exercise such as this risks making premature conclusions. Walter Bagehot, commenting on the British Reform Acts of 1832 and 1867, observed that:

A new Constitution does not produce its full effect as long as all its subjects were reared under an old Constitution, as long as its statesmen were trained by that old Constitution. It is not really tested till it comes to be worked by statesmen and among a people neither of whom are guided by a different experience.³¹

It is good to recall Bagehot's reluctance to comment on the future of his own unwritten constitution in commenting on the Russian constitution in the twenty-first century. All of Russia's statesmen—to stretch a term to include

Russian Attitudes Towards the Rule of Law: An Analysis of Survey Data, in LAW AND INFORMAL PRACTICES: THE POST-COMMUNIST EXPERIENCE 77, 88 (Denis J. Galligan & Marina Kurkchiyan eds., 2003). But, when asked to apply those ideals to their own circumstances, a 2004 nationwide survey found that “[a]n overwhelming majority of Russians do not think that they live under a rule-of-law state” Richard Rose et al., *Resigned Acceptance of an Incomplete Democracy: Russia's Political Equilibrium*, 20 POST-SOVIET AFFAIRS 195, 200 (2004). Likewise, although 36% of over 1,600 respondents to an April 2007 poll felt that “equality before the law” had improved under Vladimir Putin (16% felt equality had worsened), Richard Rose, *The Impact of President Putin on Popular Support for Russia's Regime*, 23 POST-SOVIET AFFAIRS 97, 104 (2007), 68% of 1,600 respondents to a poll a few months before indicated that they did not feel themselves to be living under the rule of law. Press-Release, Левада Центр, *Восприятие россиянами европейских ценностей* (Feb. 15, 2007), available at <http://www.levada.ru/press/2007021501.print.html>. Both polls were conducted by the respected Levada Center.

³¹ WALTER BAGEHOT, THE ENGLISH CONSTITUTION, AND OTHER POLITICAL ESSAYS 3 (2d ed. 1884).

the politicians who inherited the opportunities Mikhail Gorbachev created—were trained under a Soviet constitution. In Vladimir Putin's case, this was triply so, since his legal education was at Leningrad State University in the 1970s, the bulk of his professional experience was gained as an unexceptional KGB spy,³² and his style of governance has been most optimistically and euphemistically characterized as “managed” or “sovereign” democracy.³³

What is more, there have been only sixteen years of post-Soviet Russian constitutionalism to assess (and only thirteen years under the 1993 Constitution). That is not even the span of a single generation. The presidency of Vladimir Putin has lasted only eight years. The Council of Europe is on record as declaring that Russia's “radical transition” should be measured on a timescale of “quinquennia, even decades. Its pace will vary.”³⁴ That is over-optimistic. Thus, an assessment of Putin's effect on an institution as slow-growing as the rule of law should be made with full awareness that this legal history may be too near to the observer to draw long-term conclusions beyond the identification of forks in the road and the risks and opportunities revealed by the selection of one path over another.³⁵ And yet, the topic is

³² LILIA SHEVTSOVA, PUTIN'S RUSSIA 30 (2003) (“Putin retired in the rank of colonel, which meant that he had not had a brilliant career in the KGB.”).

³³ The term “managed democracy” has been used both by analysts sympathetic to, and very critical of, Putin's political style of governance. See, e.g., Michael McFaul & Kathryn Stoner-Weiss, *The Myth of the Authoritarian Model: How Putin's Crackdown Holds Russia Back*, 87 FOREIGN AFFAIRS 73 (2008); BAKER & GLASSER, *supra* note 29, at 374–75; Fred Weir, *Kremlin Lobs Another Shot at Marketplace of Ideas*, CHRISTIAN SCI. MONITOR, Oct. 1, 2003 (quoting Gleb Pavlosky); Nikolai Petrov, *Dizzy with Sham Success*, MOSCOW TIMES, Mar. 4, 2008. The term “sovereign democracy” was coined by analysts (the attribution most frequently offered is to former Kremlin Deputy Chief of Staff Vladislav Surkov) quite sympathetic to the Kremlin. See Masha Lipman, *Putin's 'Sovereign Democracy,'* WASH. POST, July 15, 2006, at A21 (“‘Sovereign democracy’ is a Kremlin coinage that conveys two messages: first, that Russia's regime is democratic and, second, that this claim must be accepted, period. Any attempt at verification will be regarded as unfriendly and as meddling in Russia's domestic affairs.”); Oversloot, *supra* note 29, at 63.

³⁴ Eur. Parl. Assembly, *Resolution 1065 on Procedure for an Opinion on Russia's Request for Membership of the Council of Europe*, 27th Sess., Doc. No. 1065, ¶ 8 (1995) (resuming procedure for Russian membership in Council of Europe following peace agreement in Chechnya).

³⁵ That was certainly the message the author received from leading lawyers in Russia while conducting this sort of assessment exercise for the United States Department of Justice in 2005. See JEFFREY KAHN, AN ASSESSMENT OF THE RUSSIAN FEDERATION CRIMINAL PROCEDURE CODE IN MOSCOW AND KRASNOYARSK, OCTOBER 15 - NOVEMBER 5, 2005, FINAL REPORT FOR THE OFF. OF OVERSEAS PROS. DEV., ASSIS. AND TRAIN., CRIM. DIV., U.S. DEP'T OF JUST. (Feb. 7, 2006)

nevertheless worth discussing, and worth discussing now, because it is simply astonishing how much has been accomplished—at least on paper—in such a short span of time.

C. Law and the Economics of the Middle Class

The third note of caution: do not overestimate the power of economics in general, and the power of a growing middle class in particular, in strengthening the rule of law in the short term. This is the tenth successive year of 6% or higher growth in GDP, with virtually no public debt and enormous trade and budget surpluses.³⁶ By some measures, the average income of the Russian family nearly doubled within this time.³⁷ The obvious response is to observe that the depths to which the country had sunk make such statistics seem more substantial than they are. Different specialists looking at this same data observed that in real terms this growth brought Russians only up to 1991 *per capita* income levels.³⁸

But the perception is more important than the reality. And, thanks to an economy buoyed by steadily rising demand and heretofore unimagined prices for oil and natural gas, the perception is one of strength, control, and predictability. The middle class has not only grown,³⁹ it is investing money that remains after the rent has been paid and the bread has been bought. In fact, rent is not the sole option anymore. Mortgages have risen 150% since last year.⁴⁰

(on file with author).

³⁶ Anatole Kaletsky, *Dosvidaniya Democracy, and Hello Good Times*, TIMES (London), Oct. 4, 2007.

³⁷ Igor Fedyukin, *Putin's Eight Years*, KOMMERSANT, Sept. 18, 2007 (“According to the Russian Monitor of the Economic Situation and Public Health (RMEZ) which has monitored the economic status and health of the population regularly since 1992, the average income of the Russian family almost doubled between 2000 and 2006, from 6,087 rubles to 11,425 rubles.”).

³⁸ *Id.* (“Specialists at the Independent Institute of Social Policy (IISP) estimate that the average income per person in Russia in 2005 reached the pre-reform levels of 1991.”).

³⁹ *Id.* (“According to the Institute of Sociology at the Russian Academy of Sciences in a report ‘Urban Middle Class in Russia’ (2007), more than 20% of the economically active urban population and about 14% of the country’s overall population belong to the middle class. About 22% of the population is on the periphery of the middle class. The income threshold for middle class is 10,500 rubles per family member per month. 54% of Russia’s middle class are workers in the government sector, 16% of the middle class income is received as social aid. Experts don’t see significant prospects of the middle class growing.”).

⁴⁰ Mary Dejevsky, *Surge in Home Ownership Heralds the Rise of the Russian Middle Class*, INDEPENDENT (London), Sept. 26, 2007.

These are good signs, of course. Scholars have often associated the rule of law with the rise of a middle class, which lacking the customary power of the nobility or the church, sought to strengthen law to protect its growing property interests. But the middle class in Russia is a fragile one. What is more, it is not the same sort of middle class found in states in which the rule of law is seen as a successful safeguard. In the United States and Western Europe, most people are employed in small or medium-sized businesses; by some estimates, less than a quarter of the Russian Public is so employed.⁴¹ Half of the Russian middle class works in state bureaucracies, not in private industry or commerce.⁴² That suggests a middle class in terms of present wealth but perhaps not in terms of the independence that leads a middle class to seek protection in law for its property and savings.⁴³ Nor does it suggest the resilience through which a middle class can weather difficult times and still survive to exert its influence.

So, if support for the rule of law still requires a supporter on the top, that brings us back to the initial question: Has Vladimir Putin been that man?⁴⁴ Is

⁴¹ See Stephen Kotkin, *E-Notes: Russia Under Putin: Toward Democracy or Dictatorship?*, FOR. POL'Y RES. INST., Mar. 2007, <http://www.fpri.org/enotes/200703.kotkin.russiademocracydictatorship.html>. Kotkin states (without citation) that 70% of employment in the U.S. and Europe is in small and medium-sized businesses, but that "Russia doesn't even approach 25 percent for such employment." *Id.* Rather, Kotkin observes, "A tiny fraction of the Russian middle class owns their own businesses, but by and large, Russia's middle class is not independent, small- or medium-sized business owners." *Id.* "They're bureaucrats and functionaries, law enforcement officials and tax collectors, inspectors and education overseers. They work in the KGB successor, the FSB, and in the big state-owned gas, oil, automobile, or defense companies." *Id.*

⁴² *Id.*

⁴³ This nuance was not lost on early reformers in the Yeltsin administration after the collapse of the Soviet Union. Both Yeltsin and his then-close advisor Anatoly Chubais put this view into popular terms in the early 1990s with the slogan: "We do not need hundreds of millionaires, but millions of property owners." *Quoted in* HOFFMAN, *supra* note 25, at 308.

⁴⁴ Much is often made of the assertion that Putin himself is a lawyer. It may be more correct to say that he *attended* law school and then later returned to work in one as a KGB political officer. One doubts that his black Labrador, Koni, is named after the most famous tsarist-era lawyer, Anatolii Fedorovich Koni. See Serge Schmemmann, *A Visit with Putin*, INT'L HERALD TRIB., Sept. 16, 2007. Russia does not have a history of lawyers as leaders. Only three lawyers of vastly different calibers have led Russia in recent history. That can be compared with American history, in which twenty-six of forty-three presidents have been lawyers, or the United Kingdom, in which eleven of thirty-eight prime ministers since Pitt the Younger have been legally trained. Norway is a little harder to compare because of the dual system of government that existed in different forms between the Treaty of Kiel (1814) and the end of the Norwegian-Swedish Union (1907). But by at least one measure, since 1814, twelve of the forty-four men

his well-known assertion of the “dictatorship of law” closer to ruthless Stalin-era prosecutor Andrei Vyshinsky’s *стабильность законов* [*stabil'nost' zakonov* – “*stability of law*”] or closer to the values of the rule of law with a capital L?⁴⁵ Put another way, to what extent have Putin’s professed legal values been sacrificed in the short-term service of unprincipled post-Soviet political expediency?

III. THREE WINDOWS INTO THE RULE OF LAW IN RUSSIA

Three windows shed light on the state of law in the Russian state. With the above cautions in mind, it is worth peering through each for the different views they present. The first is bleak. The second is hopeful. The third is ambivalent. But their combination presents the state of Russian law in a three-dimensional light that few commentators have been willing to cast on the unfolding, complex, and unfinished story of Russia’s emerging legal culture.

A. *Chechnya and Terrorism*

The first topic for discussion, both chronologically and thematically, in analyzing Putin’s approach to law and the rule of law must be Chechnya. The answer to the above question about the meaning of Putin’s “dictatorship of law” is, viewed from Chechnya, unreservedly negative. That should be clear to even the most casual observer, notwithstanding the fast-paced reconstruction of the city of Grozny.⁴⁶ This is not just because of the continued anarchy and

and women who governed Norway were legally trained or legal practitioners.

⁴⁵ Vladimir Putin used this phrase several times in his speeches and writings during his first campaign for president in February 2000, at one point announcing:

In a non-law-governed (i.e. weak) state the individual is defenseless and not free. *The stronger the state, the freer the individual.* . . . [D]emocracy is the dictatorship of the law — not of those placed in an official position to defend that law . . . I know there are many now that are afraid of order. But order is nothing more than rules. And let those who are currently engaged in substituting concepts for one another, trying to pass off the absence of order for genuine democracy — let them, I say, stop looking for hidden dirty tricks and trying to scare us with the past. ‘Our land is rich, but there is no order in it,’ they used to say in Russia. Nobody will ever say such things about us in future.

Vladimir Putin’s Open Letter to Russian Voters, Feb. 25, 2000, available at <http://www.cdi.org/russia/johnson/4133.html> (emphasis in original). For a general discussion of Putin’s use of this phrase, see KAHN, *supra* note 16, at 238–39; Kahn, *supra* note 4, at 394–407.

⁴⁶ C.J. Chivers, *Under Iron Hand of Russia’s Proxy, a Chechen Revival*, N.Y. TIMES,

feudalism by which Chechnya is now, in turns, governed by Ramzan Kadyrov. It is also because of the way Putin used Chechnya to justify his executive vertical of power and his so-called “dictatorship of law.” A struggle against Chechen separatists was recharacterized as a battle against international terrorists and religious fanatics.⁴⁷ The new fight was deemed to require not only a military response but a statewide legal restructuring as well.⁴⁸

Chechnya provided a challenge and an opportunity to Putin from the moment of his ascension to power. President Boris Yeltsin nominated Putin to the post of Russian Prime Minister two days after Shamil Basayev and Emir Khattab launched a surprise incursion into Dagestan.⁴⁹ The State Duma (the lower chamber of the federal parliament) confirmed this nomination on August 16, 1999.⁵⁰ In the next thirty days, Putin was confronted with a bombing under Manezh Square in central Moscow that killed one person and injured forty (Aug. 31, 1999),⁵¹ an explosion in Buinaksk, Dagestan, that killed more than sixty people (Sept. 4, 1999);⁵² the Moscow apartment bombings that killed more than 300 people (Sept. 9 & 13, 1999),⁵³ and another apartment bombing in Volgodonsk that killed eighteen people (Sept. 16, 1999).⁵⁴

Sept. 30, 2007, at A1 (“As recently as early 2006, Grozny was less a city than rows of shattered buildings overlooking cesspools. It now has electricity almost around the clock and reliable natural gas service. Many neighborhoods have water. Block upon block of housing complexes have been rebuilt, and families have moved into buildings that a year ago were buckling shells. Markets are crowded with products, from computers and furniture to air-conditioners, flat-screen televisions and new cars.”).

⁴⁷ See *infra* note 56; see also Thomas de Waal, *Introduction to ANNA POLITKOVSKAYA, A DIRTY WAR: A RUSSIAN REPORTER IN CHECHNYA* xvi (2001); ANNA POLITKOVSKAYA, *PUTIN’S RUSSIA: LIFE IN A FAILING DEMOCRACY* 161 (Arch Tait trans., 2004); SHEVTSOVA, *supra* note 32, at 38; BAKER & GLASSER, *supra* note 29, at 123; Masha Lipman, *Putin’s Spreading War*, WASH. POST, Oct. 17, 2005, at A15.

⁴⁸ See *infra* text accompanying notes 77–85.

⁴⁹ De Waal, *supra* note 47, at xviii. The incursion began on August 7, 1999.

⁵⁰ *Russia: Yeltsin Says New Prime Minister Should Be Next President*, Aug. 9, 1999, available at http://www.rferl.org/features/1999/08/f.ru.990809161_358.asp; Julie A. Corwin, *Duma Confirms Putin*, RADIO FREE EUR./RADIO LIBERTY, Aug. 17, 1999, available at <http://www.rferl.org/newsline/1999/08/1-rus/rus-170899.asp>.

⁵¹ Amelia Gentleman, *Who is Bombing Russia?*, GUARDIAN (U.K.), Sept. 12, 1999.

⁵² Patrick E. Tyler, *6 Convicted in Russia Bombing That Killed 68*, N.Y. TIMES, Mar. 20, 2001, at A1.

⁵³ BAKER & GLASSER, *supra* note 29, at 54.

⁵⁴ Michael R. Gordon, *Another Bombing Kills 18 in Russia*, N.Y. TIMES, Sept. 17, 1999, at A1.

Putin, immediately and without hesitation, launched an overwhelming military campaign in Chechnya.⁵⁵ This was done under the label of an “anti-terrorist operation.”⁵⁶ In reality, it was the start of a second brutal war that had already killed as many as 100,000 people.⁵⁷ The explosions and attacks that punctuated Putin’s inauguration reversed public opinion from its increasing opposition to the first Chechen war to upwards of 70% approval for a military solution in Chechnya.⁵⁸ Putin seized on the change in mood, restarted the war, recharacterized it as a limited counterterrorism mission, and used it to justify the centralization of executive power.

This terrorism—some of it claimed, some of unknown or disputed origin—did not abate in the face of this show of force. To the contrary, Moscow was pockmarked with new terrorism. An explosion under Pushkin Square killed eight people on August 8, 2000.⁵⁹ The October 2002 hostage crisis at the Dubrovka Theater in Moscow, and the subsequent counter-offensive by Russian special forces, resulted in the death of 130 hostages and the terrorists.⁶⁰ In and around Moscow, suicide attacks were launched at a rock concert (July 2003, eighteen people killed),⁶¹ the Hotel National

⁵⁵ Putin’s approach to Chechnya has been unwavering since his first statements on the subject as Prime Minister. In autumn 1999, he famously responded to renewed fighting in the North Caucasus with a crude announcement that Russia would “pursue the terrorists everywhere,” and even “rub them out in the outhouse.” Michael Wines, *The World: Blowback; In Moscow, a Whiff of Terror From Afar*, N.Y. TIMES, Sept. 26, 1999. An excerpt from the press conference in Astana, where President Putin gave these remarks is available on the Russian version of YouTube. See <http://www.youtube.com/watch?v=PdYRZSW-I> («Мы будем преследовать террористов везде, в аэропорту – в аэропорту. Значит, Вы уж меня извините, в туалете поймаем, мы и в сортире их замочим, в конце концов. Все, вопрос закрыт окончательно.») [“We will pursue the terrorists everywhere, to the airport — to the airport. That means, excuse me, [if] we catch [them] in the toilet, we will rub them out in the outhouse in the end. That’s it, the question is completely closed.”].

⁵⁶ Vladimir Putin, Opinion, *Why We Must Act*, N.Y. TIMES, Nov. 14, 1999 (stating that “[t]he antiterrorist campaign was forced upon us,” and asserting links between Chechen rebels and international terrorists, including Osama bin Laden).

⁵⁷ Estimates of deaths in the first Chechen War (1994–1996) range from 20,000 (Anatol Lieven), to 80,000 (General Aleksandr Lebed’) to 100,000 (Grigorii Yavlinsky). ANATOL LIEVEN, CHECHNYA: TOMBSTONE OF RUSSIAN POWER 108 (1998); Archie Brown, *The Russian Crisis: Beginning of the End or End of the Beginning?*, 15 POST-SOVIET AFFAIRS 58 (1999) (quoting Lebed’); Grigori Yavlinsky, *An Uncertain Prognosis*, 8 J. DEMOCRACY 4 (1997).

⁵⁸ SHEVTSOVA, *supra* note 32, at 39.

⁵⁹ Patrick E. Tyler, *Rush-Hour Bomb Attack Kills 8 in Central Moscow*, N.Y. TIMES, Aug. 9, 2000.

⁶⁰ BAKER & GLASSER, *supra* note 29, at 172.

⁶¹ Андрей Скробот и Дмитрий Симакин, *Черный праздник в Тушино*, НЕЗАВИСИМАЯ

(December 2003, approximately six people killed),⁶² and the Moscow metro (February 2004, approximately forty people killed; August 2004, Rizhskaya bombing killed ten people).⁶³ Outside of the capital, a passenger train was attacked in southern Russia in December 2003 killing approximately forty people.⁶⁴ Two domestic aircraft exploded almost simultaneously in August 2004, killing eighty-nine people.⁶⁵ In Beslan, at least 330 people, mostly children, were killed by an attack and botched rescue at an elementary school's opening day.⁶⁶

Recounting this bloody timeline serves to highlight two independent, retarding effects on the rule of law in Russia. The first was the creation of a legal blackhole in a geographic territory that, ironically, Russia claimed to be an integral part of the Russian Federation. Russian military action in Chechnya, contrary to President Putin's repeated claims, was neither targeted, nor precise, nor surgical in nature. In response to terrorist attacks in Moscow and the provinces that left Russians feeling besieged and vulnerable, Putin permitted an onslaught on an entire republic within the Russian Federation. The Russian army (unmanaged by officers who could barely feed and clothe the untrained conscripts sent to fight) indiscriminately killed, destroyed, and stole.⁶⁷ Their conduct was mirrored by Chechen rebels and brigands.⁶⁸ Human

ГАЗЕТА, 7 июль 2003 г., available at http://www.ng.ru/events/2003-07-07/1_tushino.html; Юрий Гаврилов, *Пересмотра не будет: Верховный суд РФ оставил в силе приговор чеченской террористке*, РОССИЙСКАЯ ГАЗЕТА, 1 Сентябрь 2004 г., available at <http://www.rg.ru/2004/09/01/zarema.html>.

⁶² *Самая обычная бомба: Исполнительницей теракта на Моховой была молодая женщина в светлом пальто*, НЕЗАВИСИМАЯ ГАЗЕТА, 11 декабрь 2003 г., available at http://www.ng.ru/events/2003-12-11/7_bomb.html; Илья Зубко, *Разыскивается шахидка в шубе*, РОССИЙСКАЯ ГАЗЕТА — НЕДЕЛЯ, 11 декабрь 2003 г., available at <http://www.rg.ru/2003/12/11/terakt.html>.

⁶³ Владимир Федосенко, *Метро всорвал смертник: Главная версия теракта подтверждена*, РОССИЙСКАЯ ГАЗЕТА, 18 февраля 2004 г., available at <http://www.rg.ru/2004/02/18/smertnik.html>; Андрей Шаров, *В Москве ищут "черную вдову": Из четырех террористок, направившихся в столицу, в живых осталась только одна*, РОССИЙСКАЯ ГАЗЕТА, 2 сентября 2004 г., available at <http://www.rg.ru/2004/09/02/shahidki.html>.

⁶⁴ Андрей Шаров, Людмила Ёбельюгина, Наталья Козлова, *Черная пятница в Ессентуках: Взрыв в пригородной электричке унес 40 жизней. Но это число не окончательное*, РОССИЙСКАЯ ГАЗЕТА - НЕДЕЛЯ, 2003 г., available at <http://www.rg.ru/2003/12/06/vzriv.html>.

⁶⁵ BAKER & GLASSER, *supra* note 29, at 19.

⁶⁶ *Id.* at 35.

⁶⁷ See generally POLITKOVSKAYA, A DIRTY WAR, *supra* note 47.

⁶⁸ *Id.*

Rights Commissioners from the Council of Europe consistently condemned widespread and gross violations of human rights, violations of international humanitarian law, and crimes committed by all sides in the Chechen conflict.⁶⁹ In 2005, these rapporteurs described the result: a “climate of impunity” in the republic.⁷⁰ In March, the Council’s human rights commissioner and its Anti-Torture Committee condemned unlawful detention, torture, and cruelty throughout the republic.⁷¹ Beginning in 2002, and continuing thereafter with judgments too numerous to mention, the European Court of Human Rights in Strasbourg has repeatedly found Russia liable for violations of the Convention’s protection of life and prohibitions against torture and inhumane treatment in cases of disappearances, torture, summary execution, and other crimes in Chechnya.⁷²

⁶⁹ ALVARO GIL-ROBLES, COUNCIL OF EUR. COMM’R FOR HUM. RIGHTS, REPORT OF THE COMMISSIONER FOR HUMAN RIGHTS ON HIS VISIT TO THE RUSSIAN FEDERATION (IN PARTICULAR CHECHNYA, DAGHESTAN AND INGUSHETIA), ¶¶ 2, 5 (Dec. 7–10, 1999), *available at* <https://wcd.coe.int/ViewDoc.jsp?id=980347&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>; ALVARO GIL-ROBLES, COUNCIL OF EUR. COMM’R FOR HUM. RIGHTS, REPORT OF THE COMMISSIONER FOR HUMAN RIGHTS ON HIS VISIT TO THE RUSSIAN FEDERATION AND THE REPUBLIC OF CHECHNYA, 25TH FEBRUARY TO THE 4TH MARCH 2001, ¶ IV(1) (Mar. 14, 2001), *available at* <https://wcd.coe.int/ViewDoc.jsp?id=980643&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679> (“I have arrived at a point I consider to be of the utmost importance for the restoration of peace and ordinary living conditions in Chechnya. As I have already suggested, an environment of fear and insecurity obtains throughout the territory of the Chechen Republic. This is attributable to the actions of Chechen combatants as much as it is to those of the Federal forces. As investigations into such acts are rarely carried to their proper conclusion, an impression of lawlessness and impunity is increasingly pervasive.”); COUNCIL OF EUR. COMM’R FOR HUM. RIGHTS, INITIAL CONCLUSIONS OF THE VISIT OF THE COMMISSIONER FOR HUMAN RIGHTS IN THE CHECHEN REPUBLIC OF THE RUSSIAN FEDERATION (27 FEBRUARY THROUGH 1 MARCH 2007), *available at* [https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH\(2007\)6&Language=lanEnglish&Ver=original&Site=CommDH&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH(2007)6&Language=lanEnglish&Ver=original&Site=CommDH&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864) (“Through [Thomas Hammarberg’s] conversations with the inmates, he became increasingly convinced of the existence of the use of torture and ill-treatment by the law enforcement agents, whether republican or federal, during the investigative proceedings.”).

⁷⁰ See DAVID ATKINSON & RUDOLF BINDIG, COMM. ON THE HONOURING OF OBLIGATIONS & COMMITMENTS BY MEMBER STATES OF THE COUNCIL OF EUR., HONOURING OF OBLIGATIONS & COMMITMENTS BY THE RUSSIAN FEDERATION, DOC. 10568, ¶ 62 (June 3, 2005), *available at* <http://assembly.coe.int/documents/workingdocs/doc05/edoc10568.htm>.

⁷¹ Asya Umarova & Laura Aldamova, *Chechnya: Human Rights Hopes Dashed*, INST. FOR WAR AND PEACE REPORTING: CAUCASUS REPORTING SERVICE, Mar. 15, 2007, http://www.iwpr.net/?p=crs&s=f&o=334109&asp_state=henpcrs.

⁷² For a brief summary of the issues presented in the first cases, see J.D. Kahn, *Russia’s “Dictatorship of Law” and the European Court of Human Rights*, 29 REV. CENT. & E. EUR.

The second effect was the expansion and strengthening of already broad federal executive powers without augmenting judicial or legislative powers that could serve as checks on unbridled executive discretion. This second effect may well turn out to be the more insidious, and longer lasting, of the two. A certain callousness towards the law spread north from the Caucasus as everything was covered in the sticky patina of fighting terrorism. Suspects in the Moscow and regional apartment bombings were whisked out of local custody and into secret proceedings in closed courtrooms.⁷³ The indisputable advances in the reform of criminal procedure were routinely ignored by regional officials who, taking their cue from Moscow, viewed certain exceptional cases as exempt from requirements of code or case law.⁷⁴ This is not always true, and the case of Colonel Budanov, ultimately sentenced to ten years' imprisonment for the brutal rape and murder of a Chechen civilian is evidence of that.⁷⁵ But there are very few Budanov cases compared to the number of Budanovs.⁷⁶

The war in Chechnya and the terrorism that the renewed fighting did not stop—and probably further sparked—was also the ultimate catalyst for many of the political reforms that Putin adopted to strengthen the “executive

L. 1, 10–14 (2004). Some of the most recent cases involving Chechnya, are: *Betayeva v. Russia*, App. 37315/03, Eur. Ct. H.R. (2008) (finding violations of Articles 2, 3, 5, 8, and 13); *Gekhayeve v. Russia*, App. 1755/04, Eur. Ct. H.R. (2008) (finding violations of Articles 2, 3, 5, and 13); *Ibragimov v. Russia*, App. 34561/03, Eur. Ct. H.R. (2008) (same); *Sangariyeva v. Russia*, App. 1839/04 Eur. Ct. H.R. (2008) (same); *Utsayeva v. Russia*, App. 29133/03, Eur. Ct. H.R. (2008) (finding violations of Articles 2, 3, 5, 13 and a failure to comply with Article 38(1)(a)); *Betayev v. Russia*, App. 7653/02, Eur. Ct. H.R. (2008) (same); *Aziyevy v. Russia*, App. 77626/01, Eur. Ct. H.R. (2008); *Imakayeva v. Russia*, App. No. 7615/02, Eur. Ct. H.R. (2007) (discussing violation of Article 8); *Bazorkina v. Russia*, App. 69481/01, Eur. Ct. H.R. (2006) (discussing violation of Articles 2(2), 3, 5(1) & 13); *Luluyev v. Russia*, App. No. 69480/01, Eur. Ct. H.R. (2006) (same); *Estamirov v. Russia*, App. No. 60272/00, Eur. Ct. H.R. (2006) (discussing violation of Article 2(2) & 13).

⁷³ Gail W. Lapidus, *Putin's War on Terrorism: Lessons from Chechnya*, 18 POST-SOVIET AFF. 41, 43 (2002).

⁷⁴ POLITKOVSKAYA, A DIRTY WAR, *supra* note 47, at 34 (describing repeated violations of “a progressive code of criminal procedure in conformity with the highest European standards”). In this chapter, Politkovskaya examines the case file for judicial proceedings brought against an aide to former Chechen President Aslan Maskhadov. *Id.*

⁷⁵ *Id.* at 42. Politkovskaya, although drawing more pessimistic conclusions about the Russian criminal justice system, nevertheless praises the “courageous” conduct of the judge in Budanov's case, Vladimir Bukreev, and the military officer whose permission she asserts was required for prosecutors to bring an indictment, General Gerasimov. *Id.* at 53.

⁷⁶ See, e.g., Michael Schwartz, *Russian Military Officers Are Convicted of Killing 6 Chechens*, N.Y. TIMES, June 15, 2007.

vertical” as he called it. Plenty of laws have been passed to broaden the powers of law enforcement officials, diminish press freedoms, and provide for special legal regimes during presidentially declared states of emergency.⁷⁷ There is nothing altogether surprising about that. Many states have responded to self-defined acts of terrorism in the same way, albeit to widely varying degrees. Putin took his opportunity a step further, however. In the spring of 2000, Putin began to centralize control over *all* federal politics, first by creating presidential envoys by decree,⁷⁸ and then restructuring federal legislative representation with a string of statutes.⁷⁹ Immediately after the Beslan atrocities in 2004, plans were unveiled to end the popular election of regional governors, to end the election of single-mandate constituencies in the federal Duma, and establish a presidentially controlled civic forum—the Public Chamber.⁸⁰ The President’s explicitly stated justification for all of these changes was to fight terrorism.⁸¹ Of course, the detailed nature of the draft legislation, and its close fit with previous reforms, made it difficult to believe that Beslan was the catalyst, rather than the excuse, for this next round of

⁷⁷ Федеральный закон от 25 июля 2002 г. № 112-ФЗ “О внесении изменений и дополнений в законодательные акты Российской Федерации в связи с принятием Федерального закона “О противодействии экстремистской деятельности” [Federal Law “On the Introduction of Changes and Additions to the Legislative Acts of the Russian Federation in connection with the Acceptance of the Federal Law ‘On Counteracting Extremist Activity.’”]; Федеральный конституционный закон от 30 мая 2001 г. № 3-ФКЗ “О чрезвычайном положении,” (с изменениями от 30 июня 2003 г., 7 марта 2005 г.) [Federal Constitutional Law No. 3-FKZ “On the State of Emergency,” English translation, available at <http://www.legislationline.org/legislation.php?tid=46&lid=601&less=false>].

⁷⁸ Указ Президента РФ «О полномочном представителе Президента РФ в федеральном округе,» № 849, 13 мая 2000 г., СОБР. ЗАКОН. № 20, 15 мая 2000 г., ст. 2112, стр. 4318. See also РОССИЙСКАЯ ГАЗЕТА, 16 мая 2000 г., стр. 5. For description and analysis of this decree, see КАHN, *supra* note 16, at 252–67. Some have begun to forecast the end of the *polpred* system, arguing that it has served its purpose and the president who created it. Paul Goble, *Putin Likely to Disband Presidential Plenipotentiary System*, WINDOW ON EURASIA, Oct. 4, 2007, <http://windowoneurasia.blogspot.com/2007/10/window-on-eurasia-putin-likely-to.html> (Татьяна Становая, *Последние из полпредов*, Oct. 4, 2007, available at <http://www.politcom.ru/print.php?id=5176>); see also Oversloot, *supra* note 29, at 51 (“We may perhaps expect that having appointed governors will make the office of *polpred* obsolete again, and perhaps, indeed, the function of *polpred* will atrophy in the (near) future.”).

⁷⁹ For description and analysis of these statutes, see КАHN, *supra* note 16, at 252–67.

⁸⁰ See Vladimir Putin, President, Russ. Fed’n, Speech at the Enlarged Government Meeting with the Government and Heads of the Regions (Sept. 13, 2004) (transcript available at http://www.kremlin.ru/eng/text/speeches/2004/09/13/0000_type82912type82913_76667.shtml#).

⁸¹ *Id.*

changes.⁸² In any event, the president now nominates candidates for the chief executive position in each region to a regional legislature that may be disbanded if it ultimately fails to approve the candidate.⁸³ These executives can be dismissed and the legislatures prorogued for a variety of reasons that ultimately are the prerogative of the president to initiate. Most notably, the president's nominee to head the region, even after ratified by the regional legislature, may be dismissed by presidential *ukaz* for "loss of trust" of the president or "improper execution of duties," presumably in the opinion of the president.⁸⁴

This change did not merely alter the democratic accountability of regional officials; it also altered the composition of the upper chamber of the federal parliament—the Council of the Federation—whose members are now appointed by the regional executive and legislative branches that are, in turn, susceptible to extreme pressure by the President.

These reforms made President Putin (and his foreseeable successors in office) beholden, in a way, to the strong men he placed as satraps in the Caucasus, men such as Kadyrov.⁸⁵ The price of maintaining order in the North Caucasus now includes accession to the violence done to the rule of law there by local chiefs whose approach to government is often medieval. Cooptation is a two-way street.

B. Russia and the Council of Europe

Physically, legally, and psychologically, the wars and chaos in Chechnya suggest that Russia is quite far from its constitutional claim to be a democratic, federal, rule-of-law state.⁸⁶ Russian participation in the Council of Europe system, on the other hand, suggests a closer approximation to that goal, and a broad willingness at the highest levels of institutional and personal politics to

⁸² Oversloot, *supra* note 29, at 49 ("However, the propositions made on 13 September were so detailed—and fit in so well with previous policies—that it is fully incredible that preparations for these institutional changes had started just after 'Beslan.'").

⁸³ Статья 1, 2) (б), Федеральный закон от 11 декабря 2004 г. № 159-ФЗ, О внесении изменений в федеральный закон «Об общих принципах организации законодательных (представительных) и исполнительных органов государственной власти субъектов Российской Федерации» и в федеральный закон «Об основных гарантиях избирательных прав и права на участие в референдуме граждан Российской Федерации».

⁸⁴ *Id.*, статья 1, 5).

⁸⁵ Oversloot, *supra* note 29, at 53.

⁸⁶ See *supra* note 3.

build a modern legal culture. Russia applied to join the Council in the spring of 1992, less than six months after the end of Soviet power.⁸⁷ Russia signed the European Convention on Human Rights (ECHR) in 1996 and ratified it with some reservations in 1998.⁸⁸ Accession was slowed considerably by the first Chechen War (1994–1996).⁸⁹ Thus, the bulk of Russia's stay under this human rights and rule-of-law based umbrella organization has been during Vladimir Putin's term of office.⁹⁰

Much good has come from Russian membership from just about every perspective, but especially from a legal one. The Council of Europe invited Russia to become a member with a large number of conditions attached.⁹¹

⁸⁷ The Russian tricolor replaced the Soviet hammer and sickle on Christmas Day 1991. Russia applied for membership on May 7, 1992. Bill Bowring, *Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes*, 6 EUR. HUM. RTS. L. REV. 628, 628–43 (1997).

⁸⁸ Russia signed the ECHR on February 28, 1996. See Council of Europe Treaty Office, European Convention for the Protection of Human Rights & Fundamental Freedoms, Chart of Signatures & Ratifications, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=9/24/2007&CL=ENG> (last visited Apr. 8, 2008). President Boris Yeltsin signed the federal law ratifying the treaty on March 30, 1998. See «О ратификации Конвенции о защите прав человека и основных свобод и Протоколов к ней,» СОБР. ЗАКОН., 1998 № 42, ст. 1514, стр. 2939–40 (Ratification was made with reservations lodged on May 5, 1998).

⁸⁹ See Eur. Parl. Assembly, *Resolution On Russia's Request for Membership in the Light of the Situation in Chechnya*, 27th Sess. Doc. No. 1055 (1995) (suspending membership process after “unreservedly” condemning the “indiscriminate and disproportionate” use of force by Russia in Chechnya and declaring the same in violation of Russia's international obligations); see also Eur. Parl. Assembly, *Resolution 1065 of Procedure For an Opinion on Russia's request for Membership of the Council of Europe*, 27th Sess., Doc. No. 1065, ¶ 11 (1995) (resuming procedure for Russian membership in Council of Europe following peace agreement in Chechnya).

⁹⁰ What is more, the Council of Europe commissioned monitors to report on progress within Russia towards meeting its legal and political obligations in the Council of Europe. These reports were completed in 1998, 2002, and 2005, providing useful Russia-specific benchmarks to assess progress in a wide range of areas. See RUDOLF BINDIG & ERNST MUEHLEMANN, COMM. ON THE HONOURING OF OBLIGATIONS & COMMITMENTS BY MEMBER STATES OF THE COUNCIL OF EUR., HONOURING OF OBLIGATIONS AND COMMITMENTS BY THE RUSSIAN FEDERATION, Doc. 8127 (June 2, 1998), available at <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc98/edoc8127.htm>; DAVID ATKINSON & RUDOLF BINDIG, COMM. ON THE HONOURING OF OBLIGATIONS & COMMITMENTS BY MEMBER STATES OF THE COUNCIL OF EUR., HONOURING OF OBLIGATIONS AND COMMITMENTS BY THE RUSSIAN FEDERATION, Doc. 9396 (Mar. 26, 2002), available at <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc02/edoc9396.htm>; ATKINSON & BINDIG, *supra* note 70.

⁹¹ Eur. Parl. Assembly, *Opinion on Russia's Request for Membership of the Council of Europe*, 1996 Sess., Doc. No. 193 (1996) [hereinafter *Russia's Request*]; Eur. Parl. Assembly, *Invitation to the Russian Federation to Become a Member of the Council of Europe*, Council of

New legal codes were required, including codes of civil and criminal law and procedure.⁹² Council of Europe conventions and protocols against torture, the death penalty, and many others were to be ratified on strict timetables.⁹³

The Council of Europe took a considerable institutional risk in allowing Russia to join its club.⁹⁴ The number one fear was *not* that the Council would be ineffective in promoting political and legal reforms in Russia. Although that was certainly a serious concern, that was really just one fear of many. As noted below, it has yet to be determined whether membership's benefits to Russia and the Council of Europe as a whole outweighed membership's risks. When that verdict is returned, however, it is likely that the Council of Europe will be seen to have done more to advance the rule of law in Russia than any other single institution, political circumstance, or individual actor.

The overriding fear was rather that Russian noncompliance with Council norms and obligations would destroy the Council of Europe from within. Chechnya was the most striking example of how the Council's effectiveness was challenged by its new member. The excesses of the Second Chechen War, if initially popular in Russia, evoked a crisis in Europe and resulted in a brief

Ministers Res. 96(2), 1996 Sess. (Feb. 8, 1996).

⁹² *Russia's Request*, *supra* note 91, ¶ 7 (e.g., "a new criminal code and a code of criminal procedure; a new civil code and a code of civil procedure; a law on the functioning and administration of the penitentiary system; . . . new laws in line with Council of Europe standards . . . on the role, functioning and administration of the Procurator's Office and of the Office of the Commissioner for Human Rights; for the protection of national minorities; on freedom of assembly and on freedom of religion; . . . the status of the legal profession will be protected by law: a professional bar association will be established," etc.).

⁹³ *Id.* ¶ 10 (listing, among others, the European Convention on Human Rights; Protocol No. 6 on the abolition of the death penalty in time of peace; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; European Framework Convention for the Protection of National Minorities; European Charter of Local Self-Government; European Charter for Regional or Minority Languages; studying, with a view toward ratification, the Council of Europe's Social Charter; signing and ratifying and applying the basic principles of other Council of Europe conventions—notably those on extradition, on mutual assistance in criminal matters, on the transfer of sentenced persons, and on the laundering, search, seizure and confiscation of the proceeds of crime; etc.).

⁹⁴ See Bowring, *supra* note 87, at 639–40; Bill Bowring, *Russia's Accession to the Council of Europe and Human Rights: Four Years On*, 4 EUR. HUM. RTS. L. REV. 362, 379 (2000) (noting fears that flagrant Russian non-compliance threatened the integrity of the Strasbourg system); Jeffrey Kahn, Note, *Russian Compliance with Articles Five and Six of the European Convention of Human Rights as a Barometer of Legal Reform and Human Rights in Russia*, 35 U. MICH. J. L. REFORM 641, 644 (2002) (questioning whether Russian violations could "bring the efficacy of this innovative human rights system into doubt, in the process diminishing the reputation of the Council of Europe as a whole").

suspension of Russia's voting rights in the Parliamentary Assembly of the Council, a sensational walkout from that body by the Russian delegation, and vituperative diplomatic exchanges on both sides.⁹⁵ Lord Judd, in his report to the Council, expressed his dismay that the European Court of Human Rights had been sidelined. "What on earth is the point of having these institutions," he said, "if our governments are not prepared to act? . . . the Council of Europe is about human rights or it is about nothing."⁹⁶ The fear was, of course, that the Council had been played for a fool by the Russians and that, as a result, its own credibility and effectiveness had been undermined not just in Russia but in other countries and subject areas.

Thus, when the Council was considering Russia's initial request for membership, the Parliamentary Assembly expressed its opinion on the first Chechen War, raging at the time: "The Chechen conflict cannot be resolved by the use of force. There will be no peace in the region, nor an end to terrorist attacks, without a political solution based on negotiation and on European democratic values."⁹⁷ It appears, at least for now, that the Assembly was wrong. The rebels have been either co-opted or killed. Grozny is slowly being rebuilt.⁹⁸

The tragic irony is that the Assembly should have been right. Chechnya's reconstruction is now overseen by a maniac, Ramzan Kadyrov, who has been given a free hand by Moscow to run Chechnya more or less as a fiefdom so

⁹⁵ The Assembly's actions are summarized in Eur. Parl. Assembly, *Credentials of the Delegation of the Russian Federation, Opinion of the Comm. on Legal Aff. and Hum. Rts.*, 2001 Sess., Doc. No. 8956 (2001), available at <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc01/edoc8956.htm>. For unofficial transcripts and summaries of the debates, see Eur. Parl. Assembly, *Provisional Version of the Report of the Debate of 06 April 2000 at 10 A.M.* [hereinafter *April 2000 Debate*], available at <http://assembly.coe.int/Main.asp?link=/Documents/Records/2000/E/0002061000E.htm> (last visited June 2, 2008), and Eur. Parl. Assembly, *Provisional Version of the Report of the Debate of 06 April 2000 at 15 P.M.* [sic], available at <http://assembly.coe.int/Main.asp?link=/Documents/Records/2000/E/0002061500E.htm>.

⁹⁶ *April 2000 Debate*, *supra* note 95.

⁹⁷ *Russia's Request*, *supra* note 91, ¶ 4.

⁹⁸ See Chivers, *supra* note 46; see also *Report of the Commissioner for Human Rights on His Visit to the Chechen Republic of the Russian Federation*, *supra* note 69, ¶ VI ("It is equally evident that a certain economic revival is taking place. It is possible to see many new and reconstructed houses and much building going on particularly outside of Grozny, markets springing up, cafes, petrol stations, restaurants and shops opening up; there is traffic and bustle in the streets. Local NGOs are establishing themselves. Unemployment, however, remains extremely high, particularly for the young, and a number of buildings, streets and infrastructures remain to be restored. Corruption remains rife, affecting even the compensation money for the reconstruction of destroyed property.").

long as he can keep what is euphemistically called order. The Council was utterly ineffectual in stopping the violence or even moderating it. As a result, the Council of Europe had as a member a country that had entirely cordoned off a section of its population and its territory from the rule of law and other core values of the Council.

In addition to Chechnya, there have been many other failures. Russia, for example, has not ratified Protocol No. 6 to the Convention abolishing the death penalty, although its presidential moratorium on executions has continued since Yeltsin decreed it.⁹⁹ With France's recent abolition of the death penalty under all circumstances, Russia is now the only member of the Council of Europe not to have ratified either Protocol 6 or Protocol 13.¹⁰⁰ The deadline for this commitment expired in 1999.¹⁰¹ Other states have been subject to sanctions for less blatant disregard of the obligations of membership. But to the chagrin of many, Russia has often appeared to thumb its nose at the Council with one hand, while the other hand has rested gently on the spigot of a natural gas pipeline or two.

The strains to the credibility of the Council of Europe *political* system caused by Russian membership would have been bad enough. But the Council has also suffered great strain to its *judicial* system by expanding the jurisdiction of the European Court of Human Rights to include Russia. Russia is the only member-state to have failed to ratify Protocol 14, which the Commissioner for Human Rights called an act of sabotage against the European Court of Human Rights.¹⁰² This protocol, which can only enter into

⁹⁹ See Chart of Signatures and Ratifications, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=114&CM=8&DF=4/6/2008&CL=ENG> (last visited June 2, 2008).

¹⁰⁰ Terry Davis, Sec'y Gen. of the Council of Eur., Speech at the Conference Marking the First European Day Against the Death Penalty (Oct. 9, 2007) (transcript available at http://www.coe.int/t/dc/press/news/20071009_disc_sg_EN.asp?). Protocol 13 to the Convention concerns the abolition of the death penalty in all circumstances, including with respect to acts committed in time of war or of imminent threat of war, which are not excluded by Protocol 6.

¹⁰¹ See *Russia's Request*, *supra* note 91, ¶ 10(ii).

¹⁰² *Thomas Hammarberg: Russia Witnessing Positive Trends In Protection Of Human Rights*, INTERFAX, Oct. 4, 2007, <http://news.rin.ru/eng/news/10948> ("The State Duma's refusal to ratify Protocol 14 was viewed at the Council of Europe as sabotage against the European Court of Human Rights, Hammarberg told Russian journalists in Strasbourg on Thursday."). See Eur. Parl. Assembly, *Report of the 31st Sitting of the Parliamentary Assembly, 2 Oct. 2007, 3 P.M.*, 2007 Sess., Doc. No. AACR 31, at Remarks of Mr. Margelov (2007), available at <http://assembly.coe.int/Main.asp?link=/Documents/Records/2007/E/0710021500E.htm> ("The Russian Government was timely in introducing a draft law relating to ratification in the State Duma, the

force upon ratification of all member states, would unplug a huge bottleneck in the docket of the Court that Russia is largely responsible for creating.¹⁰³

Russia accounts today for more than one-fourth of the Court's docket and has also led the league tables in volume of petitions submitted to the Court for several years.¹⁰⁴ Last year, over 50,000 applications were lodged with the Court, over 10,000 of them from Russia.¹⁰⁵ That makes Russia the single largest source of petitions to the Court out of the forty-seven member-states to the Convention.¹⁰⁶ This is an extraordinary achievement for Russia, and an unhappy one for everyone else.¹⁰⁷ The most recent proof in point is the Court's judgment in the case of *Babushkin v. Russia*.¹⁰⁸ The Court held that Babushkin, a convict serving a sentence for aggravated violent robbery in Nizhny Novgorod, had been subjected to conditions of detention that violated

lower House of the Russian Parliament, but the relevant committee in the Duma made a terrible mistake in preventing that law even from being considered.”). The Duma failed to ratify the protocol last fall by a vote of 27–113. Steve Gutterman, *Head of European Human Rights Court Seeks Russian Approval of Stalled Reform*, ASSOCIATED PRESS, May 10, 2007 (reprinted in JOHNSON'S RUSSIA LIST, #107, May 11, 2007). For a recent speech by German Chancellor Angela Merkel on the subject, see Angela Merkel, Ger. Chancellor, Speech to the Eur. Parl. Assembly, Spring session (Apr. 15, 2008), available at http://www.coe.int/t/dc/files/pa_session/april_2008/20080415_disc_merkel_en.asp (“I hope that in the new Duma the time has now come to look at Additional Protocol 14 again from a different perspective and secure ratification by Russia. I would welcome that very much, as it would be in everyone's interest.”).

¹⁰³ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Art. 19, opened for signature May 13, 2004, available at <http://conventions.coe.int/Treaty/EN/Treaties/html/194.htm>. For a more critical view of the reform, see Patricia Egli, *Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Towards a More Effective Control Mechanism?*, 17 J. TRANSNAT'L L. & POL'Y 1 (2007).

¹⁰⁴ REGISTRY OF THE EUROPEAN COURT OF HUMAN RIGHTS, SURVEY OF ACTIVITIES 2006, at 3, 51 (2007). As of December 31, 2007, Russia had more than twice the number of allocated cases pending against it (20,296) than its nearest competitor, Turkey (9,173). REGISTRY OF THE EUROPEAN COURT OF HUMAN RIGHTS, SURVEY OF ACTIVITIES 2007, at 53 (2008). By comparison, with the exception of Russia, Turkey, Ukraine, and Romania, all other member-states had fewer than 3,200 cases pending against it. *Id.* Russia also had the most applications submitted to the Court in 2003, 2004, and 2005. See REGISTRY OF THE EUROPEAN COURT OF HUMAN RIGHTS, SURVEY OF ACTIVITIES 2005, at 34–35 (2006).

¹⁰⁵ SURVEY OF ACTIVITIES 2006, *supra* note 104, at 38, 40.

¹⁰⁶ *Id.*

¹⁰⁷ This is especially so for a Court that, according to its former President, receives approximately 900 letters and 250 international phone calls each day, and whose website registered fifty-seven million “hits” in 2005. Luzius Wildhaber, *The European Court of Human Rights: The Past, The Present, The Future*, 22 AM. U. INT'L L. REV. 521, 527 (2007).

¹⁰⁸ App. No. 67253/01, Eur. Ct. H.R. (2007).

the Article 3 prohibition of inhuman or degrading treatment.¹⁰⁹ But, as a result of the bottleneck to the Court's docket for which Russia is primarily responsible, the alleged violation occurred almost eight years ago.¹¹⁰

This docket backlog affects *all* member states. The egregious nature of violations to the Convention committed on the eastern extreme of the Court's jurisdiction make serious violations committed on the western side of Europe appear comparatively less serious, thus slackening overall protections as a result. This has been the burden placed on all of Europe by Russia's membership.

As justified as these complaints are, Russian acceptance of the jurisdiction of the European Court of Human Rights has been so important to the development of the rule of law in Russia that, on balance, and assuming that some resolution of the current docket crisis can be found, the risks were worth taking. The Court has the power to rule on the merits of admissible petitions by anyone who alleges a violation by Russia of his or her rights guaranteed under the Convention.¹¹¹ And because the Court assesses a violation in virtually every case by undertaking a close examination of Russian domestic law for compliance with the Convention, every judgment is a recipe for further reform. What is more, the rights secured by the Convention read like a laundry list of democratic and rule-of-law principles, including rights to life, liberty, privacy, free expression and association, religious freedom, and prohibitions against torture, cruel, inhuman or degrading treatment, discrimination, involuntary commitment and unlawful detention.¹¹² Russia has committed itself to all of these prescriptions.

That commitment, of course, was made at a rather general and abstract level at the time of ratification. As Russia has lost specific case after specific case in Strasbourg, Russia has repeatedly cried foul or worse. Mis-, mal-, and nonfeasance has taken many forms. With regard to one case, *Ilascu et al. v. Moldova & Russia*,¹¹³ the Russian Representative to the Committee of Ministers of the Council of Europe was instructed by his government simply not to participate in the Committee's examination of the execution of the

¹⁰⁹ *Id.* Even the abominable conditions that the Court found Babushkin to have endured led to only a modest award of €2500. *Id.*

¹¹⁰ *See id.* Note that Babuskin entered into the ECHR system in 2001 and the case was not decided until late 2007.

¹¹¹ European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 32, 34, 41, Nov. 4, 1950, 213 U.N.T.S. 222.

¹¹² *Id.*

¹¹³ App. No. 48787/99, Eur. Ct. H.R. (2004).

judgment of the European Court.¹¹⁴ In several of the Chechen cases before the Court, the Government has refused to submit documents requested by the Court.¹¹⁵ And a leader of the Russian human rights bar in Strasbourg, Karina Moskalenko, has been subjected to trumped up disbarment hearings.¹¹⁶ Russian politicians have also been tempted to claim victim status. Last January, Putin accused the Court of “politicisation” of its judgments against Russia.¹¹⁷ And Sergei Baburin, former deputy speaker of the Duma, complained that Russia’s membership fees simply fund “attacks” on Russia by the Council of Europe.¹¹⁸

That is hard to swallow when one looks at the cases Russia has lost. These are hardly close calls or political questions. The Chechen cases are the most harrowing, and several have already been mentioned. But they are a very small

¹¹⁴ The Representative described the judgment of the Court as “inconsistent, controversial, subjective, politically and legally wrong and based on double standards.” The case involved the arrest, trial, inhumane treatment, and torture of individuals by the so-called Moldavian Republic of Transdniestria. Although Russia has paid the just satisfaction sums awarded by the Court, it has refused to comply with the Court’s direction to both Russia and Moldova to release the two applicants who remain in custody. Wildhaber, *supra* note 107, at 530–32. The Court has also found, on occasion, that Russian officials have hindered the work of the Court through the harassment of applicants seeking redress before the Court or through repeated failures to submit documents requested by the Court. *See, e.g.,* Popov v. Russia, App. No. 26853/04, Eur. Ct. H.R. ¶¶ 246–251 (2006) (holding that officials about whose facility petitioner had complained had intimidated petitioner with repeated meetings designed to interfere with his petition to the Court in Strasbourg in violation of ECHR Art. 34); Fedotova v. Russia, App. No. 73225/01, Eur. Ct. H.R. ¶¶ 45–52 (2006) (holding that inquiry into payment of taxes by petitioner’s translator, which followed application to the Court by petitioner for just satisfaction and that was conducted not by the competent tax authority but by the local police amounted to “an interference with the exercise of the applicant’s right of individual petition and incompatible with the respondent State’s obligation under Article 34 of the Convention”).

¹¹⁵ *See, e.g.,* Imakayeva v. Russia, App. No. 7615/02, Eur. Ct. H.R. ¶¶ 119, 142 (2007) (explaining “[t]he Government refused to disclose any documents which could shed light on the fate of the applicant’s son and husband and did not present any plausible explanation concerning their alleged detention or subsequent fate. In view of this patent denial of cooperation, the Court is obliged to take a decision on the facts of the case with the materials available.”). The Court attributed liability for the presumed death of the individual to the State. *Id.*

¹¹⁶ Peter Finn, *Russia’s Champion of Hopeless Cases is Targeted for Disbarment*, WASH. POST, June 2, 2007, at A16; Gutterman, *supra* note 102. The allegation was Kafka-esque: Moskalenko allegedly failed to provide adequate representation to one of her clients, Mikhail Khordorkovsky. She is one of twelve lawyers for Khordorkovsky that have been subjected to disbarment proceedings, often on trumped up or otherwise flimsy grounds. Finn, *supra*.

¹¹⁷ Umarova & Aldamova, *supra* note 71.

¹¹⁸ *Id.*

fraction of the cases heard by the Court.¹¹⁹ Much more common are cases recounting torturous police interrogation or abusive practices;¹²⁰ lengthy,¹²¹ undocumented,¹²² or inhumane detention in conditions that have improved little since a United Nations special rapporteur ultimately gave up trying to describe them, stating that he would need “the poetic skills of a Dante or the artistic skills of a Bosch adequately to describe the infernal conditions” he found;¹²³ gross failures of process in criminal or civil cases; arbitrary or bad-faith bureaucratic actions against disfavored religious or ethnic groups;¹²⁴ property rights violations; and the list goes on and on.¹²⁵

Russia set aside 110 million rubles (US\$4.2 million) to pay these judgments last year.¹²⁶ That is an eleven fold increase from 2003.¹²⁷ On its face, that is hardly a good indicator that the rule of law has improved under Putin. It also reflects the anticipated volume of cases expected, since even in the most egregious cases, the damages ordered by the Court are almost offensively small

¹¹⁹ SURVEY OF ACTIVITIES 2007, *supra* note 104, at 59 (chart of violations by article showing fair trial and property cases to far outnumber combined number of cases concerning the right to life, torture, inhuman or degrading treatment, and liberty/security issues).

¹²⁰ See, e.g., Mikheyev v. Russia, App. No. 77617/01, Eur. Ct. H.R. (2006) (describing nine days of police torture that the petitioner alleged to have included beatings, threats, and the application of electric shocks, following which the applicant attempted suicide through defenestration); see also Sheydayev v. Russia, App. No. 65859/01, Eur. Ct. H.R. (2007).

¹²¹ Khudoyorov v. Russia, App. No. 6847/02, Eur. Ct. H.R. (2006); Kalashnikov v. Russia, App. No. 47095/99, 36 Eur. Ct. H.R. 587 (2002).

¹²² Belevitskiy v. Russia, App. No. 72967/01, Eur. Ct. H.R. (2007); Menesheva v. Russia, App. No. 59261/00, Eur. Ct. H.R. (2006).

¹²³ U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Hum. Rights, *Report of the Special Rapporteur, Submitted Pursuant to Commission on Human Rights Resolution 1994/37, Addendum, Visit by the Special Rapporteur to the Russian Federation*, ¶ 71, U.N. Doc. E/CN.4/1995/34/Add.1 (Nov. 16, 1994) (describing the Butyrskaya and Matrosskaya Tishina No. 1 remand centres in Moscow). See, e.g., Khudoyorov, App. No. 6847/02, Eur. Ct. H.R. (2006).

¹²⁴ Moscow Branch of the Salvation Army v. Russia, App. No. 72881/01, Eur. Ct. H.R. (2006); Timishev v. Russia, App. Nos. 55762/00 & 55974/00, Eur. Ct. H.R. (2006).

¹²⁵ The first judgment against Russia was *Burdov v. Russia*, App. No. 59498/00, 38 Eur. Ct. H.R. 639 (2002), which found a violation of Article 6(1) and Article 1 of Protocol No. 1 to the Convention in the failure of the Russia judicial system to enforce its civil judgment in Burdov’s favor for lack of payment of his state pension. See *infra* note 129. Protection of Property was the second highest category of judgments against Russia in 2007. See SURVEY OF ACTIVITIES 2007, *supra* note 104, at 59.

¹²⁶ Umarova & Aldamova, *supra* note 71.

¹²⁷ *Id.*

in consideration of the human rights violations for which they are supposed to compensate.¹²⁸

On the other hand, one fact is unassailable. As has already been noted, malfeasance has taken many forms. But one form that Russia has not dared to take has been a refusal to recognize the legitimacy of a judgment of the Court. Russia has paid every, single judgment assessed against it, without exception. This is a feat worth noting, and it is to be attributed solely to Vladimir Putin, since the first judgment against Russia was not handed down until May 2002.¹²⁹ Russia's representatives appear to take their legal responsibilities to represent Russia at the Court very seriously, for even when they refuse documents or complain about the Court, they do so in legal filings and oral arguments. In other words, political rhetoric notwithstanding, the Court commands the respect of the Russian leadership. And it is apparent—in Russia's obstructionism, if nothing else—that these repeated losses sting. Why do they sting? Because Russia, its institutions and leaders, like, want, and need a self-conception and outward impression of being a rule-of-law state. Because, as with less successful human rights instruments that preceded the Strasbourg system, shaming effects have a surprising power on states.

By way of example and conclusion, a summary of a case recently handed down by the Court nicely encapsulates these points. The case is styled *Nasrulloev v. Russia*.¹³⁰ Nasrulloev was a Tadjhik who had fallen on the wrong side of the current regime in Tadjhikistan and fled to Moscow.¹³¹ He

¹²⁸ For example, four days of continuous beatings at the hands of five police officers followed by attempted sodomitization with a bottle, which ended the violence by eliciting a signed confession, was compensated with €20,000 in non-pecuniary damages, plus any applicable taxes and simple interest. *Sheydayev v. Russia*, App. No. 65859/01, Eur. Ct. H.R. (2007). Nearly five years of pre-trial detention in inhumane conditions was deemed compensable with €8,000. *Kalashnikov v. Russia*, App. No. 47095/99, 36 Eur. Ct. H.R. 587 (2002). The disappearance of the petitioner's son and husband at the hands of Russian authorities, which was found to work multiple violations of Arts. 2, 3, 5, 8, 13 & 38 of the Convention was deemed compensated with €90,000 plus costs. *Imakayeva v. Russia*, App. No. 7615/02, Eur. Ct. H.R. (2007).

¹²⁹ *Burdov*, 38 Eur. Ct. H.R. at 639. This was also the first application declared admissible against Russia. *Id.* Burdov was a pensioner awarded state compensation for services rendered during the Chernobyl nuclear disaster. Burdov fought a long-running legal battle to receive his unpaid compensation that was unsuccessful until the European Court began to act on his petition. In compensation for the violation of his right to a fair trial and property interest in his pension, a violation that Russia worked by failing to guarantee execution of Burdov's court judgment, the European Court awarded Burdov €3,000. *Id.*

¹³⁰ App. No. 656/06, Eur. Ct. H.R. (2008).

¹³¹ *Id.* ¶¶ 6–11.

was arrested there on a request for extradition to Tashkent.¹³² The legal question before the Court concerned the legality and length of Nasrulloev's detention pending extradition, which lasted three years.¹³³ Russia, as usual, lost the case and has been ordered to pay Nasrulloev over €41,000 in non-pecuniary damages and costs.¹³⁴ There can be no doubt that Russia will pay.

But more interesting than the outcome was Russia's fairly typical behavior in the run-up to judgment. The Russian government fought this case from its lowest level court to the Russian Constitutional Court and throughout proceedings in Strasbourg, on legal and factual grounds. But Nasrulloev's lawyer, Karinna Moskalenko, feared that Russia would extradite him before the case could be heard in Strasbourg.¹³⁵ She notified the European Court and sought interim measures to protect him from extradition to a country with an even worse human rights record than the one he was in.¹³⁶ Within sixteen days of Russia's announced intention to extradite Nasrulloev, the European Court received Moskalenko's request for interim protection, ruled on it, communicated the ruling to Moscow, and received assurances from the Russian Government that the domestic authorities had been informed of the Court's order not to extradite until further notice.¹³⁷ There were no legal tricks or shenanigans after that.

It gets better. A few days after receipt of the order had been confirmed, the Moscow City Court overruled the prosecutor's decision to extradite the applicant, holding that the Tajikistan Government had not furnished the requisite guarantees concerning the fair trial and subsequent treatment of Nasrulloev.¹³⁸ The Russian Court then applied Tadjik law to conclude that Nasrulloev was eligible for amnesty under a general amnesty law that rendered any subsequent prosecution of him politically motivated.¹³⁹ The Russian Supreme Court upheld the lower court's findings on appeal.¹⁴⁰

¹³² *Id.* ¶ 14.

¹³³ *Id.* ¶¶ 62, 79. In addition, Nasrulloev alleged that extradition could result in his torture and execution, violations of the Convention. *Id.* ¶ 57. The Court held this complaint to be inadmissible. *Id.* ¶ 61.

¹³⁴ *Id.* at Statement of Judgment ¶¶ 1–5.

¹³⁵ *Id.* ¶¶ 39–40.

¹³⁶ *Id.*

¹³⁷ *Id.* ¶¶ 39–42.

¹³⁸ *Id.* ¶ 43.

¹³⁹ *Id.* ¶ 44.

¹⁴⁰ *Nasrulloev v. Russia*, App. No. 656/06, Eur. Ct. H.R. ¶¶ 43–47 (2007).

One can take away from this case that Russian justice only works when a harsh, outside light is shined on it. That would hardly be a complete misperception, as it surely works better under those circumstances and it is hard to escape the conclusion that the Strasbourg Court's order was the "but for" cause of his liberation. But one should also conclude that Russia takes the Strasbourg system seriously, complies with Court orders or defends its refusals to do so in court filings, pays its judgments, and has the capacity to do far more justice through its laws than Russia is usually given credit. What is more, the Strasbourg system only "worked" in this instance (as in many instances) by applying *Russian law* found in the caselaw of the Russian Constitutional Court and in the Criminal Procedure Code to conclude that Nasrulloev had been held unlawfully, and for an unlawfully long time, in detention.

C. Codification and the Criminal Procedure Code

A third window is opened by close scrutiny of some of the laws Russia has passed. "It would not be unfair," observed a distinguished scholar of Russian Law, Ferdinand Feldbrugge, to say at least that the last years of Yeltsin's presidency were "characterised by a bare-faced political opportunism and the absence of serious efforts to adopt any long-term strategy."¹⁴¹ As a result, he observed, legal developments in this period were mixed.¹⁴² On the one hand, there was codification, especially in the realm of private law: a code of arbitration procedure (1992 & 1995), parts one and two of the Civil Code (1994 & 1996), the Family Code (1995), the Criminal Code (1996), and the Tax Code (1998), along with codes of lesser importance. On the other hand, as I have already mentioned, a sense of lawlessness was pervasive, and the end of the Communist Party's control of property and capital was largely conducted like a rigged fire sale.¹⁴³

The volume of codification and re-codification of law during the Putin administration in the first term alone, on the other hand, was staggering. There was part two of the Tax Code (2000), the Land Code (2001), part three of the Civil Code (2001), the Criminal Procedure Code (2001), the Labor Code (2001), the Administrative Violations Code (2001), the Arbitration Code (2002), the Civil Procedure Code (2002), the Customs Code (2003), and the

¹⁴¹ Ferdinand Feldbrugge, *The Rule of Law in Russia in a European Context*, in *RUSSIA, EUROPE, AND THE RULE OF LAW* 203, 208 (Ferdinand Feldbrugge ed., 2007).

¹⁴² *Id.*

¹⁴³ See *supra* notes 20–24 and accompanying text.

Housing Code (2004). There are many good reasons to be pleased with these legal reforms. Tax reform, for example, has contributed to a better business climate and more predictability for both the state and society.¹⁴⁴ It has also led to an upward tick in the percentage of legally obtained income reported by Russian citizens.¹⁴⁵

There are many different codes and much could be said about each one of them. But the most constructive reform of the Putin years, the most important of these codification and re-codification projects, the one with the most direct effect on the liberty of members of society, and the one with the potential for the most lasting effect on the rule of law is the reform of the criminal justice system. It is potentially the reform that could be Putin's lasting legacy. This is saying a lot to describe a man who, according to Lilia Shevtsova, used his position as head of the FSB to spirit his former boss Anatoly Sobchak out of Russia ahead of a corruption investigation (thus, in her words, helping "a witness and potential suspect escape justice") and who presided over the institution that released scandalous *kompromat* of questionable authenticity against former Prosecutor General Yuri Skuratov.¹⁴⁶

Russia's new Criminal Procedure Code works a sea change in the law of criminal procedure (that is, the law that governs one's rights from the moment one is suspected of a crime to the last appeal).¹⁴⁷ There is much about the new Russian system that is, as provided on the books at least, an *improvement* on procedure in the United States and Western Europe. For example, the Code permits a police officer to arrest a person only "on suspicion of having committed a crime for which incarceration is a potential penalty."¹⁴⁸ This limitation should be contrasted with jurisdictions, like many states in the United States, in which an arrest is permitted even for offenses that could never result in a jail term.¹⁴⁹ Another example is the absolute exclusion of

¹⁴⁴ Fedyukin, *supra* note 37.

¹⁴⁵ *Id.* ("The percentage of legal earnings as part of the Russian's total income is growing: in 2000 legal earning made up 38.2% of a Russian's income, where as today it makes up 48%, according to RMES [the Russian Monitor of the Economic Situation and Public Health].")

¹⁴⁶ SHEVTSOVA, *supra* note 32, at 32–33 & 278 n.11.

¹⁴⁷ See Уголовно-процессуальный Кодекс Российской Федерации [Criminal Procedure Code], Federal Law No.174-FZ, signed December 18, 2001 (as amended through December 30, 2006) [hereafter CrPC] (all English translations of the Code herein are taken from the translation prepared by the U.S. Department of Justice in 2004. The primary editors were Vasily Vlasihin, Lead Research Fellow, the Institute of U.S. and Canada, Russian Academy of Sciences, and Professor William Burnham of Wayne State University School of Law.).

¹⁴⁸ *Id.* art. 91(1).

¹⁴⁹ See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (upholding arrest of driver

confessions obtained outside the presence of a lawyer.¹⁵⁰ If counsel was not present when the defendant confessed to the police, the confession is inadmissible at trial if repudiated by the defendant, including a defendant who had waived his right to counsel. This is designed to decrease police brutality.¹⁵¹ Such a strict exclusionary rule is found in Italy, but not elsewhere in Western Europe.¹⁵²

Even where the Code does not surpass Western European or American practices, it often meets them. The old Soviet code, for example, granted the power to order pretrial detention to the procurator.¹⁵³ The new Code at last implements a provision of the 1993 Constitution (Art. 22(2)) that provides that “no person may be detained for more than 48 hours” without a “judicial order”—a command that now must come from a judge, not a prosecutor.¹⁵⁴ The same reversal has been done for the power to issue warrants to search a home or seize personal papers.¹⁵⁵

Here, again, Russian membership in the Council of Europe has worked benefits.¹⁵⁶ Initially, the drafters of the Code feared that the judicial system was not yet ready to handle the additional work, so they inserted a proviso delaying the effects of the new detention portions of the Code until 2004.¹⁵⁷ But the Russian Constitutional Court held the delaying provisions unconstitutional in a 2002 decision issued just a few months before the effective date of the new Code.¹⁵⁸ The Court not only relied on the “direct

for failure to secure small child with a seatbelt, a misdemeanor offense punishable only by fine); *see also* *Virginia v. Moore*, 128 S. Ct. 1598 (2008) (upholding against Fourth Amendment challenge an arrest for driving with a suspended license that, although based on probable cause, was not an arrestable offense under state law).

¹⁵⁰ CrPC art. 75(2).

¹⁵¹ William Burnham & Jeffrey Kahn, *Russia's Criminal Procedure Code Five Years Out*, 33 *REV. CENT. & E. EUR. L.* 1, 39–40 (2008).

¹⁵² STEPHEN C. THAMAN, *COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH* 82–83 (2002).

¹⁵³ *See* Уголовно-процессуальный Кодекс РСФСР, Ведомости Верховного Совета (1960), № 40, ст. 593, arts. 11, 89, 96, 97 (as amended through Dec. 29, 2001).

¹⁵⁴ *See* CrPC, arts. 10(1), 29(2), 91(2), 94(2)–(3), 101(1), 107(2), 108(7).

¹⁵⁵ CrPC arts. 155, 182(2)–(3), 186; *see also* Burnham & Kahn, *supra* note 151.

¹⁵⁶ The Code of Criminal Procedure was largely catalyzed by Russia's quest to join the Council of Europe, whose standards for arrest, detention, and trial Russia had to satisfy. A wide variety of European and American legal experts were consulted in its drafting and implementation. *See* Burnham & Kahn, *supra* note 151.

¹⁵⁷ Kahn, *supra* note 94, at 667–68.

¹⁵⁸ Постановление Конституционного Суда РФ от 14 марта 2002 г. N 6-П “По делу о проверке конституционности статей 90, 96, 122 и 216 Уголовно-процессуального кодекса

effect” of Article 22(2) of the Constitution, but also observed that since the Constitution was ratified, Russia had taken on the additional obligation of implementing the European Convention.¹⁵⁹

In addition to stripping prosecutors of the power to order pre-trial detention, amendments to the Criminal Procedure Code and the Criminal Code, in March 2001 and October 2002, respectively, limited the types of crimes for which someone could be detained.¹⁶⁰ Cases in which investigators requested pre-trial detention decreased from 144,000 in the first half of 2000 to 66,000 in the first half of 2003—an almost 220% decrease.¹⁶¹

Witnesses, suspects, and defendants now have greater rights than ever before. This is particularly so with respect to the right to counsel, which attaches to more participants in the criminal justice system at an earlier stage of proceedings than ever before. Prior to being questioned for the first time, the new Code spells out that a suspect is entitled “to have a one-on-one meeting with [counsel] in a confidential setting.”¹⁶² Someone accused of a crime, rather than merely suspected of it, is entitled to an “unlimited number of one-on-one meetings of unlimited duration in a confidential setting with defense counsel.”¹⁶³

One of the more abstract, but critically important changes in the Code is the adoption of adversarial principles. The old Soviet Code was a calcified version of continental European practices that provided for an exclusive state investigation into criminal wrongdoing and a trial that largely revolved around

РФФСР в связи с жалобами граждан С.С.Маленкина, Р.Н.Мартьянова и С.В.Пустовалова,” СОБР. ЗАКОН., 25 марта 2002, N 12, ст. 1178.

¹⁵⁹ *Id.* Direct effect of constitutional rights and freedoms is imposed by Art. 18 of the Constitution. The Convention provisions at issue were the third and fourth clauses of Article 5 of the Convention concerning prompt and exclusively *judicial* oversight of pretrial detention in pursuit of a trial within a reasonable time.

¹⁶⁰ The March 2001 change in the old Code permitted detention only if the crime charged was punishable by over two years imprisonment (up from one year) and the amendment to the Criminal Code, effective October 2002, reduced the maximum punishment for simple theft to two years or less. That eliminated an entire class of crime from potential pre-trial detention.

¹⁶¹ See Burnham & Kahn, *supra* note 151, at 18 (citing Борис Гаврилов, *Новеллы уголовного процесса на фоне криминальной статистики*, 10 РОССИЙСКАЯ ЮСТИЦИЯ 5, 6 (2003) [Boris Gavrilov, *New Features of the Criminal Process in Statistics*, 10 ROSSIJSKAIA IUSTITSIIA 5, 6 (2003).]).

¹⁶² СтПС, art. 46(4)(3). The Code provides that the meeting may not be limited to less than two hours, even if the suspect is needed to participate in investigative actions. *Id.* art. 92(4).

¹⁶³ *Id.* art. 47(4)(9). An arrested suspect must be questioned within twenty-four hours of the point of his actual arrest, *id.* art. 46(2), while an accused must be questioned “immediately after presenting the charges.” *Id.* art. 173(1).

a case file or dossier compiled by the state's investigator.¹⁶⁴ The Soviet version of this approach to criminal justice ostensibly undertook to compile a "complete and objective" case file,¹⁶⁵ but in reality blurred the responsibilities of the prosecution and the court.

The new Code works a 180 degree turnaround from Soviet practice, providing that: "A court is not an organ of criminal prosecution and shall not take the prosecution or defense side in a case. The court shall create the conditions necessary for the parties to perform their procedural duties and to exercise the rights granted to them."¹⁶⁶ Thus, the prosecutor has been stripped of his judicial powers to issue warrants, as previously noted. The state has formally lost its monopoly on gathering evidence for trial, a responsibility it must now share with the defense. Evidence is now expected to be presented by live witnesses from both sides, followed by cross-examination.¹⁶⁷

This change is most visible when it comes to jury trials, which the Code has returned to Russia after an absence of seventy-five years.¹⁶⁸ Once limited to a select few provinces, jury trials are now available everywhere in Russia except Chechnya.¹⁶⁹ Last year, jury trials accounted for 13.7% of subject-level court cases, up from 11.9% in 2005.¹⁷⁰ Statistics confirm the jury's

¹⁶⁴ See generally Раздел Второй, Уголовно-процессуальный Кодекс РСФСР (1960); see also *id.* art. 213(3) (investigator to conduct an "objective and complete" investigation of all sides); see also Burnham & Kahn, *supra* note 151, at 25–28.

¹⁶⁵ Раздел Второй, Уголовно-процессуальный Кодекс РСФСР art. 213(3).

¹⁶⁶ CrPC, art. 15(3).

¹⁶⁷ I have noted elsewhere the deep structural problems in combining such adversarial and common-law approaches to the collection and presentation of evidence with the continental European case file or dossier approach that Russia has retained. See Jeffrey Kahn, *Adversarial Principles and the Case File in Russian Criminal Procedure*, in THE COUNCIL OF EUROPE AND RUSSIA (Katlijn Malfliet & Ria Laenen eds., forthcoming 2008); see also Burnham & Kahn, *supra* note 151.

¹⁶⁸ Burnham & Kahn, *supra* note 151, at 75.

¹⁶⁹ The delay of their introduction in Chechnya was upheld as constitutional by the Constitutional Court. Постановление Конституционного Суда РФ от 6 апреля 2006 г. N 3-П "По делу о проверке конституционности отдельных положений Федерального конституционного закона "О военных судах Российской Федерации," федеральных законов "О присяжных заседателях федеральных судов общей юрисдикции в Российской Федерации," "О введении в действие Уголовно-процессуального кодекса Российской Федерации" и Уголовно-процессуального кодекса Российской Федерации в связи с запросом Президента Чеченской Республики, жалобой гражданки К.Г. Тубуровой и запросом Северо-Кавказского окружного военного суда," СОБР. ЗАКОН., 17 апреля 2006, N 16, ст. 1775.

¹⁷⁰ For statistics see, The Judicial Department of the Supreme Court of the Russian Federation, http://www.cdep.ru/material.asp?material_id=217 (last visited June 2, 2008).

independence. While the non-jury acquittal rate has traditionally been below 1%,¹⁷¹ the acquittal rate for juries ran around 20% for the first cases.¹⁷² The rate dropped in 2000 and 2001 to around 15%, and in 2002 to 8.5%.¹⁷³ But in more recent years, it has returned to its former levels, with a 22% rate for 2006.¹⁷⁴

One must take great care in describing the Code's remarkable reforms to make clear that what is required by law does not always reflect what transpires on the ground. My own field research, as well as anecdotal reports from others, confirms that the reality is much grimmer than these wonderful paper changes. What one sees in the average Russian courtroom (let alone police precinct house) is a far, far cry from what one might imagine from an academic reading of the code books. But that is a predictable conclusion, even if it is based only on the sheer volume and nature of petitions brought before the European Court, the very court whose caselaw and Convention mandate helped to catalyze the Russian reform in the first place. The ever increasing ranks of competent counsel can now provide solid defenses for clients accused of non-political crimes. But most Russians cannot afford counsel,¹⁷⁵ and even now, many counsel are far from competent.¹⁷⁶ There are still several generations of

¹⁷¹ The reported acquittal rate in 2002 in trials in district courts, where there is no right to a jury trial, was 0.71%. РОССИЙСКАЯ ЮСТИЦИЯ. The acquittal rate in district courts in 2006 was 0.5%. See Обзор деятельности федеральных судов общих юрисдикции и мировых судей за 12 месяцев 2006 г., Judicial Department of the Supreme Court of the Russian Federation, <http://www.cdep.ru/uploaded-files/statistics/анализ%20статистики%2012%20мес%202006г.xml> (last visited June 2, 2008).

¹⁷² See Burnham & Kahn, *supra* note 151, at 76, n.375 (citing Stephen Thaman, *The Resurrection of Trial by Jury in Russia*, 31 STAN. J. INT'L L. 61, 270–71 (1995)).

¹⁷³ For reviews for 1997–2001 and 2002, see Burnham & Kahn, *supra* note 151, at 76, n.376; Судебная статистика за первое полугодие 2002 года, РОССИЙСКАЯ ЮСТИЦИЯ 2003, № 1.

¹⁷⁴ Judicial Department of the Supreme Court of the Russian Federation, *supra* note 170.

¹⁷⁵ Russia's human rights commissioner, Vladimir Lukin, identified a growing rich-poor gap as Russia's primary social problem in 400-page report on human rights. *Russian Human Rights Ombudsman Release 2006 Report*, BBC WORLDWIDE MONITORING, Mar. 16, 2007. Vladimir Putin made the same point on October 18, 2007, and stated that the growing middle class represents a big challenge for Russia. *Putin Says Fighting Poverty in Russia is His Greatest Challenge*, BBC WORLDWIDE MONITORING, Oct. 18, 2007 (Transcript of RTR Rossiya television broadcast 0800GMT, Oct. 18, 2007) ("The most difficult [task] has certainly been fighting poverty. I have to point out, however, that we are consistently tackling this problem. Today it is not just about fighting poverty. Today it is about changing the situation in which we have a very great disparity between the incomes of those citizens of Russia whom we regard as rich and those whom we regard as low-income citizens.").

¹⁷⁶ See generally Басманное правосудие: уроки самообороны. Пособие для адвокатов: прочти и передай другому (Каринна Москаленко и Леонид Никитинский, ред. 2004).

police, prosecutors, judges and defense lawyers who were trained under the old regime. They have all staunchly resisted these reforms. But they are increasingly being displaced by a new cadre of younger professionals with institutional and ideological investments in the new system that should give one hope. Thus it is worth keeping Bagehot's cautionary words in mind.¹⁷⁷

Some comments should be made in conclusion regarding the state's willingness to ignore Code provisions in political cases. How do we reconcile the positive effects of such reforms in run-of-the-mill cases with the destructive effects of the transparently political machinations that trump these reforms in high-profile cases? As Feldbrugge himself points out, "[o]ne of the intriguing features of the politico-legal scene in Russia over the last decade has been that political struggles were often fought out in the criminal courts."¹⁷⁸ They need not have been fought there, of course, as a wide variety of authoritarian regimes in history have shown. And the use of the courts in this capacity is hardly new, Soviet "telephone justice" being well-known to all.¹⁷⁹

The short answer is that no such reconciliation is possible. Every time the system is abused in that way, the system corrodes and respect for the rule of law weakens. Scientists like Igor Sutyagin and Valentin Danilov have been convicted of selling state secrets in highly irregular proceedings.¹⁸⁰ Political activists on the internet are charged with "inciting hatred or animosity and humiliating human dignity" (a violation of Article 282 of the Criminal Code) when they post critical comments about the police.¹⁸¹ Aleksandr Nikitin and

¹⁷⁷ See BAGEHOT, *supra* note 31.

¹⁷⁸ Feldbrugge, *supra* note 141, at 209.

¹⁷⁹ An instructive example comes earlier, in 1878, in the case of Vera Zasulich, who had attempted to assassinate the military governor of St. Petersburg, whom she blamed for the unlawful flogging of a fellow student. The great Russian lawyer, Anatolii Fedorovich Koni, presided as judge at her jury trial. He was subjected to intense pressure by the regime to ensure a guilty verdict. Koni pledged only to ensure "the impartial observance of the law," which infuriated Count Konstantin Palen, the Minister of Justice, who stated: "Indeed, justice, impartiality! . . . but in this accursed affair the government has a right to expect special services from the court and from you . . . [T]here are cases which must be viewed . . . politically." *Quoted in* WILLIAM G. WAGNER, MARRIAGE, PROPERTY, AND LAW IN LATE IMPERIAL RUSSIA 8, 9 (1994). For Koni's reflections on the case, see А.Ф. Кони, Избранные произведения (A.F. Koni, [Izbrannii proizvedeniia] Selected Works) Vol. 2 (1959). For similar reflections, see also Donald Mackenzie Wallace, RUSSIA ON THE EVE OF WAR AND REVOLUTION 86-87 (Cyril E. Black, ed. 1961).

¹⁸⁰ See Kahn, *supra* note 4, at 398.

¹⁸¹ *Authorities Tighten Control over Blog Space*, BBC WORLDWIDE MONITORING, Apr. 14, 2007 (Translation of Russian Ren TV Television Broadcast on April 12, 2007). See also Lyudmila Alexandrova, *Criminal Case Opened Against User of Russian Internet Magazine*,

Grigorii Pasko, Mikhail Trepashkin and Larisa Arap,¹⁸² are all examples of how the state has weakened respect for the rule of law by using law as a political tool to oppress or suppress its opponents. If this continues, the slowly emerging atmosphere of a new legal culture for Russia will evaporate and the Criminal Procedure Code will take its place in the Potemkin village of other paper reforms in Russian history.

A more balanced answer must take into account that the new Criminal Procedure Code makes it harder, although not impossible, to conduct political trials. Higher pay for more independent judges makes it harder to find a venue in which the regime can be confident of success. An increase in both the number and level of competency of defense counsel with greater legal powers at their disposal makes it harder, although not impossible, to convict political defendants either in a court of law or in the court of public opinion. And while Putin has engaged in his vendettas, or allowed others to pursue theirs, he has also continued to support reforms that make it harder for him to do so. Such behavior is not schizophrenia. It shows a *realpolitik* side to Putin that is concededly far better than the alternative, even though one can hardly condone its immediate results for individual defendants or the attendant risks for the legal system as a whole. All of his anti-corruption campaigns, counter-terrorism measures, and renewed economic empowerment could have been used to much worse effect for the rule of law.

The most high-profile political case during Putin's term in office was the show trial of former Yukos chairman Mikhail Khodorkovskii, his business partners, and some of his lawyers.¹⁸³ Khodorkovskii is now more than halfway through his original eight-year sentence on charges ranging from tax evasion to fraud.¹⁸⁴ That an oligarch was convicted of these crimes is not particularly interesting, although elements of the law's manipulation are still shocking. In the shifting legal landscape of privatization, it is hard to imagine the rise of an oligarch with clean hands. What is interesting is the selection of Khodorkovskii, and Khodorkovskii alone, for prosecution. In a common law

ITAR-TASS (Russ.), Apr. 13, 2007.

¹⁸² Lynn Berry, *Psych Clinic Releases Russian Activist*, USATODAY.COM, Aug. 20, 2007, http://www.usatoday.com/news/world/2007-08-20-96402573_x.htm (recounting forty-six day forced hospitalization of member of Garry Kasparov's opposition group); Alex Rodriguez, *Russian Dissidents Called Mentally Ill; Soviet-era Practice Revived, Activists Say*, CHI. TRIB., Aug. 7, 2007, at Zone c, 1.

¹⁸³ Sophia Kishkovsky, *Parole Unlikely for Jailed Russian Oil Executive*, N.Y. TIMES, Oct. 26, 2007 (noting passage of halfway point in Khodorkovskii's eight-year sentence).

¹⁸⁴ *Id.*

system like the United Kingdom or the United States, selective prosecution may be defended as an inevitable exercise of prosecutorial discretion. But Russia claims to operate a system of mandatory prosecution that is closer to the continental European model.¹⁸⁵ Russia will, sooner or later, be forced to respond to the numerous violations of the European Convention alleged in petitions to the Strasbourg Court by lawyers for Khodorkovskii's criminal matter and lawyer's for Yukos's civil claims against the Russian state.¹⁸⁶ And although all of this is cold comfort to the man now imprisoned in eastern Siberia, the trial of Khodorkovskii did shine a harsh, dissecting light on the Basmann courthouse in particular, and the legal system in general.

The more light that is shined on the Russian system the better, it seems to me. The activities of Abramovich, Potanin, Friedman, and others could hardly have been considered to have raised less suspicion than Khordokovskii's. But no trials were held, in small part because of the obvious fear that they would unsettle a jittery post-privatization market, but much more so because of cronyism. Some oligarchs, who could hardly be considered cronies of the Kremlin, such as Berezovskii and Gusinskii, were forced into exile.¹⁸⁷ And Gusinskii, himself, before exile suffered a brief period of criminal detention to scare him into divesting his media holdings to the state.¹⁸⁸ That was conduct for which Russia was held accountable in the European Court, but which was in reality, a pyrrhic victory for Gusinskii.¹⁸⁹ In other words, when the state abuses legal process now, there are multiple legal resources for well-heeled defendants to shame the state, though not to fully remedy the abuse. That is a step in the right direction, although a small one.

The latest political case, of course, is one that has not been prosecuted in any country. That is the case assembled in the United Kingdom by the Crown Prosecution Service against Andrei Lugovoi for the radioactive murder of

¹⁸⁵ CrPC, art. 21, entitled "Obligation to Prosecute," requires the pursuit of every case in which evidence of a crime has come to light.

¹⁸⁶ In fact, the European Court has already handed down a judgment against Russia concerning one of Khodorkovskii's attorneys, Platon Lebedev, who was also charged and convicted in parallel proceedings. Lebedev successfully alleged that his detention at various stages of the criminal proceedings violated several provisions of Article 5 of the Convention. See *Lebedev v. Russia*, App. No. 4493/04, Eur. Ct. H.R. (2007).

¹⁸⁷ HOFFMAN, *supra* note 25, at 483, 492.

¹⁸⁸ *Id.*

¹⁸⁹ *Gusinskii v. Russia*, App. No. 70276/01, 41 Eur. Ct. H.R. 17, 281 (2004) (awarding Gusinskii €88,000 plus tax and interest as compensation for the violation of his Art. 5 rights caused by his detention, which led to the loss of his media empire).

Aleksandr Litvinenko in London.¹⁹⁰ In October 2007, the British Ambassador in Russia, Sir Tony Brenton, offered to buy a plane ticket to London for now Duma Member Lugovoi, glibly stating that an innocent man had nothing to fear from a fair trial.¹⁹¹ No doubt that statement rings true with many, and there is no reason to believe that a British trial would be anything other than absolutely fair and procedurally sound.

But that assurance entirely misses the point. British policy statements in this case risked undermining respect for the rule of law and British credibility in promoting it. The Russian Constitution sets forth an absolute prohibition on extraditions of Russian citizens.¹⁹² That fact was generally ignored or downplayed by the Foreign Office. One would think that it would be a sound policy decision not to encourage the Russians to breach their own constitution, which would set a rather awkward precedent given the concern at the time that Putin might amend or disregard the constitutional provision that limited his term in office to two consecutive terms.¹⁹³ The Kremlin should not be encouraged to pick and choose which constitutional provisions may be ignored and which should be followed.

Both Ambassador Brenton and former Secretary-General of the Council of Europe Daniel Tarschys also pointed to the European Convention on Extradition, to which Russia is a party.¹⁹⁴ Professor Tarschys wrote that Russia's ratification of three treaties on extradition, along with the reservations and declarations attached to them, "do not seem to vindicate the refusal to extradite Mr. Lugovoi" and that Russian objections to British extradition requests "should at any rate be based on these texts rather than on the Russian constitution."¹⁹⁵ That would be a very strange reading of the treaty, to which Russia lodged a declaration attached to its instrument of ratification.¹⁹⁶ The

¹⁹⁰ *Obituary: Alexander Litvinenko*, INDEPENDENT (U.K.), Nov. 25, 2006; *Spy Death: Russia Blocks Extradition*, CNN.COM, May 22, 2007, <http://edition.cnn.com/2007/WORLD/europe/05/22/uk.spy/index.html>.

¹⁹¹ Сэр Тони Брентон, посол Великобритании в России: Луговому нечего бояться справедливого суда, *Комсомольская правда*, available at <http://www.kp.ru/daily/23980/74497> (last visited Apr. 17, 2008).

¹⁹² Конст. РФ, статья 61(1).

¹⁹³ Конст. РФ, статья 81(3).

¹⁹⁴ European Convention on Extradition, Dec. 13, 1957, E.T.S. No. 024, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm>.

¹⁹⁵ Daniel Tarschys, Letter to the Editor, *Article Opens Door to Extradition of Lugovoi*, FIN. TIMES (London), July 19, 2007, at 12.

¹⁹⁶ Declarations and Reservations Contained in the Instrument of Ratification to the European Treaty on Extradition, Deposited on 10 December 1999, available at <http://conventions.coe.int/>

declaration explicitly stated that, per the Russian Constitution, “a citizen of the Russian Federation may not be extradited to another State.”¹⁹⁷ In fact, the treaty expressly provides that “[a] Contracting Party shall have the right to refuse extradition of its nationals” and makes provision for precisely the sort of declaration that Russia lodged.¹⁹⁸ The plain meaning of these provisions seems sufficiently clear such that it is difficult to see how they could be read to compel action other than that which Russia has already taken. However *factually* unsatisfying this interpretation and result is to so many involved, it is *legally* correct. There is an American legal saying: bad facts make bad law. The murder of Litvinenko is replete with bad, even horrible facts, and one may well be concerned that the rush to take a tough law-and-order stance with Russia, popular though it may be, will ultimately undermine the respect for the laws that surround such cases.

IV. CONCLUSIONS

It would be an unconscionable omission to close this discussion without a few remarks about the presidential elections held March 2, 2008, which led to the election of Dmitrii Anatolevich Medvedev as Russia’s third post-Soviet President.¹⁹⁹ Many speculated that they would not be held at all. Thus, the

Treaty/Commun/ListeDeclarations.asp?NT=024&CM=8&DF=10/14/2007&CL=ENG&VL=1.

¹⁹⁷ *Id.* (“With respect to sub-paragraph ‘a’ of paragraph 1 of Article 6 of the Convention the Russian Federation declares that in accordance with Article 61 (part I) of the Constitution of the Russian Federation a citizen of the Russian Federation may not be extradited to another State.”).

¹⁹⁸ European Convention on Extradition, *supra* note 194, art. 6(1)(a).

¹⁹⁹ The Federal Central Election Commission reported the official results of the election. The Commission announced that out of over 74.7 million voters participating, Dmitrii Medvedev had won over 52.5 million votes, or 70.28%. Постановление Центральная Избирательная Комиссия Российской Федерации «О результатах выборов Президента Российской Федерации», № 104/777-5, 7 марта 2008 г., *available at* <http://www.cikrf.ru/postancik/Zp080777.jsp>. Both the conduct of the election campaign and the election itself were subject to fierce criticism by Russian and international analysts. A delegation of the Parliamentary Assembly of the Council of Europe criticized the presidential campaign and election both before and after the polls held on March 2, 2008. *See* Press Release, PACE Pre-Election Delegation Concerned By Limited Choice in Russian Presidential Election, Feb. 8, 2008, *available at* <http://assembly.coe.int/ASP/Press/StopPressView.asp?ID=2008> (“An election where candidates are confronted with almost insurmountable difficulties when trying to register risks not qualifying as free. An election where there is not a level playing field for all contestants can hardly be considered as fair.”); *see also* Press Release, Russian Presidential Election: For an Election to be Good it Takes a Good Process, Not Just a Good Election Day, March 3, 2008, *available at* <http://assembly.coe.int/ASP/Press/StopPressView.asp?ID=2013> (characterizing the election as a “plebiscite” and

sheer occurrence of an election, notwithstanding allegations of polling station improprieties (or worse), is worth noting. Although it might not be entirely safe to say that the Putin era is over, a sharp line of demarcation was drawn by this election between that time and whatever follows after.²⁰⁰ The elections have deliberately been left to the conclusion of this Article, for reasons that should become clear.

Right up to the end, the question for many was whether Vladimir Putin was the least worst practical alternative to lead Russia for the next four years. That is essentially the same question that was asked a decade ago. On the eve of the 1996 Russian presidential elections, it was Boris Yeltsin who was considered the least worst practically available leader for Russia.²⁰¹ Much was forgiven in efforts spent to stave off his defeat at the hands of Gennadii Zyuganov.²⁰² This round it is worse, of course, because, in that case, Yeltsin did not need to risk even the appearance of fiddling with laws that prohibited his retention of power. The same pathological questions about ends and means, acceptable election results, and cataclysmic alternative futures had saturated talk of Putin's future, just as they did Yeltsin's. Six months before the elections, this pathology had even infected the popular internet site "YouTube," where people can post homemade videos on the internet. One might be surprised by how many people devote their time to making funny, musical, or other types of videos about Vladimir Putin. One that caught the eye spliced Putin's words together with a tune of a nice reggae beat to depict him serenading his audience with an answer to a question posed by NTV's Vladimir Kondratev: "Кто мог бы быть президента? Кто может быть? Я!"

that it repeated "most of the flaws revealed during the Duma elections of December 2007").

²⁰⁰ On April 15, 2008, Putin was unanimously elected chairman of the United Russia political party, which controls 315 of the 450 seats in the Duma, the lower house of the Russian Parliament. Sophia Kishkovsky, *Putin Agrees to Lead Party*, INT'L HERALD TRIB., Apr. 15, 2008, available at <http://www.ihf.com/articles/2008/04/15/europe/russia.php>; *Putin Elected to Lead United Russia*, KOMMERSANT, Apr. 15, 2008, available at http://www.kommersant.com/p-12358/r_527/Putin_United_Russia/. Hours after taking the oath of office, Dmitrii Medvedev nominated Putin to become Russia's Prime Minister. *Medvedev Becomes Russia's Leader*, BBC NEWS, May 7, 2008, <http://news.bbc.co.uk/2/hi/europe/7386940.stm>. Putin was confirmed the following day with 392 votes in support of his confirmation. See Утреннее пленарное заседание Госдумы 8 мая 2008 года, available at <http://www.duma.gov.ru/>.

²⁰¹ See generally MICHAEL MCFAYL, RUSSIA'S 1996 PRESIDENTIAL ELECTION: THE END OF POLARIZED POLITICS (1997); MICHAEL MCFAYL, RUSSIA'S UNFINISHED REVOLUTION: POLITICAL CHANGE FROM GORBACHEV TO PUTIN 289-304 (2001).

²⁰² HOFFMAN, *supra* note 25, at 306-20.

("Who might be president? Who? Me!").²⁰³ When last viewed, it had already received over 200,000 hits!²⁰⁴

None of this would matter, of course, if Putin's last eight years had not brought a sense of stability and predictability to most Russians after the upheavals of the 1990s. Those two characteristics are commonly considered to be two of the great benefits of the rule of law in a society. According to a poll by the Levada center this past August, 82% of Russians approved of Vladimir Putin's leadership.²⁰⁵ This is an almost fourteen-fold increase from his starting point eight Augusts earlier, when only about 6% of Russians could even say who he was.²⁰⁶ There are obvious economic reasons for this popularity. Putin has presided over the most stable period of economic life that Russians have experienced since *perestroika*.²⁰⁷ The stabilization fund meant to backstop this success is bulging.²⁰⁸ It has also been a time, not just of stability, but of stable economic improvement.²⁰⁹ Birth rates, according to the President, are the highest they have been in fifteen years.²¹⁰

²⁰³ See Video Clip: Putin (YouTube 2006), http://www.youtube.com/watch?v=-ctFr2eO_L8 (last viewed June 2, 2008).

²⁰⁴ *Id.*

²⁰⁵ Alexander Osipovich, *Putin's 8 Years a Hit with Business*, MOSCOW TIMES, Aug. 17, 2007.

²⁰⁶ *Id.* (citing Public Opinion Foundation Poll dated August 18, 1999).

²⁰⁷ Putin himself boasted about reversing capital flight from Russia and the "immense growth" in Russia's stock market capitalization under his administration. See Response by Vladimir Putin to KOMMERSANT Correspondent, Interview with Newspaper Journalists from G8 Member Countries, June 4, 2007, http://www.kremlin.ru/eng/speeches/2007/06/04/2149_type82916_132716.shtml.

²⁰⁸ Catherine Belton, *Russia Torn Over How to Invest its Oil Riches*, FIN. TIMES (London), Sept. 18, 2007, at 13 (noting that in the years since 2003, Russia has accumulated \$127.5bn (£92bn, £64bn) in oil revenues in the stabilization fund).

²⁰⁹ David Kramer, Dep. Assis. Sec. of State for Eur. & Eurasian Aff., Remarks to the Baltimore Council on Foreign Affairs: The U.S. and Russia (May 31, 2007), available at <http://www.state.gov/p/eur/rls/rm/85874.htm> ("While the latest figures aren't in yet, we know that U.S. investment in Russia shot up by 50% in 2005. Many of our top companies are increasing their stake in the Russian Federation, including such mainstays of our economy as Alcoa, International Paper, Coca-Cola, GM, Proctor and Gamble, which employs more than 20,000 Russians, and Boeing, which employs 1,300 and last year signed an \$18 billion deal (that's billion, with a "b") to buy titanium from Russia. And just the other day, Boeing initialed a contract valued at as much as \$2.4 billion with Russian airline S7, Russia's second largest, for the purchase of at least 15 long-range jets. Many firms that vowed they'd never go back to Russia after the 1998 financial meltdown are damn glad they did -- for the Russian market has been an incredibly lucrative one in recent years.").

²¹⁰ Прямая линия с Президентом России (Стенограмма прямого теле- и радиозэфира Oct. 18, 2007), available at http://www.kremlin.ru/appears/2007/10/18/1259_type63381type

It is not surprising to anyone that a man with approval ratings that consistently hover in the upper seventieth percentile should be tempted to remain in power. But it is shocking to a lawyer's ears to hear the drumbeat and clamor in the run-up to the election for him to do so by simply ignoring or quickly amending the provisions of the Russian Constitution; these ideas have grown from quarters that really should know better. Anatol Lieven has argued in the *Financial Times* that constitutional amendment is a better option than simple retirement for Putin and the country.²¹¹ Norman Stone asked in *The Times*, "Why should a successful president be held back by some constitutional formality?" and answered his own question with the old fallacy from extremes: "There is no real reason for constitutions to be set in tablets of stone."²¹²

No doubt, that answer is true of any constitution. The Russian Constitution, barely fifteen years old, is not exactly pre-ordained for entablature. But it would hardly seem wise to encourage a precedent of political elites modifying the Constitution and organic statutes to serve their own short-term preferences to retain their offices.

An implicit theme of this Article has been to emphasize the importance of institutions over individuals in the establishment of the rule of law; hence the appropriateness of delaying until the conclusion of this Article a discussion of some of the political personalities that have driven legal reforms. Although political scientists generally agree that the rule of law is an indispensable variable in the consolidation of democracy, they not infrequently search for indicia of it in the highest echelons of power, most remote from the lives of everyday people and the legal and judicial institutions that most directly affect its existence. That is not to say that the selection of a president is unimportant. But an observer of American presidential elections would be rash to judge the

82634type146434_148629.shtml ("Что мы наблюдаем за последнее время? Коэффициент рождаемости – самый высокий за последние 15 лет, а коэффициент смертности самый низкий – с 1999 года. Снизилась и детская смертность.").

²¹¹ Anatol Lieven, *The Wrong Way for Putin to Retain Influence*, FIN. TIMES (London), Oct. 10, 2007, at 11.

²¹² Norman Stone, *Vladimir Putin Rescued Russia from Disaster: So Let's Just Leave Him Be*, TIMES (London), Oct. 4, 2007. See also Ethan S. Burger, *Russia Profile Weekly Experts Panel: Putin Forever?*, RUSSIANPROFILE.ORG, Oct. 12, 2007, <http://www.russiaprofile.org/page.php?pageid=Experts%27+Panel&articleid=a1192189263> ("The Russian constitution is not a sacred document. Some will argue that the events between October-December 1993, where a flawed referendum followed the use of force against the Russian Supreme Soviet, gives the present constitution an aura of illegitimacy that anyone concerned with the rule of law cannot help but be troubled by. . . . If United Russia overwhelmingly controls the State Duma after the next round of legislative elections, then the constitution should be amended.").

establishment of the rule of law in the United States by either its odd electoral system, in which the person who wins the largest percentage of the popular vote does not necessarily become president, or the legal rumblings that have followed recent presidential elections. It is to say, however that better measures of Russia's legal culture are to be found outside high politics, as the three windows on Russia opened above are intended to suggest. The mundane is what matters more.

Theories abounded in the months before (and after) the election about how Putin might retain power. These theories include procedurally clean amendment of the Constitution that would be retroactively applicable to him, a bait-and-switch scheme from the position of Prime Minister, retention of office under some sort of national crisis justification, and even simply seizing power on the grounds of overwhelming popularity. Putin could have borrowed a page from the political playbook of Singapore's Lee Kuan Yew. The first prime minister of Singapore capped his premiership by creating the post of Senior Minister upon his transfer of power to his successor, Goh Chok Tong. After Mr. Goh's transfer of power to a new Prime Minister (always within the party that has always ruled Singapore, and this time to Lee Kuan Yew's son, Lee Hsien Loong), Mr. Goh became Senior Minister and another post was created for then Senior Minister Lee, that of Minister Mentor.²¹³ So there is a template here if the largest country in the world wanted to imitate one of the smallest. Those who see Prime Minister Putin as pulling the strings of a puppet-presidency fronted by Medvedev may well believe such an approach was not entirely rejected.²¹⁴

²¹³ *Founding Father Lee Kuan Yew to Mentor Son's Cabinet*, AGENCE FRANCE PRESSE, Aug. 10, 2004, available at <http://www.singapore-window.org/sw04/040810a1.htm>.

²¹⁴ This Article is not the place to make predictions about the future of Russian legal reform under President Medvedev. But one of his early speeches is particularly worth noting for its parallel with an early speech delivered by Putin. When Vladimir Putin was a candidate for President, he famously asserted that he would preside over a "dictatorship of law." See Vladimir Putin's Open Letter to Russian Voters, *supra* note 45. The phrase was pregnant with meaning and many, including this author, speculated about what it might mean. See Kahn, *supra* note 72, at 2; Kahn, *supra* note 4, at 394. In a speech given a little over two weeks before the March 2008 presidential elections, then-candidate Medvedev similarly emphasized respect for, and supremacy of, the law, observing that "I have spoken many times about the sources of a legal nihilism in our country that remains a distinguishing feature of our society." See Dmitrii Anatolevich Medvedev, former Russian presidential candidate, Speech at the V Krasnoyarsk Economic Forum (Feb. 15, 2008) (transcript available at http://www.medvedev2008.ru/english_2008_02_15.htm). His "legal nihilism" speech—and what it foretells about his law reform agenda—may be parallel to Putin's "dictatorship of law" program.

Law should stand above power and powerful politicians. It should not only constrain present office holders, but it should also provide a stable and useful forecast for what future office holders can expect. One useful rule-of-thumb for consolidated democracies is that two multi-party, contested elections have been held resulting in the peaceful turnover of power between competing political forces.²¹⁵ The routinization of such a process of electoral change is crucial.²¹⁶ A democratic opposition can really only be expected to play a game it has lost the first time if there are reasonable expectations of achieving power in the future. Russia is now a far cry from that benchmark, thanks to Putin. But were Putin to have used the easy option of cancelling constitutional limitations on his power, that move would have been far worse than statutory fiddling with electoral thresholds and single-member mandates. It would signal that the constitution could no longer be trusted to do what it was designed to do: bind the hands of present office holders who might otherwise alter institutional rules of the game to augment their own powers. The whole point of a constitution is to prevent that type of abuse by, in a sense, binding Ulysses to the mast so he cannot succumb to the Sirens' song.

Therefore, from the point of view of building the rule of law, the counter-intuitive answer is that a procedurally legitimate constitutional amendment to benefit the current office-holder would have been the worst choice. The reason is that such an approach would advance the notion that constitutional requirements really should be no more constraining than ordinary statutes. The rule of law is built by more than that. A constitution should have a "higher law" foundation. If the 1993 Constitution has been stuck under a cloud by virtue of the manner of its establishment, then its amendment under current conditions would work only to darken that cloud.

²¹⁵ SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 266–67 (1991) ("One criterion for measuring this [democratic] consolidation is the two-turnover test. By this test, a democracy may be viewed as consolidated if the party or group that takes power in the initial election at the time of transition loses a subsequent election and turns over power to those election winners, and if those election winners then peacefully turn over power to the winners of a later election. Selecting rulers through elections is the heart of democracy, and democracy is real only if rulers are willing to give up power as a result of elections.").

²¹⁶ *Id.* at 266 ("Anti-incumbent and antiestablishment responses are the classic democratic reactions to policy failure and disillusionment. Through elections one set of rulers is removed from office and another is installed in office, leading to changes if not improvements in government policy. Democracy is consolidated to the extent these in-system responses become institutionalized.").

President Putin left office when his term expired on May 7, 2008. That in itself is a form of legal reform; few Russian leaders have ever left office of their own accord, and none who were relatively young, physically able, and politically very strong. If he desires to be president again in the future, he should resist the clarion call to interrupt the presidency of his successor. It is best for the rule of law that Putin make a clean and sharp break from the presidency, and from the temptation to claim for his premiership duties that have previously been lodged in the president's portfolio. That would do more to strengthen the institutions that he is leaving than he can accomplish by seizing more power. His views may well be colored by fears for his legacy or his continued influence, or even his safety, and that may lead him to linger in one capacity or another. *How* he conducts himself *under* a new president will be as important to his legal reform legacy as the work accomplished in his two terms as president.

Putin's legacy as someone who supported these legal codes and institutions, and who paid his dues and judgments to the Council of Europe and its Court, will be weakened if he stays in command and strengthened if he leaves President Medvedev the same powers that he enjoyed himself. His legacy has already been strengthened by leaving at the end of his second term because that legacy will grow brighter with age. If President Medvedev seeks to pare back the legal reforms that Putin put in place, he will be the one to explain why he needs even weaker institutions than his strong predecessor built and then governed under to so much popular success.

If the answer is that Russia is not ready, that there is no alternative, or that Putin is well-intentioned in lingering on the basis of unprecedented popular support, then one must respond by saying that there is indeed a road that is paved with such good intentions, but it does not lead to the rule of law.