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## The Search for the Rule of Law in Russia

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## THE SEARCH FOR THE RULE OF LAW IN RUSSIA\*

JEFFREY KAHN<sup>†</sup>

### ABSTRACT

There exists broad consensus in political science that the rule of law is as essential to a consolidated modern democracy as electoral politics or a robust civil society. Paradoxically, however, the rule of law as an institution has not been subjected to nearly the same rigorous study as those other popular variables. Although frequently used, the term is rarely defined. Political scientists declare the general importance of the rule of law, but reduce their focus to the “rules of the game” for political elites and the adoption of select laws and judicial institutions. Frequently, an instrumentalist metaphor is deployed: the law is a sword, or shield, or tool to advance democratic ends, by which the law’s utility can be measured.

This Article presents two related arguments against such approaches to the study of the rule of law in Russia. First, predictions about Russian democracy will be more prone to error if specialists on Russia urge the development of the rule of law but limit themselves to cramped understandings of the full parameters of this institution. Second, instrumentalist metaphors of the rule of law hinder our understanding of the importance of the rule of law for a would-be democracy like Russia. The rule of law is better understood there not as an instrument wielded by or against the state, but as a causeway. The primary value of this causeway stems from the security its existence provides citizens to move freely among state and non-state institutions in daily life, commerce, and politics.

Exactly what sort of an institution is the rule of law? What is the extent of its value in a teetering electoral democracy like Russia? How can its existence – let alone its efficacy – be measured in such a state? These are the questions addressed in this Article from theoretical,

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\* The ideas expressed in this Article originated in a lecture given at St. Antony’s College, Oxford University, on June 25, 2005, as part of the conference ‘Political Leadership, Political Institutions, and Political Culture in the Soviet Union and Russia,’ a conference to mark the retirement of Professor Archie Brown.

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historical, and contemporary political perspectives

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I. INTRODUCTION

At the climax of Robert Bolt’s play, *A Man For All Seasons*, Cromwell plays the part of prosecutor at the show trial of Sir Thomas More. “I put it to the Court,” Cromwell says, “that the prisoner is perverting the law – making smoky what should be a clear light to discover to the Court his own wrongdoing!” To this attack, More stoically replies, “The law is not a ‘light’ for you or any man to see by; the law is not an instrument of any kind. The law is a causeway upon which, so long as he keeps to it, a citizen may walk safely.”<sup>1</sup>

Citizens do not walk safely in the Russian Federation. From the most basic transactions of daily life to the most complex commercial affairs, all are subject to arbitrary and capricious interference by the state. Corruption is widespread.<sup>2</sup> The courts are widely mistrusted to resolve either the legal disputes that arise between private citizens or to remedy

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1. ROBERT BOLT, *A MAN FOR ALL SEASONS*, Act II 152-53 (Random House 1962).

2. See, e.g., Stephen Sestanovich, *Russian Democracy in Eclipse: Force, Money, and Pluralism*, J. DEMOCRACY, July 2004, at 33. An anti-corruption campaign took pride of place in President Vladimir Putin’s State-of-the-Nation Address on April 25, 2005. See *Putin Focuses on Domestic Policy in State-of-Nation Address to Russian Parliament*, BBC MONITORING INTERNATIONAL REPORTS, Apr. 25, 2005 (“Our bureaucracy remains a closed and sometimes simply arrogant caste which sees state service as a kind of business. . . . Our plans do not include handing the country over to inefficient and corrupt bureaucrats.”).

## RULE OF LAW IN RUSSIA

the wrongs a citizen may suffer at the hands of state officials.<sup>3</sup> If the citizen should seek a political solution to this insecurity, whether through grassroots activism or periodic electoral campaigns, he subjects himself to the state's wide array of what has euphemistically been gathered under the heading "administrative resources," i.e. a canting political playing field of *компромат* [*kompromat* – blackmail], increasingly restrictive election laws, structural fraud, and occasional violence.<sup>4</sup> Whether private individuals or public dissidents, oligarchs or *силовики* [*siloviki* – military or security services], citizens of the Russian Federation lack the ability to plot a course in private life, business, or politics that, so long as they keep to it, will secure their legal rights and protect them from loss, seizure, or arrest. Such a state of affairs is, to put it mildly, a problem for a would-be consolidated democracy.

Bolt's metaphor of the rule of law as a causeway presents in a nutshell the argument I advance in this Article. This Article is about the value of the rule of law as an institution in a country that asserts – in the first clause of the first article of the first chapter of the first section of its constitution – to be a democratic, federal, rule-of-law state.<sup>5</sup> Last month, President Putin unabashedly insisted that such a statement is not merely aspirational.<sup>6</sup> And yet, experts on Russian politics spare surprisingly little attention to the questions that Russia's constitutional

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3. Robert Coalson, *Vast Majority of Russians Have No Faith in Judicial Independence*, RFE/RL NEWSLINE, Jun. 3, 2005, <http://www.rferl.org/newsline/2005/06/030605.asp> (Poll of 1600 respondents, conducted prior to the conviction of Yukos executives Khodorkovskii and Lebedev, indicating that 69.8% of respondents fear becoming victims of corruption in law enforcement agencies, and believe that the state "constantly" (nearly 36% of respondents) or "frequently" (13.9%) uses the courts or police for political ends.). See also Richard Rose, Neil Munro & William Mishler, *Resigned Acceptance of An Incomplete Democracy: Russia's Political Equilibrium*, 20 POST-SOVIET AFF. 195, 200 (2004) (91% of respondents to 2004 nationwide survey of face-to-face interviews believe state officials selectively enforce the law and 84% believe bribe-takers go unpunished).

4. Two instructive examples, out of many, are the quixotic fate of Aleksandr Arinin's campaign for president in the republic of Bashkortostan in spring 1998 and the violent death of Yabloko activist and journalist Larisa Yudina in Kalmykia on 8 June 1998. For interviews with both activists and brief summaries of their fates, see JEFFREY KAHN, *FEDERALISM, DEMOCRATIZATION, AND THE RULE OF LAW IN RUSSIA*, 214-20, 231-33 (2002).

5. KONSTITUTSIA ROSSIISKOI FEDERATSII [Constitution] §1, Ch. 1, art. 1, cl. 1 (Russian Federation) ("Российская Федерация – Россия есть демократическое федеративное правовое государство с республиканской формой правления.") ("The Russian Federation – Russia is a democratic federative law-governed state with a republican form of government.").

6. For Putin's view, see *60 Minutes: President Putin* (CBS television broadcast May 9, 2005), available at [http://kremlin.ru/eng/speeches/2005/05/09/0842\\_type82916\\_87807.shtml](http://kremlin.ru/eng/speeches/2005/05/09/0842_type82916_87807.shtml).

Of course, Russia is a democracy. This is a state that has freed itself from the situation where it was for 80 years when one political force dominated the scene and had a

and presidential assurances must provoke: Exactly what kind of institution is the rule of law? What is the extent of its value in a teetering Russian democracy? How can we measure the existence (let alone the efficacy) of the rule of law in such a state?<sup>7</sup> This is despite the increasing importance of law in Russian life and a broad consensus in political science that the rule of law is essential to a consolidated modern democracy.<sup>8</sup>

The choice between these two metaphors – between law as a tool and law as a causeway – is, and has always been, a crucial one for Russia's

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monopoly on power in the country. There is no doubt that Russia has entered a completely different stage.

It goes without saying that the development of democratic institutions in this country is at an early stage. But they are growing stronger and asserting themselves. The people have not just chosen democracy. There is no doubt that the main democratic institutions are already in place. Even the mentality of our society has become democratic.

We have a multi-party system. It is still weak and requires consolidation but this is an absolute fact. We conduct very important democratic law-based elections to a representative body of government, the parliament. The head of state, who is entitled to be in power for no more than two four-year terms in succession, is democratically elected as well.

Our judicial system is making headway, even though there have been some problems. I'd like to point out that we have an independent legal system.

We haven't just created conditions but achieved a real division of power between the executive, legislative (representative) and judicial bodies of government. This fact, as well as the mass media, and the development of democratic institutions and a civil society, are the main indications of the Russian Federation's democratic development.

Therefore, it is beyond any doubt that Russia is a democratic state. *Id.*

7. I adopt Rawls' broad definition of an institution:

[A] public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like. These rules specify certain forms of action as permissible, others as forbidden; and they provide for certain penalties and defenses, and so on, when violations occur. As examples of institutions, or more generally social practices, we may think of games and rituals, trials and parliaments, markets and systems of property. An institution may be thought of in two ways: first as an abstract object, that is, as a possible form of conduct expressed by a system of rules; and second, as the realization in the thought and conduct of certain persons at a certain time and place of the actions specified by these rules.

JOHN RAWLS, A THEORY OF JUSTICE § 10, at 47-48 (revised ed. 1999).

8. See, e.g., Valerie Bunce, *Comparative Democratization: Big and Bounded Generalizations*, 33 COMP. POL. STUD. 703, 714 (2000) ("Without rule of law, democracy cannot be fully realized."); Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95, 99 (Mar./Apr. 1998) ("In many countries, people still argue over the appropriateness of various models of democracy or capitalism. But hardly anyone these days will admit to being against the idea of law.").

political development. History shows that, with few exceptions, Russia's leaders have chosen the former, instrumentalist metaphor. Russian even provides a proverb, still in use today, for this understanding of law as a tool: "закон как дышло – куда повернул, туда и вышло" [*zakon kak dyshlo – kuda povernul, tuda i vyshlo*: The law is like the shaft of a wagon; it goes wherever you turn it.].<sup>9</sup>

Experts on Russian politics are also surprisingly unreflective in their use of this metaphor in advocating the rule-of-law course that Russia should pursue today. One respected American scholar, for example, urges that "[t]o build a state that abides by the rule of law, individual Russian judges, lawyers, and citizens must adopt a fundamentally new relationship with the law and make it a tool of defense that emanates from society rather than an instrument of control in the hands of the state."<sup>10</sup> For this scholar and for many others, the only metaphor is law as a tool, whereby the value of law depends upon who wields the tool and for what purpose.<sup>11</sup> This instrumentalist metaphor typically takes the form of either sword or shield – or the shaft of a wagon – wielded by or turned against the state.<sup>12</sup>

Metaphors matter because they frame the way we think about problems. The metaphor of law as a tool is the wrong one to use when arguing for the sort of rule of law needed for a consolidated Russian democracy. It is uncontentious today to critique the use of law as a political tool in Imperial Russia, during the Bolsheviks' consolidation of their power, or in an increasingly ossified and stagnant Soviet system. An instrumentalist conception of law is even less appropriate to de-

9. See, e.g., Vyacheslav Kostikov, "Dva Putina, dve strany," ARGUMENTY I FAKTY, Feb. 9, 2005, available at [http://www.aif.ru/online/aif/1267/04\\_01](http://www.aif.ru/online/aif/1267/04_01) (the article replaces закон [*zakon* – statute] with суд [*sud* – court], but without meaningful difference).

10. MICHAEL McFAUL, RUSSIA'S UNFINISHED REVOLUTION: POLITICAL CHANGE FROM GORBACHEV TO PUTIN 328 (2001).

11. See, e.g., José María Maravall & Adam Przeworski, *Introduction to DEMOCRACY AND THE RULE OF LAW* 3, 15 (José María Maravall & Adam Przeworski, eds., 2003) ("When power is monopolized, the law is at most an instrument of the rule of someone. Only if conflicting political actors seek to resolve their conflicts by recourse to law, does law rule. . . . Rule of law can prevail only when the relation of political forces is such that those who are most powerful find that the law is on their side or, to put it conversely, when law is the preferred tool of the powerful. . . . The conflict between rule of majority and rule of law is just a conflict between actors who use votes and laws as their instruments.").

12. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 38-39 (1983) (arguing that the concept of law transcendent over politics and distinct from the state's powers has been substantially weakened in the twentieth century and replaced with a view of law as an instrument of the state, which Berman characterizes as a significant threat to the Western legal tradition).

scribe the institutions and practices that are critically important to an aspiring post-Soviet Russian democracy, all the more so when the understanding of law as a tool is nearly ubiquitous among Russia's current leaders and wealthiest private citizens. For a Russian state of limited economic resources, severe institutional and attitudinal constraints, and a political legacy of authoritarianism, it is the rule of law envisioned in the metaphor of a causeway – and not in the metaphors of weaponry – that reformers should strive to achieve. In this Article, I briefly trace this history to highlight the consequences of legal instrumentalism in Russia's political past and to present the argument for the better metaphor of the causeway for the rule of law that Russia needs in its first forays into democratic governance.

## II. THE RULE OF LAW

There is broad consensus in political science that the rule of law is as integral to effectively functioning modern democratic systems as electoral politics and a robust civil society.<sup>13</sup> Paradoxically, however, the concept has not been subjected to the same rigorous study as those other, more popular political science variables. When political scientists and policy-makers promote the development of the rule of law in Russia, their analysis of this institution is frequently too reductionist. Analysts typically limit their interest in the rule of law to its effect on elites negotiating the “rules of the game” in electoral contests over control of the upper echelons of political institutions. This reductionism also manifests itself in another way: the willingness to proclaim the existence of the rule of law merely on the positivist evidence of the adoption of new laws and codes and judicial institutions alone. But the rule of law is not the sort of institution that can be established by putting pen to paper or setting bricks on mortar. That has been a painful, and painfully expensive, lesson for Russian would-be reformers

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13. See, e.g., Bunce, *supra* note 8; Carothers, *supra* note 8, at 95 (“One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world’s troubles.”); JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 10 (1996) (“To achieve a consolidated democracy, the necessary degree of autonomy and independence of civil and political society must further be imbedded in and supported by the rule of law. . . .”); JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 139 (2003) (noting importance of legal institutions to a market economy, from enforcement of contracts and shareholder rights to orderly bankruptcy procedures to bank and securities regulation); Francis Fukuyama, *The Art of Reconstruction*, WALL ST. J., July 28, 2004, at A12 (emphasizing the “new consensus” on the importance of rule of law as an institution).

and an international community of legal aid donors to learn.<sup>14</sup>

Area-studies specialists and comparativists alike frequently use the term 'rule of law' without seriously attempting to define it.<sup>15</sup> Although everyone agrees that the rule of law is important, its existence in a polity is a question that tends to be answered the way U.S. Supreme Court Justice Potter Stewart once defined pornography: "I know it when I see it."<sup>16</sup> When definitions are offered, they are often unhelpfully conclusory and imprecise.<sup>17</sup> A frequent tendency is to focus exclusively on the problems of drafting a viable constitutional structure, with the tacit expectation that the rule of law will trickle down from the institutions of high politics.<sup>18</sup> An emphasis on constitutionalism leads to undue

14. Carothers, *supra* note 8 at 104 (critiquing legal aid donors of model codes and training courses that produce only "modest" results, especially in Russia, "probably the single largest recipient of such aid, . . . [and] not even clearly moving in the right direction."). See also Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 1, 3 (Feb. 1998) (advocating "the prudent choice . . . to defer legal projects that are costly and ambitious and instead to begin modestly," noting "the risk that too heavy an initial investment in legal reform could deprive the productive economy of necessary resources and thus stifle legal and economic reforms . . .").

15. See, e.g., Vladimir Gel'man, *Regime Transition, Uncertainty and Prospects for Democratization: The Politics of Russia's Regions in a Comparative Perspective*, 51 EUROPE-ASIA STUDIES 939, 939-956 (1999); JOHN LOWENHARDT, *THE REINCARNATION OF RUSSIA* 26-28 (1995); LILIA SHEVTSOVA, *PUTIN'S RUSSIA* 65-66, 258-59 (2003); Gordon B. Smith, *Russia and the Rule of Law*, in DEVELOPMENTS IN RUSSIAN POLITICS 5 108 (Stephen White et al. eds. 2001); M. Steven Fish, *The Travails of Liberalism*, J. DEMOCRACY, Apr. 1996, at 105, 113-15 (advocating a "rights-based liberalism" for Russia without any reference to the rule-of-law mechanisms essential for such a project).

16. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

17. Even one of the better working definitions, by Linz and Stepan, overemphasizes the high politics of constitutionalism and underemphasizes the equally important role of an everyday legal culture, non-governmental legal institutions, and the self-binding commitment of the state vis-à-vis citizens (and not just as against its organized political opponents). See LINZ & STEPAN, *supra* note 13, at 10. Linz and Stepan refer to constitutionalism as the "primary organizing principle" of their rule-of-law arena and the focus of their concern is almost exclusively on the self-binding constraints of politicians. *Id.* at 248, esp. n.31. In a previous incarnation of this seminal work, the authors use the broader term "rule of law" interchangeably with the narrower term "Rechtsstaat," although it seems unlikely that the authors really intended to limit themselves to the formalistic, positivist implications of the German term. See Juan J. Linz & Alfred Stepan, *Toward Consolidated Democracies*, J. DEMOCRACY, April 1996, at 14-33.

18. SHEVTSOVA, *supra* note 15, at 259 ("A transition to the rule of law meant that the regime trusted society, giving it the chance to truly participate in government, and was relying not on behind-the-scenes pacts, force, and fear, but on the law and on independent institutions. Without a strategy of participation for society, millions of people could not consciously participate in the restoration of Russia, and the modernization of which the president spoke could not take place.").



focus on legal formalism and positivism.<sup>19</sup> Other scholars briefly acknowledge the problems of developing a legal culture, but then turn their focus to more tangible topics like lawmaking and election-monitoring.<sup>20</sup> Thus, one scholar asserts that the rule of law requires only the passage of legislation and the funding of institutions for the laws' enforcement.<sup>21</sup> Still others use "rule of law" simply as a general placeholder to express their criticism of *ad hoc*, non-transparent, corrupt, or other unsavory types of state action.

This tendency toward reductionism inhibits our study of Russia because the rule of law is a rich and multi-faceted concept that encompasses far more than electoralism, constitutionalism, or codification. The rule of law extends far beyond the institutions required for elites to negotiate the functioning of high politics. In addition to state institutions (such as a legislature, judiciary, or organs of law enforcement) the rule of law also requires a variety of non-state institutions: organized legal education, a professional bar, and a myriad of supporting professions (accountants, investigators, etc.) and organizations (newspapers, public registries, credit bureaus, etc.). The rule of law affects the development of mass attitudes and commercial behavior. It imbeds itself in a country's political culture and in its civil society. It entrenches expectations about the role and limits of a state bureaucracy, and the limits of commercial freedom and individual action.<sup>22</sup> Finally, but most importantly, the rule of law requires some level of shared expectations by political elites, lawyers, and laypersons about what *counts* as law, about what are the limits of judicial power, and about into what spheres of life the law may *not* be permitted to intrude. The institutional strength of the rule of law, although difficult to measure, is best expressed on a continuum.<sup>23</sup> Thus, when observers of Russia's transition from authoritarianism urge the development of the

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19. See, e.g., Robert Barros, *Dictatorship and the Rule of Law: Rules and Military Power in Pinochet's Chile*, in MARAVALL & PRZEWORSKI, *supra* note 11, at 190-93.

20. In a surprisingly ahistorical claim that the rule of law "rests significantly on democratic institutions and processes," Neil MacFarlane limits his essentially positivist definition of the term with the caveat of judicial independence. S. Neil MacFarlane, *Politics and the Rule of Law in the Commonwealth of Independent States*, in LAW AND INFORMAL PRACTICES 61, 63-66 (Denis J. Galligan & Marina Kurkchiyan eds., 2003).

21. Smith, *supra* note 15, at 112.

22. Civil society, political society, economic society and a usable state bureaucracy are all areas that are considered essential to a consolidated democracy. See LINZ & STEPAN, *supra* note 13, at 7.

23. See, e.g., KATHRYN HENDLEY, TRYING TO MAKE LAW MATTER: LEGAL REFORM AND LABOR LAW IN THE SOVIET UNION 12 (1996) (adopting a rule-of-law continuum between positivism and judicial

rule of law, but limit themselves to cramped understandings of its meaning or accept Austinian positivism as sufficient evidence that it has taken root, they are bound to be disappointed in their expectations, and their predictions for Russian democracy are prone to error.

Why are political scientists apparently comfortable calculating electoral thresholds for parliamentary party lists, or comparing advantages of presidential versus parliamentary systems, or parsing the criteria for robust civil societies, economic systems and multinational federations, but tend to shy away from defining the parameters for the rule-of-law variable?<sup>24</sup> Political scientists seem to prefer to assign that task – when it is even acknowledged – to the lawyers.<sup>25</sup> This is an artificial academic divide with a long history but little utility. Thirty-five years ago, Dankwart Rustow noted, “Our current emphasis in political science on economic and social factors is a most necessary corrective to the sterile legalism of an earlier generation” and warned that “[w]e have been in danger of throwing away the political baby with the institutional bathwater.”<sup>26</sup> This sharp division of disciplines and consequent exclu-

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review for constitutionally entrenched rights). See also Stephen Holmes, *Lineages of the Rule of Law*, in Maravall & Przeworski, *supra* note 11, at 49.

24. See, e.g., Guillermo O’Donnell, *Illusions About Consolidation*, J. DEMOCRACY, April 1996, at 34, 36 (Referring to Robert Dahl’s definition of polyarchy, “the definition of polyarchy is silent about important but elusive themes such as if, how, and to what degree governments are responsive or accountable to citizens between elections, and the degree to which the rule of law extends over the country’s geographic and social terrain. These silences are appropriate: the definition of polyarchy, let us recall, establishes a crucial cut off point – one that separates cases where there exist inclusive, fair, and competitive elections and basic accompanying freedoms from all others, including not only unabashed authoritarian regimes but also countries that hold elections but lack some of the characteristics that jointly define polyarchy.”).

25. The lawyers, on the other hand, lack the perspective and skills that make the contribution of political scientists and Russian specialists to this question so valuable.

A man who has had legal training is never quite the same again . . . is never able to look at institutions or administrative practices or even social or political policies, free from his legal habits or beliefs. It is not easy for a lawyer to become a political scientist. It is very difficult for him to become a sociologist or a historian . . . . He is interested in relationships, in rights in something or against somebody, in relation to others . . . . This is what is meant by the legalistic approach.

JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 9 (1964) (*ellipses in citation*) (quoting J.A.G. Griffiths, *The Law of Property, in LAW AND OPINION IN ENGLAND IN THE TWENTIETH CENTURY* 117-19 (Morris Ginsburg, ed., 1959)).

26. Dankwart A. Rustow, *Transitions to Democracy: Toward a Dynamic Model*, 2 COMP. POL. 337, 343-44 (1970). Likewise, even Lord Dicey was not immune from these turf battles, asserting that certain subjects of parliamentary procedure and convention were “not one of law but of politics,

sion of subjects has had a negative effect on our ability to explore the parameters and problems of such a crucial institution.

Admittedly, defining the full scope of the term “the rule of law” is not easy. Professor William Butler observed that the phrase was first devised by A.V. Dicey in his magisterial treatise, *Introduction to the Study of the Law of the Constitution*, and that the phrase was first introduced into Russia by a 19th century Russian translation of this work.<sup>27</sup> That is not to say that Dicey invented the idea; Dicey himself observed that the principles behind the concept owed their establishment to the “labours of lawyers” from the earliest times of medieval England.<sup>28</sup> Successive legal scholars have debated its theoretical foundations from every vantage point.<sup>29</sup> It is not my intent, nor is it possible within the constraints of this Article, to provide an exhaustive treatment of the term. And the choices I have made below in selecting my criteria could easily be expanded or narrowed based on any number of jurisprudential predispositions. I do not pretend to have offered the final word or even to have adequately defended the laundry list I have propounded.

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and need trouble no lawyer or the class of any professor of law.” A.V. Dicey, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 31 (10th ed. 1959). *See, e.g.*, Geoffrey Marshall *The Analysis of British Political Institutions* in *THE BRITISH STUDY OF POLITICS IN THE TWENTIETH CENTURY* 258 (Jack Hayward, Brian Barry, & Archie Brown eds., 1999) (“If we imagine a late twentieth-century political scientist transposed to the first decade of the century and ask in what direction he might have looked for assistance in analyzing the nature of British political institutions, we should find him turning not only to the historians and journalists but to the works of the lawyers, in particular that of Albert Venn Dicey, Frederick Maitland and Sir William Anson.”).

27. William E. Butler, *Jus and Lex in Russian Law: A Discussion Agenda*, in *LAW AND INFORMAL PRACTICES*, *supra* note 20, at 47, 48. Professor Bernard Rudden, however, notes that the phrase “the government of law” appears in Adam Ferguson’s essay “On the History of Civil Society,” published in 1767. *See* Bernard Rudden, *Civil Society and Civil Law*, in *THE REVIVAL OF PRIVATE LAW IN CENTRAL AND EASTERN EUROPE: ESSAYS IN HONOR OF F.J.M. FELDBRUGGE* 17 (George Ginsburgs, Donald D. Barry & William B. Simons, eds., 1996). This was the year that Semon Efimovich Desnitskii, the “father of Russian jurisprudence,” returned to Moscow from his six years at Glasgow University, where he studied law under John Millar and Adam Smith. *See* A.H. Brown, *The Father of Russian Jurisprudence: The Legal Thought of S.E. Desnitskii*, in *RUSSIAN LAW: HISTORICAL AND POLITICAL PERSPECTIVES* 117, 118-20 (William E. Butler ed., 1977).

28. Dicey, *supra* note 26, at vi. The first manifestation of the idea was revolutionary, an unprecedented act of self-restraint by the 12th-century kings of England (who, prior to that time, were responsible only to the god under whose authority they claimed power). The monarch assented to bind his ministers and officers to act under laws, interpreted by royal courts, to which the citizen could appeal under law (in stark contrast to the tradition of personal appeals to another patron) against abuses of power by those who acted in the name of the crown.

29. *See generally*, H.L.A. HART, *THE CONCEPT OF LAW* (1961); RAWLS, *supra* note 7; Geoffrey Marshall, *The Analysis of British Political Institutions*, in *THE BRITISH STUDY OF POLITICS IN THE TWENTIETH CENTURY*, *supra* note 26, at 276-278.

Rather, my objective is to expose the depth of meaning that “the rule of law” encompasses and the problems the phrase presents to political scientists, lawyers, and Russian area-studies specialists interested in observing the breadth of rule-of-law issues in Russia. Following Dicey, I think that the term is of most use to comparativists and Russian area-studies specialists if it is stated as a set of general principles rather than as a list of specific institutional or legislative requirements.<sup>30</sup> I offer three such principles as a starting point.<sup>31</sup>

A. *Three Principles*

Two caveats are necessary before introducing these three principles. First, all three principles reinforce one essential meaning of the rule of law. Nearly all scholars agree that the rule of law means the supremacy of law *over* government, or put another way, government *under* law.<sup>32</sup> The law is binding on the state itself, which remains constrained by it until the law is repealed or changed by some later properly promulgated law.<sup>33</sup> This subordination was justified historically, but with increasing controversy, with the “belief in the existence of a body of law beyond the law of the highest political authority.”<sup>34</sup> The continuing jurisprudential debate over what this normative belief in a higher law

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30. This is also in keeping with the practice of lexicographers, too. See BLACK'S LAW DICTIONARY 1332 (6th ed. 1991) (“A legal principle, of general application, sanctioned by the recognition of authorities, and usually expressed in the form of a maxim or logical proposition. Called a ‘rule,’ because in doubtful or unforeseen cases it is a guide or norm for their decision. The rule of law, sometimes called ‘the supremacy of law,’ provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application.”).

31. Dicey argued that the rule of law encapsulated “under one expression at least three distinct though kindred conceptions.” Dicey, *supra* note 26, at 188. Other scholars, notably John Rawls, have ascribed certain principles or precepts to the term that can either be located within Dicey’s formulation or that broadly track it. See RAWLS, *supra* note 7, at § 38. Although easily recognizable within Dicey’s formulation, my own exposition of the necessary elements of the rule of law do not exactly correspond to his.

32. Dicey, *supra* note 26, at 187. *But see* Maravall & Przeworski, *supra* note 11, at 15 (“Rule of law is just one possible outcome of situations in which political actors process their conflicts, using whatever resources they can muster. When law rules, it is not because it antecedes political actions. We wrote this book because we believe that law cannot be separated from politics.”).

33. BERMAN, *supra* note 12, at 9 (“The monarch, it is argued, may make law, but he may not make it arbitrarily, and until he has remade it – lawfully – he is bound by it.”).

34. *Id.*, at 45. For a strongly argued Machiavellian critique of this view, see Maravall & Przeworski, *supra* note 11, at 1 (“The normative conception of the rule of law is a figment of the imagination of jurists. It is implausible as a description. Moreover, it is incomplete as an explanation.”).

might be (e.g. common law, divine law, natural law, universal human rights) should not distract us. It has little guidance to offer the three principles I will examine.

The crucial distinction to make, and the second caveat to these three principles, is that the “rule of law” is not synonymous with “rule by law” or “rule through laws.” These latter phrases describe a political system in which statutes and other legislation are the supreme authority in the state by virtue of adherence to a formal legislative process of passing statutes and other legal acts. Such a system is commonly called a *Rechtsstaat*, and that is not what I mean by a rule-of-law state in which government operates under law. In a *Rechtsstaat*, the state merely subordinates itself to its own rules, which it can change in accordance with the same procedures; in other words, the state is subject to no subordination at all. Such a positivist approach to law is an insufficient guarantee of the procedural and substantive requirements of the rule of law that are explored below.<sup>35</sup> The concept of rule of law envisions a system in which the state is *not* the sole source of law and adherence to procedural formality is necessary but not sufficient for law to be made. The self-binding notion of government under law does not create a *Rechtsstaat*, not rule through laws, but a much deeper and broader set of constraints on state power.

These constraints can be identified in the following three principles, essential to (if not exclusive to or exhaustive of) the meaning bound up in the phrase “the rule of law.” They are worth exploration by political scientists and Russian specialists who use the term as one of many criteria to assess Russian democracy. I will return to them repeatedly in this Article.

First, the rule of law, or supremacy of law over government, means that there can be no offense – criminal, civil, political or administrative – without law. This concept has an ancient formulation: *nullem crimen sine lege*. As Dicey expressed it, “no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.”<sup>36</sup> There is a lot packed into this phrase, including an implicit

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35. Similarly, many scholars equate the rule of law with constitutionalism. But there exist plenty of examples (e.g. the Soviet Union, Nazi Germany, apartheid South Africa) to demonstrate that such a formalistic *Rechtsstaat* can easily fail to satisfy the other (some would say, normative) criteria of the rule of law discussed below. See Harold J. Berman, *The Rule of Law and the Law-Based State (Rechtsstaat)*, in *TOWARD THE RULE OF LAW IN RUSSIA?: POLITICAL AND LEGAL REFORM IN THE TRANSITION PERIOD* 43, 49 (Donald D. Barry, ed. 1992).

36. Dicey, *supra* note 26, at 188. See also RAWLS, *supra* note 7, at 209-10.

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notion of what *is* law. Without diving deep into philosophy, our purposes are met by a few generally accepted expectations. First, although stated in the negative, the phrase “no offense without law” has an enormous positive component: unless the law prohibits an action, that action is permissible. No offense without law thus implies that the law must be publicly accessible, knowable by those whom it would constrain, to afford a sense of predictability or legal certainty. The law must be stated in general terms. And it must not be retroactive in its application.

A second principle must be that the first principle is universalized: all law applies equally to all citizens. Political elites in the executive and the legislative branches do not enjoy the prerogative to choose when the law applies, or to whom, a feature common to authoritarian regimes.<sup>37</sup> The principle therefore requires that the judiciary treat similar cases similarly, a principle of equality that promotes not just a certain predictability about legal judgments, but a formal equality of arms between legal combatants regardless of wealth, military rank, or political office that would otherwise immunize against judicial process.<sup>38</sup> It may even imply a judicial mechanism to protect, or at least to give voice to, discrete and insular minorities at risk of permanent political exclusion by entrenched majorities.<sup>39</sup>

These two principles imply a third principle: the capacity for enforce-

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37. This aspect of the rule of law has a long lineage. *See, e.g.*, Lord Coke, PROHIBITIONS DEL ROY (1607), reprinted in 77 THE ENGLISH REPORTS KING'S BENCH DIVISION 1342, 1342 (Max. A. Robertson & Geoffrey Ellis eds. 1979) (1607), in which Lord Coke, then Chief Justice in the Court of Common Pleas, found himself in sharp conflict with both the Archbishop of Canterbury and James I. The issue was whether the king as chief justice of England could select cases out of his courts for his own decision, on the theory that his judges exercised discretionary powers granted by the Crown and just as easily revoked. Coke's answer was that such an act would not be a judicial act, but an exercise in legislative or executive power.

38. Dicey, *supra* note 26, at 193 (“[N]o man is above the law . . . every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”). *See also* RAWLS, *supra* note 7, at 208-09. This last point is perhaps the most susceptible to variation. Most Western democracies permit themselves some form of sovereign immunity from suit against the state and qualified immunity for certain suits against their officials. However, with the growth of the administrative state, the citizen's ability to demand equitable relief, if not money damages, against the state and its agents has generally kept pace with this rule-of-law concept.

39. *See, e.g.*, United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938) (famously raising, without answering, the question “whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

ment of this supremacy of law over government. Thus, the third principle of the rule of law requires the existence of an independent and politically neutral judiciary that is broadly accessible to aggrieved individuals. By extension, the establishment by the state of a judiciary is not enough. In a complex modern society, a class of legal professionals is necessary; so, too, therefore, are supporting institutions like law schools, bar associations, and other non-state organizations. At its most basic level, the tribunals established by the state and open to a professional, non-state class of advocates must be able to give legal meaning to rights. From a criminal perspective, that means the rigorous application of established procedures to force the state to meet a standard of proof for its charges. From a civil perspective, it means that rights are not merely hortatory. To quote another ancient maxim: *ubi jus ibi remedium* – for every right there is a remedy.<sup>40</sup> That these aspects of judicial process to hear legal claims or present a defense have a deep, intrinsic importance to the rule of law is embedded in this phrase. The Latin word “*jus*” contrasts with “*lex*” in much the same way that a “fundamental right” or higher “principle of law” contrasts with a simple “statute” or other positivist expression of parliamentary or executive will. English lacks this distinction, retained in French (*loi* versus *droit*) or Russian (*право* [*pravo*] versus *закон* [*zakon*]). The ancient phrase is not, nor could it sensibly be *ubi lex ibi remedium* and retain its meaning for a rule-of-law state.<sup>41</sup>

### B. Institutional Problems of the Rule of Law

As principles go, these three concepts are fairly clear. But how do they manifest themselves in political systems, and when, and why? Political scientists interested in transitions from authoritarianism should explore the problems presented in the practical application of these principles and the prerequisites to their development, with as much vigor as they demonstrate in seeking to demystify and decode the

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40. Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633 (2004); Dicey, *supra* note 26, at 199. *But see* Webster v. Doe, 486 U.S. 592, 611-613 (1988) (Scalia, J., dissenting) (rejecting absolute application of this principle in the context of American constitutional law).

41. See, e.g., Gianmaria Ajani, *The Rise and Fall of the Law-Based State in the Experience of Russian Legal Scholarship: Foreign Patterns and Domestic Style*, in TOWARD THE RULE OF LAW IN RUSSIA?: POLITICAL AND LEGAL REFORMS IN THE TRANSITION PERIOD, *supra* note 35, at 5 (“While, in complying with the notion of the rule of law, the political power that governs the state is subordinated to a law that it has not directly produced, in the case of *Rechtstaat*, the state subordinates itself to its ‘own’ law.”).

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principles that define legitimate elections, parliamentary systems, and civil society. That is not to demand that they descend into the legal minutiae and statutory interpretation that fascinate the practicing lawyer or law professor. But if comparative politics is to insist – and rightly so – on the rule of law as a *sine qua non* for consolidated democracy, then this insistence can only have real meaning if the full meaning of the term is more deeply plumbed and its empirical problems more thoroughly studied.

The overarching principle of law's supremacy over politics is a concept with tangible ramifications that political scientists can observe and measure. As noted above, for there really to be "no offense without law," the boundaries of the law must be knowable and clearly stated in general terms. The criminal law cannot be made retroactive to prohibit past conduct. Thus, the failure to publish legal acts, or the passage by a parliament of secret laws (such as laws on state secrets), bills of attainder, or laws retroactively criminalizing past conduct, are all indicia of a system in which law still struggles with politics for ultimate supremacy. Likewise, lawmakers must enact laws in good faith and under an assumption of capacity, i.e. there must not be laws that create duties that are impossible to perform.<sup>42</sup> The work of parliaments is readily susceptible to such observation.

Another avenue for exploration is the practical application of constitutions and laws, a refrain that will be familiar to sovietologists and specialists on the satellite states of the former Soviet Union. Are constitutional rights merely aspirational statements without practical effect or are they cognizable in a court of law? Does every right really have a legal remedy and does every legal person have an equal right to seek that remedy? Are these remedies for injury available not just against another citizen, but against the state? Can the military be called to account for violation of the law? Are there spheres of state authority or even geographic areas of the state in which the law is suspended or otherwise does not fully apply?

In addition to assessing the empirical level of equality before the law, political scientists are well-equipped to hypothesize reasons for such equality to develop or be suppressed. For example, Stephen Holmes has argued that equality before the law is correlated with the level of

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42. RAWLS, *supra* note 7, at 208 ("[O]ught implies can. . . . [Th]e actions which the rules of law require and forbid should be of a kind which men can reasonably be expected to do and to avoid."). As Lon Fuller observed, "[t]o command what cannot be done is not to make law; it is to unmake law, for a command that cannot be obeyed serves no end but confusion, fear and chaos." LON L. FULLER, *THE MORALITY OF LAW* 37 (rev. ed. 1969).



pluralism in society. Thus, where many groups of roughly equal political strength exist and compete for leverage vis-à-vis the state, Holmes says that we should expect the state to be pressured to promote greater equality before the law. Conversely, when pluralism decreases and there exist fewer powerful social groups and more opportunity for the state to play one group against others (or for state co-optation by one group against others), the society may move away from an approximation of rule of law and closer to “rule *by* law” or “rule *through* law.”<sup>43</sup> These are hypotheses that political scientists are uniquely well-placed to test.

Similarly, the extent that a judicial system follows the rule of law is susceptible to political science methods and standards of measurement. The integrity of the judicial process can be assessed. Do the courts regularly turn to rules of evidence and fixed procedures that govern fact-finding? Do the courts routinely create a written record of their findings? Are there ascertainable signs of due process in legal proceedings, i.e. do tribunals operate in an open forum, treat all parties equally, and adhere to a process designed to facilitate rational inquiry into the relevant circumstances of allegations that the law has been violated? Are court orders practically enforceable?

The courts, in order to function, must have institutional guarantees of security regardless of the outcome of cases before it.<sup>44</sup> Thus, what is the tenure of judges, and how are they removed from office? What protections do judges enjoy against political interference in their work? Are courts provided sufficient resources to function independently? Do necessary supporting institutions exist?<sup>45</sup> Another part of this security,

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43. Stephen Holmes, *Lineages of the Rule of Law*, in Maravall & Przeworski, *supra* note 11, at 22-23. If Holmes is right, than an extension of that hypothesis might suggest that certain procedural rights (e.g. notice, confrontation, etc.) are powerful indicators of the existence of rule of law, since these mechanisms are usable by all interest groups, and especially by the weaker against the politically more powerful.

44. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 32-33 (1960) (“If (as in medieval times) a tribunal can be penalized for ‘wrong judgment,’ a factor of fear enters which increases chanciness of outcome. If a boss will fine, fire, exile or kill for a vote or judgment which annoys him, but may reward the willing, then in any case in which his interest is not obvious, one big weight in the scales may drop blind until one knows the whether and the which-way of the fix. England’s lesson under the Stuarts, and then under the Hanovers, ran indeed less to such uncertainty in lesser cases than to altogether too much certainty when the Crown was openly on one side, but we have seen enough in modern Europe to know that judicial servility produces not only injustice but a day-to-day unreckonability.”).

45. Then sitting RF Supreme Court Chief Justice Viacheslav Lebedev emphasized a long list of practical problems for a functioning legal system at a conference at the Brookings Institution in January 1993: “recruitment, appointment, compensation, and training of judges, the efficiency of

as well as an intrinsic element of a rule-of-law based judiciary, is the requirement of published opinions of the court, including a published dissent when multiple judges are empanelled to hear a single case. Published opinions promote publicity, predictability and steadiness of the body of law, while avoiding secret action or favor, by creating pressure to conduct careful analysis of the facts and issues before the court, to justify with law and reason the decision that is made.

Who are the judges, lawyers, and bailiffs charged with operating this system? Judicial institutions require judges who are trained to decide cases, not to mention the advocates trained to present them. The same methods can be turned to examine the judges and lawyers that staff such a system. How are they trained and chosen? If the judicial institution is to operate in a rule-of-law state, then its legitimacy and efficacy will largely be dependent on its constitution by what Karl Llewellyn called "law-conditioned" officials, whose legal education, training, and experience combine to generate a particular habit of legal thinking.<sup>46</sup> This professionalization, in turn, implies the existence of supporting non-state institutions, like a professional bar and law schools.<sup>47</sup>

The political culture that pervades legislative and judicial institutions, like the mass attitudes that exert influence on them, are also amenable to analysis. Do legislators have a basic understanding of these rule-of-law principles? Do citizens have trust in courts to adjudicate their disputes dispassionately and strictly in accordance with the law? How do citizens view the legal system in general? Do citizens turn to lawyers to aid them in understanding their rights, or is such an idea considered naïve, futile, or even dangerous?

These questions are not merely a laundry list. Systematic comparisons of Russian law over time and with other legal systems can be made

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communications and recordkeeping systems, the adequacy of facilities for subordinate federal tribunals, the effectiveness of mechanisms for enforcing judicial decisions, the relationships between federal and nonfederal court systems, and the relationships between judicial officers and political officials at all levels." See Bruce L.R. Smith, *Constitutionalism in the New Russia*, in LAW AND DEMOCRACY IN THE NEW RUSSIA 1, 14 (Bruce L. R. Smith & Gennady M. Danilenko, eds., 1993).

46. LLEWELLYN, *supra* note 44, at 19-20 ("They have been law-conditioned. They see things, they see *significances*, both through law-spectacles, in terms of torts and trusts and corporations and due process and motions to dismiss; and this is the way they sort and size up any welter of facts. Moreover, they *think* like lawyers, not like laymen . . ."). Although Llewellyn is interested exclusively in the American law-conditioned judge, his observation is congruent with this rule-of-law requirement.

47. Llewellyn recognized, and we should, too, the dangers of overprofessionalization. See *id.* at 23 n.14. To this risk the countermajoritarian hazards of judicial activism should be added.

by probing the different manifestations of these three principles.

C. *The Rule of Law as a Causeway*

The metaphor of a causeway better expresses the conception of the rule of law outlined above than an instrumentalist metaphor of sword or shield. More importantly, it is precisely this conception that should be the focus of a state in which ruling elites seek to establish a consolidated democracy. The value of this causeway lies first in the free movement of citizens that it facilitates among state and non-state institutions in daily life, commerce, and politics. The law is what enables the citizen to know what actions he is permitted to take and what constitutes a transgressive behavior of the law. If the citizen strays from this known path, choosing not to make use of the protections of the law or engaging in unlawful activity, that peril is known, too. These two aspects of the law as a causeway – establishing secure avenues for social interaction and identifiable paths of licit conduct – are of tremendous value to citizens in a state emerging from authoritarian rule into, perhaps, the early stages of democratic government. This conception of the rule of law shifts the initial conception of the state from a gendarme to a traffic policeman.

Negotiation over the establishment of this legal causeway is exactly the sort of activity in which the political elite should be engaged in the early, critical period of a new or struggling democracy. This process goes hand in hand with establishing the “rules of the game” for repeated electoral competition. Planning a legal causeway is another way of emphasizing that elites should be engaged in establishing the parameters of state power: where it begins, how far it extends, and where it stops. Thus, viewing the rule of law as a causeway also makes clear that certain spheres of life are simply none of the state’s business. There exists a world of private activity and decisions into which no one would want the law to intrude (e.g. the decision to procreate, the choice of religion, etc.). What Bernard Rudden has called the “precious sphere of non-law” is readily identifiable by the metaphor of a causeway: it is what lies off the path in the bramble bush of human relations that are best left unencumbered by the state’s legislation.<sup>48</sup>

The direct relationship between the rule of law and individual liberty is also better expressed by the causeway metaphor than by visions of the

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48. Rudden, *supra* note 27, at 17, 21.

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law as sword or shield.<sup>49</sup> When the state sets forth what activity is protected and what is prohibited, and acknowledges the limits of state power, it has established for the citizen “a basis for legitimate expectations[,] . . . grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled. If the bases of these claims are unsure, so are the boundaries of men’s liberties.”<sup>50</sup> If, in the words Bolt placed in the mouth of Thomas More, the citizen keeps to the causeway, he may walk safely: no offense against the state is hidden, his rights against all comers are clear. John Rawls stated this relationship well:

But if the precept of no crime without a law is violated, say by statutes, being vague and imprecise, what we are at liberty to do is likewise vague and imprecise. The boundaries of our liberty are uncertain. And to the extent that this is so, liberty is restricted by a legitimate fear of its exercise. The same sort of consequences follow if similar cases are not treated similarly, if the judicial process lacks its essential integrity, if the law does not recognize impossibility of performance as a defense, and so on. . . . To be confident in the possession and exercise of these freedoms, the citizens of a well-ordered society will normally want the rule of law maintained.

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Knowing what things it penalizes and knowing that these are within their power to do or not to do, citizens can draw up their

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49. Dicey, *supra* note 26, at 203 (a constitution should not be “the source but the consequence of the rights of individuals, as defined and enforced by the courts.”). Dicey presents a consequentialist rationale for this principle, as well as an empirical one:

[W]here the right to individual freedom is a result deduced from the principles of the constitution, the idea readily occurs that the right is capable of being suspended or taken away. Where, on the other hand, the right to individual freedom is part of the constitution because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation.

*Id.* at 201.

50. RAWLS, *supra* note 7, at 207.

plans accordingly. One who complies with the announced rules need never fear an infringement of his liberty.<sup>51</sup>

There are many reasons why this should be so. A stable institutional environment permits the calculation of risk and affords a certain degree of predictability to the results of contemplated social interactions. This is so not only for the citizen vis-à-vis citizen, but also for the citizen in relation to the state. Nowhere is this facet of the rule of law more important, or more easily identified, than in the criminal law that punishes transgression with the deprivation of liberty. But the common law or private civil law that regulates relations between citizens also presents a causeway. It is this area of law that creates a “legal matrix” that defines who has legal capacity and enables those “legal persons” to own, trade, contract, and dispose of things and to recognize and enforce the legal obligations of others.<sup>52</sup> Individuals can contract with each other (or with the state for that matter) and know, so long as they stay on this causeway, what routes they can take to secure their interests with the aid of the state’s neutral courts and bailiffs.

The metaphor of the rule of law as some sort of instrument or weapon captures none of these core understandings of the rule of law. The reach of the law as tool or weapon cannot be known in advance like a causeway can be mapped. Its power, like its boundaries, is also likely to be unknown until the moment the weapon is tried in some legal contest. The principle that the law applies universally to all is also confused by the notion implicit in this bellicose metaphor that some individuals seem to have more right to wield the sword of law than others. Thus, the law-as-weapon metaphor necessarily renders suspect the state’s capacity to establish a “neutral judiciary” for the resolution

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51. *Id.* at 210-11, 211-12.

52. The phrase “legal matrix,” as well as this understanding of private civil law, is borrowed from Rudden, *supra* note 27 at 17, 20-21. As a metaphor, law as matrix is broadly compatible with the more literary (but perhaps less pliable) law as causeway. Professor Rudden’s deliberate separation of the uses of private civil law first as matrix and then “as shield,” *id.* at 17, 21, 30-34, 43, I consider to be evidence that the causeway metaphor is viable as a freestanding explanatory concept. Indeed, some of what Professor Rudden considers to operate as “shield,” such as the protection given citizens by the principle that the State as contractor/debtor/etc. is no less bound by the civil law than any other “legal person,” may as well be viewed as “causeway”: the citizen can travel through various transactions with the State secure in the knowledge that both are juridical equals, and therefore equally obliged to observe the same rules of the road that govern their relationship. The advantage that I see is that a causeway cannot be turned into the weapon that a sharp-edged shield may become; with all the attendant perceptions of law as weapon of change, revolution, empowerment in a zero-sum political game.

of disputes. How could the law be used as a weapon against the state in the state's own forum? Is not a verdict for the state, then, a blow against the people who would use the law as a sword or shield? These are the loaded questions that Marxist legal theory answers in the negative, a preconception that Bolshevik legal nihilists delightfully embraced to destroy the gossamer threads of the rule of law that existed in the tsarist legal system.

What is more, instrumentalist metaphors of law, even at their most benign, cast the relationship between the state and the individual immediately into an adversarial posture. The state is inherently suspect, and the citizens' protection against its necessarily adverse motives lies in the law. Law as weapon envisions a zero-sum battle between state and the individual: one for the law's power and the other for the law's protection. The state's loss is therefore the individual's gain. What a corrosive set of assumptions in a state seeking to leave behind the oppressive vestiges of authoritarian rule! Given Russia's authoritarian and totalitarian pasts, it is understandable that political scientists should be attracted to the latter instrumentalist metaphor of law as a tool or weapon in the hands of citizens to protect their rights from an aggressive, intrusive, or feckless state. As Valerie Bunce observed, "much of the discourse on democratization (and on economic reform) emphasizes arguments that appear to support less, not more, state and thus the notion of state subtraction . . . and with the need to reign in the state."<sup>53</sup> Instrumentalist metaphors of the rule of law implicitly accept this premise of state subtraction. It is the rule of law as "кто кого" [*kto kogo* – who over whom], an embrace of the idiom of "закон как дышло" [*zakon kak dyshlo* – law as wagon shaft].

Finally, if the point of electoral politics in a democracy is to provide sufficient enough of a guarantee to the losing party that it will have future chances for victory for it to remain faithful to the "rules of the game," it then it seems strange to adopt an instrumentalist metaphor of the rule of law that implicitly sets the individual at odds with the state. The process of placing constraints on the breadth and reach of a new, putative democracy is not necessarily more effective – and may be more difficult – when framed in an adversarial context of offense and defense. Among the salutary effects of the rule of law on other core features of a consolidated democracy – such as a robust civil society – is the ability of the rule of law to promote a conciliation between the state

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53. Bunce, *supra* note 8, at 714.

and its citizens.<sup>54</sup> The rule-of-law causeway promotes a conception of the state that instrumentalist metaphors cannot: a state that has the power to conduct what is identifiably its business – securing borders, promoting economic stability, and the like – while limiting the state’s power to employ its monopoly on the legitimate use of force against the individual in ways that deprive the individual of his established legal rights.<sup>55</sup> Thus, for example, the codification of private civil law separate and apart from the laws that the state adopts for the health and safety of all (e.g. criminal law, labor law, antitrust, etc.) establishes relationships to property and other persons that are largely “not the State’s business . . . if people act in good faith and stay licit, the State will stay away.”<sup>56</sup>

These metaphors, of course, are not mutually exclusive. In a well-established, consolidated democracy, we may well want the rule of law to operate as a causeway in some instances and as a sword or shield in other circumstances. My argument is simply that the salutary expectations for the effect of the rule of law on an emerging democracy are met by those aspects of the concept captured by the causeway metaphor and hindered by those aspects of the concept captured by instrumentalist metaphors of sword, shield, or tool. Thus, like the choice whether to hold nationwide or regional elections first, the sequencing of rule-of-law objectives is important. In a consolidated democracy with a long history of the rule of law, the law may work simultaneously as causeway, sword, and shield. There may come a time when law is sufficiently embedded in the political culture, institutions, and expectations of a society that the kind of countermajoritarian legal activism best described by the law-as-weapon metaphor can be tolerated, if not even viewed as an occasional necessary corrective to democratic abuses (e.g. the American Civil Rights Movement). But in an unsteady system such as Russia’s, teetering along a series of tipping points, the causeway should be privileged over all other conceptions of law. This is both because of the salutary effects of such conceptions for the other arenas of a consolidated democracy and because it is less complicated and possibly less expensive. In a world of limited re-

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54. This effect echoes what Hendley describes as the “reciprocal” sense of law: “a vision of law as a means of structuring society based on broadly shared values.” Hendley, *supra* note 23, at 4.

55. This is not to deny that the legal *process* of remedying injury is inherently adversarial. Litigants *defend* their rights in court, sometimes as against the whole world all at once (e.g. to settle title to abandoned property). The causeway metaphor does not deny this truism. It better captures, however, the well-defined boundaries of action understood by all participants.

56. Rudden, *supra* note 27, at 17, 21.

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sources, in which the political leaders of an emerging democracy face severe constraints on what reforms to conduct and in what order, a metaphor of the rule of law that encourages the simultaneous development of state and society within each's own spheres is to be encouraged.

### III. THE RULE OF LAW IN MODERN RUSSIAN HISTORY

#### A. *Imperial Russia*

The law in Imperial Russia, much like that country's famously impassable roads, was never a citizen's causeway.<sup>57</sup> "[T]he most striking and important contrast between [pre-nineteenth century] Russia and the rest of Europe," S.E. Finer noted, "was that the country had no tradition of what we have called 'law-boundedness'."<sup>58</sup> Russia lacked any "systemic body of private law, nor any trained jurists or advocates."<sup>59</sup> Peter the Great's procuracy was established "[p]recisely because there was no professionalized judiciary, and notably none who could control maladministration."<sup>60</sup>

Tsarist attempts to systematize Russian law contrasted markedly with efforts at codification in continental Europe, especially after the French Revolution. The tsars saw the law in strictly instrumentalist, and often paternalistic, terms: "a higher priority on the outcome of particular cases than on the strict observance of procedural or substantive rules, and a perception of law as intrinsic to those who exercised authority."<sup>61</sup>

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57. It is not the purpose of this Article to discuss the origins of Russia's stark divergence from the legal histories of Western European states. That fact is taken as well-established. Much has already been written about the revolutionary historical events that swept through Western Europe but bypassed Russia: the medieval "Reception" of Roman law, the assertion of Papal supremacy by Gregory VII in the 11<sup>th</sup> century (credited with the creation of separate legal "systems" of secular, canon and other law), the Renaissance, etc. See e.g. BERMAN, *supra* note 12, *passim*; GENNADY M. DANILENKO & WILLIAM BURNHAM, *LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION* 2-3 (2d ed. 2000); JEFFREY D. SACHS & KATHARINA PISTOR, *Introduction to THE RULE OF LAW AND ECONOMIC REFORM IN RUSSIA* 4 (1997).

Instead, Kievan Rus fell under Mongol subjugation for nearly 250 years. "Had Kiev survived," one scholar has speculated, "in the course of time universities might have opened, law might have been systematically taught, commentaries compiled, a legal profession formed, and the Russian legal system might have come to resemble others of the Romanist tradition more closely." WILLIAM E. BUTLER, *RUSSIAN LAW* 18 (2d ed. 2003).

58. 3 S.E. FINER, *THE HISTORY OF GOVERNMENT FROM THE EARLIEST TIMES: EMPIRES, MONARCHIES AND THE MODERN STATE* 1407 (1999).

59. *Id.* at 1407.

60. *Id.* at 1419.

61. WILLIAM G. WAGNER, *MARRIAGE, PROPERTY, AND LAW IN LATE IMPERIAL RUSSIA* 5 (1994).



The eagerness with which Peter and his successors proclaimed the law, which meant little more than setting the will of the sovereign down in writing, demonstrates a core difference between the rule of law and rule *through* laws. A century after Chief Justice Coke sparred with James I over the king's ability to interfere in cases before his own law courts, Peter the Great declared that "His Majesty is a sovereign monarch who is not obliged to answer for his acts to anyone in the world."<sup>62</sup> The rule-of-law principle that all law applies equally to all had no place in imperial Russia.

Even this "rule *through* law" was a norm to which successive Russian autocrats found it difficult to adhere. The *Nakaz* (Instruction) of Catherine the Great, innovative (though, ultimately, impotent) as it was for Russia, did little but expose the resistance of the empress and her officials to even the most generalized constraints on executive power.<sup>63</sup> Law was still the personal possession of the tsarina, and neither she nor her officials could rid themselves of the same personalized and paternalistic understandings that they brought to any other mechanism of state authority. From the reign of Catherine through that of Nicholas I and Russia's humiliation in the Crimean War, little had changed. On the eve of Speranskii's codification of the laws under Nicholas I, "[a] full record of the law did not exist, and much of what did exist was inaccessible, not to say unknowable, by official and citizen alike."<sup>64</sup> Provincial and district courts were staffed by noblemen in need of money and in even greater need for legal training. Appellate courts were folded into various Senate departments, with the expected result that legal judgment and political expediency were often indistinguishable. Public sources of law were scarce, its discussion rarer still, and law faculties trained noblemen (when they sought training) for a lifetime of state service, not independent legal thought. The administration of Russian law required neither a trained judiciary nor a professional bar, published sources of law, or any precondition on what counted as law beyond the will of the autocrat.<sup>65</sup>

The liberal judicial reform of Alexander II was the most dramatic

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62. FINER, *supra* note 58, at 1414 (quoting Military Service Regulations of 1716).

63. See WAGNER, *supra* note 61, at 5-6; NICHOLAS V. RIASANOVSKY, A HISTORY OF RUSSIA 258-59 (5th ed. 1993); BUTLER, *supra* note 57, at 27. The same criticism could be made of Catherine the Great's court reform of 1775. See DANILENKO & BURNHAM, *supra* note 57, at 5.

64. BUTLER, *supra* note 57, at 29.

65. As even the conservative Slavophile Ivan Aksakov could observe: "The old court! At the mere recollection of it one's hair stands on end and one's flesh begins to creep!" RIASANOVSKY, *supra* note 63, at 376.

challenge to this understanding of the role of law in imperial Russia, and the last. Despite their short lifespan – structural reforms began in 1864, reactionary counter-reforms followed an assassination attempt on the tsar in 1866, and the last vestiges of the reform were wiped clean with the first Bolshevik decrees of the October Revolution in 1917 – the reforms had a tremendous impact on Russian law. And although they never accomplished (nor were intended to create) a rule-of-law state in the Russian Empire, their short course provides a glimpse at the practical difficulties even basic legal reforms presented to the regime. The reforms depended not just on legislated changes announced from above, but on decades of support for legal education and a gradual shift in behavioral norms and attitudes.

The elements of these short-lived legal reforms are well-known to all: the establishment of a unified system of courts independent of the state bureaucracy, security of tenure for an educated class of jurists, the abolition of secret judicial proceedings, general equality before the law, the simplification of legal process, public trials, and trial by jury for serious criminal offenses.<sup>66</sup> Requirements that jurists obtain both formal legal training and adequate experience prior to appointment to the bench constrained the power of the state to reward members of the nobility for their service with judicial positions. Judges were instructed to apply laws that were facially unclear or contradictory according to the “general meaning” of the law. Appellate courts (courts of cassation) were to publish their decisions in part to provide such guidance.<sup>67</sup> The Civil and Criminal Cassation Departments of the Imperial Senate were established at the pinnacle of this judicial hierarchy, with considerable effect on the development of modern legal doctrine.<sup>68</sup>

The reform itself was preceded, and only made possible by systematic legal training begun in the 1830s by Nicholas I under the supervision of Mikhail Speranskii, who simultaneously had set about the codification of all Russian imperial legislation and normative acts since nearly the start of Romanov rule. Legal training worked a sea change on legal personnel, turning them from an uneducated, grasping nobility to a trained class of jurists with concrete ideas about the role of law in

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66. *Id.* at 376-77.

67. WAGNER, *supra* note 61, at 41.

68. *Id.* at 45 (“This was an unprecedented situation for tsarist Russia. There now existed not only a reasonably successful system for interpreting and enforcing civil law uniformly throughout the empire, but also an agency capable of creating law in an important area of civil affairs which was independent of the direct control of the autocrat.”).

society.<sup>69</sup> Bar associations formed to regulate the profession, assist in the practical training of new lawyers, and provide legal aid to the poor.<sup>70</sup> But the regime that thought that more lawyers would increase order in a Russia that was rapidly seeking economic growth after a disastrous Crimean War, was also deeply fearful of these new, educated professionals and (rightly) suspicious of their loyalty to the existing autocratic order.<sup>71</sup> As with Alexander's reforms of state education, conservative curricula did not appear to resolve this internal contradiction. What one contemporary commentator said of the regime's education reforms applies equally to its hopes for a rekindled legal profession: "они хотели огня, который бы не жёг" [*oni khoteli ognya, kotorii by ne zhëg* – "They wanted fires that would not burn."].

This short period in nineteenth century Russia, however, also shows how difficult establishing the rule of law can be, and how easy it is to destroy its development in its early stages. By 1866, following an assassination attempt, Alexander II already began to retreat from his reforms. As the fear of radicalism spread through the state apparatus, more and more classes of cases were excepted from the general judicial system (which already excepted military and church issues, as well as the entire peasantry from its jurisdiction).<sup>72</sup> Press laws established the extra-judicial enforcement of media sanctions, categories of political crimes were expanded and special tribunals convened to hear such cases with restricted access to juries. Following the assassination of Alexander II in 1881, whole regions of Russia could be placed under states of emergency that excluded the courts altogether.<sup>73</sup>

The celebrated case of Vera Zasulich illustrates many of these

69. *Id.* at 13-14. In 1854, there were 44 law professors in the Russian Empire; by 1913 this number had grown to 111. *Id.* at 28. Between 1840 and 1863, approximately 4000 students received law degrees. *Id.* Between 1864 and 1900, this number grew to roughly 24,000 students. *Id.* As a result, by 1870, three-quarters of the members of appellate and district courts that had been created by the judicial reform had specialized legal training. *Id.* at 16. By 1890, this figure had grown to over ninety percent. *Id.* See also BUTLER, *supra* note 57, at 30, 56-67 (introducing the legal thinkers who were the fruits of these efforts).

70. WAGNER, *supra* note 61, at 32. Although civil litigation skyrocketed as a result of the increased availability of lawyers and the gradual professionalization of the courts, mass attitudes toward the legal profession were not necessarily greatly improved. See, e.g., ANTON CHEKHOV, *Ivanov*, in IVANOV, *THE SEAGULL AND THREE SISTERS* 6, 10 (Ronald Hingley trans., Oxford University Press 1968) (1887) ("Doctors are like lawyers, only lawyers just rob you, while doctors rob you and murder you as well."). Of course, Chekhov, a physician by training, expressed an antagonism that was hardly unique to Russian society.

71. See BUTLER, *supra* note 57, at 31.

72. RIASANOVSKY, *supra* note 63, at 377.

73. WAGNER, *supra* note 61, at 52-53.

deficiencies. In 1878, Zasluch sought to avenge the unlawful flogging of a fellow student by shooting the military governor of St. Petersburg, General Fyodor Trepov. That Zasluch had fired the shots that wounded Trepov was widely acknowledged; her motives, however, led the state (rightly, as it turned out) to fear that a sympathetic jury would acquit her. Through what would be called “telephone justice” in the Soviet period, enormous pressure was put on the trial court, which was chaired by perhaps the most famous legal mind of his day, the liberal Anatolii Koni. Pressed repeatedly by the state to ensure a guilty verdict, Koni gave the answers dictated by the rule of law: “[a]ll I can assure in this case is the observance of complete impartiality and all the guarantees of correct justice.”<sup>74</sup> Koni pledged to do his duty: “the impartial observance of the law.”<sup>75</sup> The response of the Minister of Justice who applied the pressure on Koni, Count Konstantin Palen, typifies the results-driven view of the law held by Russian officialdom: “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.”<sup>76</sup>

Another example of law as simply another source of imperial patronage was the chartering of corporations. Each corporate charter was a grant from the monarch, set out in the form of a law. Thus, sprinkled throughout the various compilations of laws and decrees were the details of every corporation lawfully in operation in the Russian Empire.<sup>77</sup> Although cartels and syndicates grew more numerous and more powerful during the economic boom in fin-de-siècle Russia, laws prohibiting price-fixing were never removed from the statute books. Whether this confused state of the law was deliberate, intended to keep the corporate elite fearful and submissive, or merely the typical failings of the tsarist bureaucracy is unclear.<sup>78</sup> The government nevertheless gave an informal nod to cartel development, granting charters to its preferred syndicates in specific markets. The government thus maintained its flexibility in dealing with these cartels: “the formal illegality of cartels and syndicates allowed

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74. *Id.* at 8.

75. *Id.*

76. *Id.* at 8-9.

77. Thomas C. Owen, *Autocracy and the Rule of Law in Russian Economic History*, in *THE RULE OF LAW AND ECONOMIC REFORM IN RUSSIA*, 23, 25 (Jeffrey D. Sachs and Katharina Pistor eds., 1997). The author references the *Polnoe Sobranie zakonov* (1649-1913) and the *Sobranie zakonov i rasporiazhenii pravitel'stva* (1863-1917).

78. *Id.* at 33.

the state, as one liberal jurist put it, to 'seize a random victim' from time to time."<sup>79</sup> The result was a classic example of the law used as a tool, and not as a causeway. Caught in the contradiction between government encouragement and existing statutory prohibitions, the oligarchs of the day could not know what path was the lawful one that could secure their business interests. They could only hope to remain in good standing with the regime long enough to secure their profits. The regime's approach to private threats to state economic power parallels in some ways the approach taken by President Putin against his own opposing oligarchs. Such traps are much harder to spring when law serves as a causeway rather than as a tool of control.

B. *Soviet Russia, 1917-1985*

The rule of law had no place in the Soviet political system. Although Soviet leaders varied in their appreciation for the use of law and lawyers to their regime, Marxist-Leninist ideology dictated an extreme and unvarying instrumentalism towards all legal institutions. This view was most succinctly stated by Stalin's Commissar of Justice, Nikolai Krylenko:

The court is, and still remains, the only thing it can be by its nature as an organ of the government power – a weapon for the safeguarding of the interests of a given ruling class . . . A club is a primitive weapon, a rifle is a more efficient one, the most efficient is the court . . . For us there is no difference between a court of law and summary justice. . . . The court is an organ of state administration and as such does not differ in its nature from any other organs of administration which are designed, as the court is, to carry out one and the same governmental policy . . .<sup>80</sup>

Vladimir Lenin, the most famous expellee from the law faculty at Kazan' University, knew enough about the power of the law to make it the subject of his first decrees after the October Revolution.<sup>81</sup> Decree # 1 on the courts (enacted Dec. 5, 1917) abolished or suspended all

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79. *Id.*

80. *Quoted in* 1 VLADIMIR GSOVSKI, SOVIET CIVIL LAW SYSTEM 241 (1948). Krylenko was executed in 1938.

81. Decrees abolished all private property (Nov. 8, 1917), confiscated church property (Jan. 23, 1918), annulled stocks and bonds (Jan. 28, 1918), and forbade inheritance (Apr. 27, 1918). Between 1918 and 1919, government monopolies were declared over all copyrights, patents, banking, insurance, foreign trade, railways, and the merchant marine. By November 1920, all

tsarist courts.<sup>82</sup> Investigating magistrates, prosecutors, and private lawyers were also all abolished and the practice of law thrown open to “all who enjoy civil rights.”<sup>83</sup> Revolutionary tribunals, chaired by a triumvirate of one local judge and two proletarian lay assessors were established to deal with counter-revolutionary crimes. What these crimes might be was difficult to say: all imperial law was declared null and void, and reference to it was only permitted to the extent that it did not contradict the party programmes of the SD/SR coalition provisional government, its edicts, and what was termed “*революционное правосознание*” [*revoliutsionnoe pravosoznanie*] – revolutionary legal consciousness – the gut instinct of proletariat justice.<sup>84</sup> By July 1918, any use of imperial laws and procedural codes was strictly prohibited.<sup>85</sup>

The Red Terror was a time of confessions extracted by torture, procedureless hearings, and summary judgment. The understanding of law during this period was marked by a sense of anarchism and legal nihilism; state and law were both expected to wither away with the approach of a communist utopia.<sup>86</sup> The first president of the USSR Supreme Court, Pyotr Stuchka, summarized this view: “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.”<sup>87</sup> By definition, revolutionary legal consciousness meant the rejection of the principle “no offense without law” – an offense during the Red Terror was whatever offended

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industry operating with a workforce larger than ten laborers was nationalized. See GSOVSKI, *supra* note 80, *passim*.

82. SAMUEL KUCHEROV, *THE ORGANS OF SOVIET ADMINISTRATION OF JUSTICE: THEIR HISTORY AND OPERATION* 22-24 (1970).

83. *Id.* at 24. See also HAROLD J. BERMAN, *JUSTICE IN THE USSR: AN INTERPRETATION OF SOVIET LAW* 31 (Rev. ed. 1966).

84. BERMAN, *supra* note 83, at 31. SD/SR refers to the Social Democrat Socialist Revolutionary.

85. KUCHEROV, *supra* note 82, at 39. Political necessity forced a slight retreat from the initial draconian decree. Decree #2 (March 7, 1918) created circuit courts above the local people’s courts. *Id.* at 36. However, since pre-revolutionary legal codes and the lawyers trained in them had been abolished, jurisdiction was a haphazard affair. *Id.* at 36-37. Once the Bolsheviks regained the upper hand, Decree #3 (July 20, 1918) and a special instruction issued a few days later, rejected any use of the pre-revolutionary laws and procedural codes. *Id.* at 38-40; see also F.J.M. FELDBRUGGE, *RUSSIAN LAW: THE END OF THE SOVIET SYSTEM AND THE ROLE OF LAW* (1993).

86. FELDBRUGGE, *supra* note 85, at 201. See also E.L. JOHNSON, *AN INTRODUCTION TO THE SOVIET LEGAL SYSTEM* 33 (1969).

87. BERMAN, *supra* note 83, at 26.

the proletariat, as led by the vanguard Bolshevik faction.<sup>88</sup> Equality before the law was similarly rejected; Marxism-Leninism decried such a notion as false in the face of class inequality.<sup>89</sup> And the principle of an independent judiciary had no place in a system under which every organ of the state was designed to implement the state's policies. As Evgeny Pashukanis, one of the Bolsheviks' leading legal theorists, explained, "Revolutionary legality is for us a problem which is 99% political."<sup>90</sup>

As the years of War Communism drew to a close, the necessities of Lenin's New Economic Policy (NEP) drove the Bolsheviks to reverse their earlier rejection of legal formalism. The NEP sought to revive a starving and devastated society with "a temporary retreat on the road to socialism," permitting limited private enterprise, property, and small-scale industry.<sup>91</sup> Even a minor-level market economy required regulation. Thus, revolutionary legal consciousness was replaced with a massive codification drive.<sup>92</sup> In his last days, Lenin lamented over the apparatus which ". . . we took over from tsarism and slightly anointed with Soviet oil."<sup>93</sup> Stuchka, likewise, admitted the near impossibility of a total break with tsarist law: "We only imagined that we abolished the

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88. The "Leading Principles of Criminal Law," enacted by the People's Commissariat of Justice in 1919, essentially stated the goal of using the criminal law as a revolutionary tool against any bourgeois opposition, breakers, and intermediate classes before achieving the ultimate goal of the destruction of "law as a function of the state." See BERMAN, *supra* note 83, at 32.

89. M. Ya. Latsis, an assistant of Feliks Dzerzhinsky, gave the following instruction to the All-Russian Extraordinary Commission for Combating Counterrevolution and Sabotage (known by its cyrillic initials as the "Cheka"), the precursor to the NKVD and, ultimately, the KGB:

We are destroying the bourgeoisie as a class. Do not look, during the investigation, for material as to whether the accused acted against the Soviet power by word or deed. The first question you have to present to him is as to what class does he belong, what are his origin, education, training or profession. These questions have to decide about the fate of the accused.

KUCHEROV, *supra* note 82, at 57.

90. BERMAN, *supra* note 83, at 43. Pashukanis argued that law was essentially a development of the marketplace and, as such, all law was reducible to the law of contracts. Pashukanis would later recant all of his theories in a vain attempt to stave off execution in 1937. *Id.* at 27-28; see also HENDLEY, *supra* note 23, at 19-20; BUTLER, *supra* note 57, at 73-75.

91. RIASANOVSKY, *supra* note 63, at 489.

92. Civil, Criminal and Land codes were promulgated in 1922. Codes of civil and criminal procedure followed in 1923. A corrective labor code was ready in 1924. See FELDBRUGGE, *supra* note 85, at 96-97.

93. LESZEK KOLAKOWSKI, 2 MAIN CURRENTS OF MARXISM 491 (P.S. Fallah trans., Oxford University Press 1978).

## RULE OF LAW IN RUSSIA

law . . . The old law was quite persistent in the form of customary law. . . .”<sup>94</sup>

But the reconstitution of a professional class of lawyers and the replacement of revolutionary legal consciousness with codes largely cribbed from continental European codes (including a draft civil code under consideration by the Imperial State Duma in 1913 but dropped shortly before World War I) still did not connote any interest in the rule of law.<sup>95</sup> The RSFSR Criminal Code adopted in 1922 rejected the principle “no offense without law” in place of the principle of analogy: “socially dangerous acts” not explicitly articulated as criminal could be prosecuted by reference to offenses “similar in nature,” thus giving the regime great latitude to find an act criminal by comparison.<sup>96</sup> The Civil Code recognized no sphere in which the state could not intrude, and every right was granted only insofar as it advanced the State’s policies.<sup>97</sup> Pursuant to the Civil Code, transactions could be made null and void if “directed to the obvious prejudice of the State.”<sup>98</sup> As Lenin saw it: “[W]e must enlarge the interference of the State with the relations pertaining to ‘private law,’ enlarge the right of the government to annul, if necessary, ‘private contracts’ and to apply to private law relations, not the *corpus juris romani* but our revolutionary concept of law.”<sup>99</sup> Even legal capacity was only “granted” (not merely recognized) by the state “[f]or the purpose of the development of the productive forces of the country . . . .”<sup>100</sup> Thus, depending on the political mood, the regime could disenfranchise any individual or group who exercised rights in a manner viewed as contrary to the interests of the state. Today’s favored NEPman was tomorrow’s kulak or social undesirable.

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94. GSOVSKI, *supra* note 80, at 280.

95. On the derivative origins of NEP-era legal codes, see BERMAN, *supra* note 83, at 35; BUTLER, *supra* note 57, at 4; GSOVSKI, *supra* note 80, at 24-25.

96. Article 16 read “If any socially dangerous act has not been directly provided for by the present Code, the basis and extent of liability for it is determined by applying to it those articles of the code which deal with the offences most similar in nature.” JOHNSON, *supra* note 86, at 39. See also BERMAN, *supra* note 83, at 35. RSFSR refers to the Russian Soviet Federated Socialist Republic, the largest republic in the USSR union of the Soviet Socialist Republics.

97. Section One of the Civil Code of the same year made clear that “[t]he law protects private rights except as they are exercised in contradiction to their social and economic purpose.” GSOVSKI, *supra* note 80, at 315.

98. GSOVSKI, *supra* note 80, at 28. Gsovski noted that, although other legal systems had recognized precursors to this power (e.g. *abus de droit*, the unreasonable use of rights, in French law), there existed no precedent for this extraordinary power of the Soviet state.

99. *Id.* at 28, 315-316.

100. GSOVSKI, *supra* note 80, at 315.



The law was a tool toward that determination, and no legal causeway existed to provide a Soviet citizen with safe passage through changing political temperaments.

The understanding of law as a weapon and a tool only grew stronger after Lenin's death, Stalin's rise, the replacement of the NEP with collectivization, the first "five-year plans," and the purges. The anarchy and nihilism of revolutionary legality was replaced by an increasingly conservative, legalistic, and bureaucratic regime. Lazar Kaganovich articulated how ephemeral were the protections of law in late 1929: "our laws are determined by revolutionary expediency at each particular moment."<sup>101</sup> By 1936, however, Stalin famously declared the need for the "stability of laws," by which Stalin sought to control a massive centralized bureaucracy.

The rule of law was hardly the point of such a pronouncement. Law was reduced to an administrative tool of total state control that could be disregarded whenever advantageous for the state to do so. Those civil liberties promised by the 1936 Constitution were limited (as the 1922 Civil Code had been limited) by the condition that rights were exercised "in conformity with the interests of the working people, and in order to strengthen the socialist system . . . ."<sup>102</sup> What those interests might be at any given moment was a matter of Party policy, and thus always subject to change. In any event, Article 126 of the new Constitution for the first time formally recognized the Communist Party as "the vanguard of the working people in their struggle to strengthen and develop the socialist system and is the leading core of all organizations of the working people, both public and state." Even beyond the privileging of the proletariat, there could be no equality before the law in a state that constitutionally enshrined the superiority of Party members, "the most active and politically most conscious citizens in the ranks of the working class and other sections of the working people."<sup>103</sup>

Likewise, the protections of an independent and neutral judiciary that the rule of law requires were completely absent from the system. Courts lost most of their civil cases to state arbitration tribunals once the private trade and small business previously permitted under the NEP had again been outlawed.<sup>104</sup> These tribunals resolved industrial disputes that potentially threatened the all-important five-year plans,

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101. BUTLER, *supra* note 57, at 74.

102. RIASANOVSKY, *supra* note 63, at 506 (quoting KONSTITUTSIA S.S.S.R. OF 1936 [Constitution] ch. I (U.S.S.R.)).

103. KONSTITUTSIA S.S.S.R. OF 1936 [Constitution] art. 126 (U.S.S.R.).

104. JOHNSON, *supra* note 86, at 45.

signaling that economic policy played a greater role in these cases than the civil code.<sup>105</sup> The criminal law's ambit was similarly shrunk by the regime's decision to keep all significant cases out of the courts and under the control of the People's Commissariat of Internal Affairs, the NKVD. A 1934 special enactment granted the NKVD's "special boards" the powers of a star chamber. Procedural due process was all but eliminated: uncorroborated confessions had evidentiary force (and, after 1937, could legally be obtained through torture), secret hearings without counsel were the norm, and the burden of proof in cases of counterrevolutionary crimes rested squarely on the shoulders of the accused (who, inevitably, quickly became the convicted).<sup>106</sup>

If these legal weapons were not enough, the diktat of the Party ensured that millions were executed or exiled into the gulags. The Party not only drafted the general law, and selectively determined its application, but also hand picked the judges trusted to apply it with proper Soviet legal consciousness. Since one litmus test of a judge was political reliability, those elevated to high positions on the bench presumably supported the Party, accepted the importance of Party unity, and followed the principles of democratic centralism and control from above. This, along with rank fear, was the origin of the "telephone justice" described by Solzhenitsyn and many others: "In his mind's eye the judge can always see the shiny black visage of truth – the telephone in his chambers. This oracle will never fail you, as long as you do what it says."<sup>107</sup>

The worst abuses of the rule of law were rescinded in the years after Stalin's death, but without any fundamental change in the instrumentalist view of law or its subordination to Party rule. Even the 1953 law abolishing the "special boards" of the NKVD/MVD was not publicly announced until 1955.<sup>108</sup> In December 1959, the Supreme Soviet adopted the "Basic Principles of Criminal Law and Criminal Procedure," which, *inter alia*, abolished the principle of analogy and required that criminal punishment be imposed only upon sentence by a court.<sup>109</sup> This reform, however, did not entirely end the Orwellian practice of renaming a crime or a punishment as an administrative measure. Thus, while the state repealed its Stalinist bills of attainder (which made orphans or exiles of the relatives of "enemies of the people," not as a

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105. GSOVSKI, *supra* note 80, at 36.

106. JOHNSON, *supra* note 86, at 48-49.

107. ALEXANDER SOLZHENITSYN, *THE GULAG ARCHIPELAGO*, VOL. III 521 (1974).

108. JOHNSON, *supra* note 86, at 53.

109. *Id.* at 55.

criminal punishment but as an administrative measure), an “anti-parasite” law passed in 1961 provided for the summary and unappealable “resettlement” for up to five years of those held to be avoiding “socially useful work” and “leading an anti-social parasitic way of life.” No court was required to make such a finding, which could be determined by a regular meeting of comrades at a factory or collective farm with review by the local municipal council.<sup>110</sup> That same year, by special decree of the Presidium, capital punishment was extended to several economic crimes and retroactively applied to foreign currency speculation.<sup>111</sup> Dissidents actually brought to trial by the state, as most famously were Sinyavsky and Daniel in 1966, were classified as “political cases” and thus exempted from the genuine reforms of due process and other criminal procedural rights that were implemented under Khrushchev and Brezhnev.<sup>112</sup> Such statutes and decrees bore little relation to the principle of no offense without law.

The 1977 Constitution continued the privileged place of the Party above the law. Article Six stated that the Communist Party of the Soviet Union “shall be the guiding and directing force of Soviet society, the core of its political system and of state and social organizations.” This article codified a direct infringement upon the independence of the judiciary: in cases of interest to the Party, decision of the verdict and sentence could be made by the Department of Administrative Organs in the secretariat of the Party’s Central Committee well before trial. As one Moscow city procurator observed, “Party orders are law for the procuracy, judges, and investigators.”<sup>113</sup> Brezhnev’s constitution also

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110. BERMAN, *supra* note 83, at 84-85.

111. *Id.* at 86.

112. ROBERT SHARLET, SOVIET CONSTITUTIONAL CRISIS: FROM DE-STALINIZATION TO DISINTEGRATION 29-30 (1992).

113. Peter H. Juviler, *Some Trends in Soviet Criminal Justice*, in 3 SOVIET LAW AFTER STALIN 59, 68-69 (Donald B. Barry, F.J.M. Feldbrugge, George Ginsburgs & Peter B. Maggs eds., 1979). Frequency of interference was less important than the awareness of its omnipresent possibility. As a former Czechoslovakian judge explained,

Only the insiders knew for sure whether or not the Party ran the courts. There was neither total independence nor unqualified subordination. The practice of the *aparatchiki* varied from leaving the judges entirely alone to drafting verdicts in the Party Secretariats. . . . [Knowing someone] might at any time inflict his ‘suggestion’ upon us, conditioned *all* our adjudication.

Robert Sharlet, *The Communist Party and the Administration of Justice in the USSR*, in 3 SOVIET LAW AFTER STALIN, *supra*, at 321, 332.

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continued the tradition of contingency to which civil rights had been subjected since the Revolution. Article 59, for example, included the admonishment that “[t]he exercise of rights and freedoms shall be inseparable from the performance by a citizen of his duties.” Aryeh Unger has made the point that this clause “would seem to provide blanket constitutional sanction for the deprivation of a right on grounds of alleged dereliction of duty.”<sup>114</sup> In any event, the Soviet lawyer could never be confident that he knew all the relevant law necessary to present his client’s case. A morass of unrepealed or contradictory laws were haphazardly published in various gazettes and newspapers, if published at all; the Presidium still had the power to enact secret laws.<sup>115</sup>

### C. *The Rule of Law Under Gorbachev and Yeltsin*

“During the last years of its life,” Professor Bernard Rudden memorably observed, “the Soviet Union turned to law like a dying monarch to his withered God. . . . [T]he Congress and Supreme Soviet enact and amend statutes with the fervor of one who sees in legislation the path to paradise.”<sup>116</sup> Ironically, it was only in these death spasms that the state, for the first time in Russian history, actively prioritized the development of a *правило закона* *эпоха* — a rule-of-law state. And the man ushering in these reforms, Mikhail Gorbachev, was a lawyer by training — the first lawyer to lead the Politburo since Lenin.<sup>117</sup>

Gorbachev’s economic policies of *uskorenie* (acceleration), *khozraschet* (cost-accounting), and socialist competition prompted one of the most important early changes in thinking about Soviet law. The success of such policies was contingent on Soviet citizens who felt secure enough in their rights to take advantage of these changes. In this context, then Director of the Institute of State and Law and one of Gorbachev’s frequent advisors, Vladimir Kudriavtsev, wrote in December 1986: “Of the two possible principles, ‘You may do only what is permitted,’ and ‘You may do everything which is not forbidden,’ priority should be given to the latter inasmuch as it unleashes the initiative and activism of

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114. ARYEH L. UNGER, CONSTITUTIONAL DEVELOPMENT IN THE U.S.S.R. 200 (1981).

115. BERMAN, *supra* note 83, at 235.

116. Rudden, *supra* note 27, at 17.

117. ARCHIE BROWN, THE GORBACHEV FACTOR 29 (1996). Brown characterizes the five years Gorbachev spent at the MGU law faculty as “crucial ones for his intellectual development.” *Id.* To his credit, Gorbachev didn’t last more than ten days at the Stavropol’ procurator’s office to which he was assigned upon graduation from the law faculty at Moscow State University. *Id.* at 36.

people.”<sup>118</sup> Gorbachev agreed wholeheartedly with the idea and soon publicly reiterated it himself.<sup>119</sup> Advocacy of such a principle, limiting state action and expanding human liberty, was key to both *perestroika* and to the creation of a system in which law was not a tool of the state but a causeway for citizens. It was the nearest approximation to acceptance of the rule-of-law maxim “no offense without law” in Russia since before the Revolution.

Increasingly, Gorbachev promoted the construction of a *социалистическое правовое государство* [*sotsialisticheskoe pravovoe gosudarstvo*], a socialist rule-of-law state.<sup>120</sup> The Nineteenth Party Conference, held June 28 - July 1, 1988, was a milestone for promoting a rule-of-law state.<sup>121</sup> In April 1988, Gorbachev prepared for the conference with a series of meetings with regional party first secretaries. As Archie Brown observed, Gorbachev “drew attention to the significance of moving to a state based upon the rule of law, pointing out that this meant that every person and all institutions must be subordinate to the law, including the Politburo.”<sup>122</sup> In October 1988, Gorbachev asserted that this was

118. Vladimir Kudriavtsev, *Pravovaya sistema: puti perestroiki*, PRAVDA (Moscow), Dec. 5, 1986, at 3.

119. Brown, *supra* note 117, at 145-46. The notion was explicitly incorporated into three early and important pieces of economic legislation: the Law on Individual Labor Activity (1986), the Law on the State Enterprise (1987), and the Law on Co-operatives (1988). *Id.* at 146.

120. Mikhail Gorbachev, *O zadachakh partii po korennoi perestroike upravleniia ekonomiki*, Doklad na Plenum TsK KPSS, June 25, 1987, in 5 IZBRANNIE RECHI I STAT'I 183 (1988); *Cherez demokratizatsiiu - k novomu obliku sotsializma: Vstrecha v tsentral'nom Kommitete KPSS*, PRAVDA (Moscow), Oct. 24, 1988, at 1.

121. Mikhail Krasnov, *The Rule of Law, in BETWEEN DICTATORSHIP AND DEMOCRACY: RUSSIAN POST-COMMUNIST POLITICAL REFORM 195, 196-197* (Michael McFaul, Nikolai Petrov & Andrei Ryabov, eds. 2004); SHARLET, *supra* note 112, at 106.

122. BROWN, *supra* note 117, at 176. Even at the height of his powers as General Secretary (which Archie Brown pinpoints from the 19th Party Conference in June 1988 to the First Congress of People's Deputies in May 1989), political considerations still forced Gorbachev to leave the conference commission on legal reform in the hands of Andrei Gromyko, then-Chairman of the Presidium of the Supreme Soviet and hardly a legal reformer. *Id.* at 177-79. Likewise, Gorbachev was constrained to assign chairmanship of the Central Committee Commission for legal affairs to former KGB chairman Chebrikov (according to Brown, “manifestly unfit to supervise any transition to a law-governed state.”). *Id.* at 186. These appointments should not be taken as signs of Gorbachev's ambivalence about the goal of achieving a rule-of-law state. Rather, these were tactically driven appointments forced upon Gorbachev by his own political vulnerabilities from opponents of his emerging reform agenda. That Gorbachev and this agenda outlasted these opponents (Gromyko retired in April 1989 and Chebrikov was dropped from the Politburo, Secretariat, and his chairmanship of the legal commission in September 1989) is evidence supporting the wisdom of these moves. *Id.* at 186. *But see* ROBERT B. AHDIEH, *RUSSIA'S CONSTITUTIONAL REVOLUTION: LEGAL CONSCIOUSNESS AND THE TRANSITION TO DEMOCRACY, 1985-1996*, 36

the key to *perestroika*, political reforms that he characterized as “a legal revolution.”<sup>123</sup> By 1991, the advocacy of a “law-governed civil society” – *правовое эрарьданское общество* [*pravovoe grazhdanskoe obshchestvo*] – was sufficiently uncontroversial to be demanded even within the pages of the legal journals that had previously denounced the concept’s bourgeois roots and predicted the withering away of law altogether.<sup>124</sup>

Gorbachev also promoted the increasing influence of transnational legal systems on Soviet legal norms. The 1989 Law on Constitutional Supervision, for the first time in Soviet history, “provided a mechanism for the direct incorporation of various international rules into the Soviet domestic legal system.”<sup>125</sup> The law gave a Committee on Constitutional Supervision the power to review Soviet law for compliance with USSR international legal obligations. In the few years of its operation, the Committee issued decisions challenging criminal law norms on the presumption of innocence, residency permits, and the limited jurisdiction of Soviet courts regarding labor disputes. These and other cases relied on citation to the Universal Declaration of Human Rights and UN Covenant on Civil and Political Rights.

Following the collapse of the Soviet Union, Boris Yeltsin’s presidency was marked by evidence of how dramatic a conceptual shift in thinking about law had been accomplished by Gorbachev’s reforms, and also how shallow were the roots of that new thinking. Tremendous advances were made for the development of rule of law as a causeway. Foremost of these was the adoption and entry into force of the first two parts (of three) of a new Civil Code, in 1995 and 1996 respectively. Drawing on the sea change in legal thinking launched under Gorbachev, the Civil Code was premised on the principle that “what is not prohibited, is permitted.”<sup>126</sup> Through this Code, entrepreneurs and individual citizens were provided the framework to contract and otherwise secure their property and relations with each other to a degree not previously known in Russian history. And beyond the requirement that civil law rights be exercised in good faith, without infringing the rights of others

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(1997) (“Gorbachev opened a Pandora’s box by singing the praises of the law and the constitution, yet continuing to use them not as arbiters of the process but as tools within it.”).

123. *Interv’iu M.S. Gorbacheva zhurnalu “Shpigel” (FRG)*, PRAVDA (Moscow), Oct. 24, 1988, at 1.

124. Rudden, *supra* note 27, at 17 n.3 (citing Chairman of the USSR Constitutional Supervision Committee S.S. Alekseev’s article *Pravo: vremia novykh podkhodov*, SOVETSKOE GOSUDARSTVO I PRAVO, No. 2, 3, 8 (1991)).

125. Gennady M. Danilenko, *International Law and the Future of Rechtsstaat in Russia*, in Smith & Danilenko, *supra* note 45, at 96, 98.

126. BUTLER, *supra* note 57, at 364.

or creating a danger of harm to them, the Civil Code left the Russian citizen unencumbered by the teleological restrictions of the Soviet past that rendered the citizen's rights contingent on the state's satisfaction with the fulfillment of his duties.

Nevertheless, Yeltsin and his administration repeatedly discovered just how difficult it was to translate these new concepts of law into their institutional practice. This was partly due to Yeltsin's own difficulty in accepting constraints on his executive power, which a rule-of-law state necessarily imposed on him. One of Yeltsin's legal advisors for much of the 1990s, Mikhail Krasnov, recounts how Yeltsin, editing remarks that had been prepared for him, changed a statement in it that the state should be bound by law to read "the state should be bound with the law." To Krasnov, the choice of preposition made all the difference: "Clearly, this small preposition radically altered the definition of law-governed state, implying that the law reflects the tendencies of the state and is used to justify its actions instead of acting as an independent constraint."<sup>127</sup>

Yeltsin's actions in office also exposed his difficulty in coming to terms with rule-of-law constraints. For example, as the RF Constitutional Court prepared to decide a case challenging the constitutionality of the President's ban on the Communist Party, Yeltsin, by secret decree, raised the salaries of the judges empanelled to hear the case.<sup>128</sup> Both the secrecy of his act and its obvious attempt to interfere in the work of the judiciary were contrary to the rule of law. Similarly, when in February 1994 the newly constituted Russian parliament used its new power of amnesty to release from prison the leaders of the October 1993 attempted coup, Yeltsin telephoned General Procurator Kazannik to demand that he find a way to keep Yeltsin's enemies in prison. Rather than ignore the lawful order of the legislature, Kazannik promptly resigned rather than be a party to what he rightly denounced as an attempt to return to the days of "telephone justice."

Of course, Yeltsin was far from alone in being unable to put his public support for the rule of law into action. The tax code and extraordinarily high rates imposed on profits were prime examples of laws that imposed duties impossible to perform. Thus, the tax codes made virtually every serious entrepreneur a scofflaw. The *propiska* system of residency permits, although decisively held unconstitutional by the Constitutional Court, continued to be enforced in Moscow and

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127. Krasnov, *supra* note 121, at 198.

128. Rudden, *supra* note 27, at 17, 29.

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other urban areas that attracted hopeful but homeless citizens. It little helped a Caucasian trader in Moscow to inform his arresting officer that the law permitted his freedom of movement. The tax inspectorate, like the Moscow Mayor's Office, used these laws (even those held unconstitutional and therefore no longer law) as tools to extract rents, whether from would-be entrepreneurs or merely desperately poor internal immigrants.

Law was used as a tool between politicians at higher levels of power, too. According to one scholar and early member of the Russian democratic opposition,

... while arguing for the rule of law or a law-based state, 'democrats' saw law as a means of toppling the regime, as a tool that should have been directed mainly against their Communist opponents, while they themselves did not feel bound by what they considered to be outdated and unjust Communist laws.<sup>129</sup>

Soviet legal study had for years been steeped in the basic principles of Marxism-Leninism (e.g. law as an instrument of class domination), dialectical materialism (including the forecast withering away of all law and state administration) and the history of the Communist Party. All the while, Russian lawyers were starved of serious study of comparative law, constitutionalism, and federalism. The Soviet lawyer, "whether he be a convinced Marxist-Leninist or not, of whatever disposition, his concepts of law, its origins, role, and purpose, have been affected by this intellectual framework."<sup>130</sup> As Vasily Vlasihin, the head of U.S. Legal Studies at the Institute of the USA and Canada observed with some prescience at a conference held in January 1993, "all too many people in Russia think that once you get the right statutes on the books, you automatically create an operative rule of law. But Russians still do not trust law itself."<sup>131</sup> Firmly embedded in the public consciousness remained that old Russian saying that contrasts starkly with both the rule of law and the metaphor of law as a causeway: "закон как дьшло –

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129. Alexander Lukin, *Democratic Groups in Soviet Russia (1985-1991): A Study in Political Culture* 323 (1997) (unpublished D.Phil. thesis, University of Oxford) (on file with University of Oxford and British Library). See also ALEXANDER LUKIN, *THE POLITICAL CULTURE OF THE RUSSIAN 'DEMOCRATS'* 204-10 (2000).

130. W.E. BUTLER, *SOVIET LAW* 27 (2nd ed. 1988).

131. Vasily A. Vlasihin, *Toward a Rule of Law and a Bill of Rights for Russia*, in Smith & Danilenko, *supra* note 45, at 43, 46.



куда повернул, туда и вышло.”<sup>132</sup>

This mentality remained largely unreconstructed even as the institutional manifestations of new legal institutions sprang up like mushrooms while Russia fought for membership in the Council of Europe.<sup>133</sup> The moratorium placed on the death penalty in 1996, for example, is a direct result of this transnational law. Accession to the Council of Europe was contingent, in part, on Yeltsin’s ability to end the use of the death penalty. Yeltsin did so by presidential decree (*ukaz*), but was unable or unwilling to push the Duma for ratification of the ECHR Protocol that would have permanently abolished capital punishment in Russia.

These attitudinal barriers were apparent in several other areas of the rule of law. On the eve of its acceptance, legal experts from the Parliamentary Assembly of the Council of Europe concluded that “[t]he courts can now be considered structurally independent from the executive, but the concept that it should in the first place be for the judiciary to protect the individuals has not yet become a reality in Russia.”<sup>134</sup> Two years later, the situation had little improved:

[T]he mentality towards the law has not yet changed. In Soviet times, laws could be completely disregarded – party politics and “telephone justice” reigned supreme. While it cannot be said that laws are ignored as a matter of course in present times, they are disregarded if a “better” solution to a particular problem seems to present itself. This assertion is valid for every echelon of the Russian state administration, from the President of the Federation . . . down to local officials. . . . [I]t is very difficult to enforce the law through the courts. Often, a complaint against administrative abuse cannot even be brought to court, since the prosecutor’s office is the competent state organ. But even when such cases are brought to court, and the court rules against the administration, the decision is sometimes not implemented

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132. *Id.*

133. For a more in-depth analysis of this transnational influence on Russian law, see Jeffrey Kahn, *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 (2002).

134. Rudolf Bernhardt, Stefan Trechsel, Albert Weitzel, & Felix Ermacora, Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards, Doc. AS/Bur/Russia (1994), reprinted in 15 HUM. RTS. L.J. 250, 287 (1994). In fact, given the continued oversight of the judiciary by the executive branch Ministry of Justice for another two years, structural “independence from the executive” may itself have been an unduly optimistic conclusion.

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due to the low standing courts and their decisions enjoy in public opinion.<sup>135</sup>

Even something seemingly so uncontested as the publication of supreme court opinions was surprisingly suspect to leading members of the Russian federal judiciary. It is worth repeating at length the recollections of Frank Douglas Wagner, for the past eighteen years the Reporter of Decisions for the United States Supreme Court, of a visit to the United States in spring 1993 of Valerii Zorkin, then chairman of the RF Constitutional Court:

Near the end of our discussion, after we had parsed the ins and outs of preparing and publishing court opinions, Chairman Zorkin asked me a final question. It nearly threw me for a loop when he inquired: "How do you keep the press and your enemies from lying about what you've decided in important cases?" As I understood it, the Chairman was not simply asking whether or how the Supreme Court tries to dissuade its critics from putting unwarranted spin on its rulings. Rather, he seemed to be asking the much more basic question of how we defend ourselves against bald-faced liars bent on distorting our work in order to destroy the Court's credibility and, thus, its effectiveness as a functioning arm of Government. The question was so astonishing to someone raised in the western democratic tradition that it took me several moments to arrive at the answer. Finally, a light dawned. I told Chairman Zorkin that what we do is disseminate our decisions as promptly and as widely as possible through a variety of print and electronic media so that those interested can quickly and easily determine for themselves what the Court has ruled on a particular question. Since the Chairman's visit, I have come to believe that public access to the Court's decisions, no matter what the medium or source, is one of the bearings that keeps democracy's wheels turning true.<sup>136</sup>

The Yeltsin era was a *mélange* of extraordinarily rapid statutory reform of Russia's civil, political, economic, and legal institutions and

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135. Parliamentary Assembly of the Council of Europe, Strasbourg, *Opinion on Russia's Application for Membership of the Council of Europe*, Doc. 7463 (Jan. 18, 1996), reprinted in HUMAN RIGHTS L.J., Oct. 15, 1996, at 218-19.

136. Naseem Stecker, *Reflections of a Modern Scribe*, 84 MICH. B.J. 2, Feb. 2005, 41.

painfully slow reform of attitudes and norms of behavior in each of those spheres. This laid the path for many of the problems ultimately faced in the Putin administration. Many of the shallow institutional roots of the rule of law set down in the first short decade of post-Soviet Russian politics were easily uprooted in the second decade.

#### IV. THE RULE OF LAW IN PUTIN'S RUSSIA

How does President Vladimir Putin's stated intention to establish a "dictatorship of law" correspond to the RF Constitution's assertion of the existence of the rule of law?<sup>137</sup> In this regard, I do not intend to catalog the full slate of Putin's activities, reformist as often as reactionary, which task would require a book-length analysis. But what highlights would such a treatment include? How does law in Putin's Russia rate against the three principles of the rule of law discussed above: no offense without law, equality before the law, and the independence of the judiciary to enforce the law?

In his public statements, Putin seems at least able to articulate the concept of the rule of law. In his state-of-the-nation address this past April, for example, Putin insisted that the laws governing property rights "should be clear to all . . . [and] they should be stable."<sup>138</sup> His rationale tracked those aspects of the rule of law that are highlighted by the metaphor of the law as a causeway: "This allows anyone developing their own enterprise properly to plan and conduct both their business and their life. It allows citizens calmly and without anxiety to conclude contracts in such vital areas as, for example, buying a home, or privatizing it."<sup>139</sup> Putin even seemed to recognize what Professor Ruden described as the precious sphere of non-law, accepting limits on

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137. Putin introduced this phrase early in his first presidential campaign, see Open Letter from Vladimir Putin to Russia's Voters, 25 Feb. 2000, available at <http://putin2000.ru/07/05.html>. Putin used the phrase repeatedly during his first term as president. See, e.g., Russian Public TV, Moscow, in Russian (broadcast May 17, 2000, 1700 GMT), available from BBC Worldwide Monitoring, <http://news.bbc.co.uk>; "Vladimir Putin: Vlast' dolzhna byt' rabotaiushchei!" ROSSIISKAYA GAZETA (May 19, 2000) at 3; Russian Public TV, Moscow, in Russian (broadcast July 8, 2000, 0800 GMT), available from BBC Worldwide Monitoring, <http://news.bbc.co.uk>.

138. Vladimire Putin, Address, in Russian (RTR Russia TV, Moscow, broadcast Apr. 5, 2005, 08:00 GMT) (transcript available from BBC Worldwide Monitoring). In some cases, Putin's historical references to the development of the rule of law, as well as other fundamental social institutions, veers into sheer fantasy: "For three centuries, together with other European nations, hand in hand with them, we have gone through a process of enlightenment and experienced difficulties in setting up parliamentary rule, municipal and judicial power and forming similar legal systems."

139. *Id.*

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the state's power, identifying areas of life in which he contended that the state had no business to interfere.<sup>140</sup> Putin also made a hallmark of his first term the harmonization of federal and regional law, with a tremendous gain for Russia in terms of a more predictable, transparent, and ascertainable legal hierarchy.<sup>141</sup> Early in his first term, the third and final part of the Civil Code entered into force, and the long embattled Criminal Procedural Code was passed into law.

But continuing developments during Putin's presidency have exposed reactionary undercurrents not very deep below the surface. One of the most notable sources of retrenchment is Putin's antiterrorism initiative. The reintroduction of juries, for example, infuriated the security services, law enforcement, and even judges. Despite the fact that juries have only been available to the accused in all but two regions of Russia since last year, the acquittal rate for jury trials hovers at about fifteen per cent, similar to rates in other European countries that employ juries.<sup>142</sup> But just as Tsar Alexander II introduced the jury system only to exempt more and more political cases from jury trials as the independence of that institution challenged the state's power, Putin's administration has engaged in the same reactionary retrenchment. Beyond their efforts to slow the rate at which juries are introduced into Russia, the security services have actively sought to exempt terrorism and espionage cases from trial by jury, asserting the need to protect state secrets from public disclosure.<sup>143</sup> As with jury trials, the

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140. *Id.* ("The great Russian philosopher Ivan Ilyin wrote that the power of state has its own limits, determined by the very fact that it is a power that suits the external life of an individual. However, all the [internal] creative states of the soul and spirit, including love, freedom and goodwill, are not under the jurisdiction of the state and cannot be dictated by it. The state cannot demand the trust, blessing, love, goodness and faith of its citizens. It cannot regulate scientific, religious and artistic works. It must not meddle in moral, family and everyday life or, unless absolutely essential, stifle the people's economic initiative and creativity. Let us not forget this.").

141. See, e.g., Gordon M. Hahn, *The Impact of Putin's Federative Reforms on Democratization in Russia*, 19 *POST-SOVIET AFF.* 114, 117 (2003). See also KAHN, *supra* note 4, at 245-52.

142. Between 1993 and 2003, only pilot programs were permitted in nine regions; in 2003, sixty regions were added. Marjorie Farquharson, *After One Year, New Russian Criminal Procedure Code is Showing Results*, 7 *RFE/RL NEWSLINE*, July 31, 2003, <http://www.hri.org/news/balkans/rferl/2003/03-07-31.rferl.html#83>. Chechnya and Ingushetia are not slated for the introduction of jury trials until 2007. Bench trials produce acquittals roughly one to two per cent of the time. Fred Weir, *Russia Embraces Trial By Peers*, *CHRISTIAN SCI. MONITOR*, Mar. 5, 2003; Matt Bivens, *A Glum Report Card on Russia*, *MOSCOW TIMES*, June 2, 2003, available at <http://www.cdi.org/russia/johnson/7205-3.cfm>. The acquittal rate for all trials is 0.4%. The European average is roughly ten per cent. Farquharson, *supra*.

143. Mark Kramer, *Out of Communism: Reforming the Russian Legal System*, 102 *CURRENT HIST.* 327, 331-32 (2003).

Putin administration has grown increasingly restless with the moratorium placed on the death penalty during the Yeltsin administration. This year, Deputy Procurator General Vladimir Kolesnikov advocated that those convicted of terrorism charges be exempted from the protections of the moratorium.<sup>144</sup>

As with his past use of his catchphrase “the dictatorship of law,” Putin’s descriptions of fundamental legal principles are often tinged with a darker double meaning. In his state-of-the-nation speech, Putin intoned, “Firstly, only in a free and just society does every law-abiding citizen have the right to demand for himself reliable legal guarantees and state protection.”<sup>145</sup> For Putin, the citizen is entitled to legal guarantees, but only after the conclusion is reached that he is a “law-abiding” citizen. But the rule of law requires legal protections to be universally and equally applied precisely because those suspected or accused of violating the law are those most in need of reliable legal guarantees for their rights.

Likewise, Putin insisted that “[t]he inviolability of the right to private property is the basic requirement for the conduct of any kind of business. The rules to which the state adheres in this field should be clear to all.” All fair enough as far as that goes, but only moments prior to insisting on the inviolability of property Putin enjoyed a celebratory reference to “[h]aving liberated the largest mass media outlets from censorship by oligarchs.”<sup>146</sup> Such an Orwellian reference to the politically directed criminal investigations that drove Vladimir Gusinsky and Boris Berezovsky to flee their country and lose their media empires leaves one to wonder how many more such “liberations” will be permitted under Putin’s understanding of inviolable private property rights.

The Gusinsky episode, in particular, provides striking evidence of the Putin administration’s disregard for two of the rule-of-law principles described above: the principle of no offense without law and the principle of equality before the law. Gusinsky’s Media-Most empire was “liberated” from him because debt renegotiations failed with the state-controlled gas giant Gazprom.<sup>147</sup> Gusinsky spent four days in police custody on dubious charges before he bought his freedom by signing under duress an agreement to give up his majority stake in his

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144. Jan Sliva, *Council of Europe Criticizes Russia’s Human Rights Record, Commitment to Democracy*, ASSOCIATED PRESS, June 3, 2005.

145. See BBC Monitoring transcript of address taken from RTR Russia TV, *supra* note 138.

146. *Id.*

147. *Russia: The Very Long Arm of Its Law*, THE ECONOMIST, Dec. 16, 2000.

media holdings company to Gazprom. The arrangement was brokered by none other than the Acting Press Minister, Mikhail Lesin, who gave Gusinsky his *ultra vires* assurance that in exchange for Gusinsky's signature transferring assets to Gazprom, the criminal investigation of him would be dropped. In words that, given their context, foreshadowed Putin's recent doublespeak about the rule of law, the agreement Gusinsky signed while sitting in the notorious Butyrka prison stated: "The Parties realise that successful implementation of the Agreement is possible only when individuals and legal entities acquire and exercise their civil rights of their own free will and in their own interests, without compulsion by any other party to act in any particular way."<sup>148</sup>

This utter hypocrisy, and a second warrant for his arrest, led Gusinsky to file an application with the European Court of Human Rights. The European Court found that Gusinsky's arrest violated the rule of law requirement embodied in the Convention that Russian criminal law cannot be used as a tool to advance the state's ulterior political or commercial purposes.<sup>149</sup> Gusinsky's case illustrates Putin's view of law as a tool of the state, compared with the European Court's detailed opinion advancing a conception of the rule of law much closer to the metaphor of a causeway. Gusinsky, under this latter and better view, was entitled to rely on the law both in his private civil law dealings with Gazprom and in securing himself against deprivation of his liberty by the state.

The principle of equality before the law has also not fared well under Putin, although that flaw can hardly be said to have originated in his administration. Oligarchs are not the only citizens endangered by the state's use of law as a tool. Outspoken journalists, lawyers, and dissidents who challenge the state have found themselves charged with crimes in retaliation. The environmentalist and former military journalist Grigorii Pasko, himself a victim of retaliatory treason charges that remained secret throughout his closed-door trial, has described a certain "*шпиономания*" [*shpionomania* – spy-mania] that has gripped

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148. *Gusinskiy v. Russia*, App. No. 70276/01 (Eur. Ct. H.R. Nov. 22, 2004) ¶ 28, available at <http://www.echr.coe.int/echr> (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search Application Number 70276/01; then follow "Reports of Judgment" hyperlink).

149. *Id.* at ¶ 76 ("[I]t is not the purpose of such public-law matters as criminal proceedings and detention on remand to be used as part of commercial bargaining strategies. The fact that Gazprom asked the applicant to sign the July agreement when he was in prison, that a State Minister endorsed such an agreement with his signature and that a State investigating officer later implemented that agreement by dropping the charges strongly suggest that the applicant's prosecution was used to intimidate him.").

Putin's *силезику* [*siloviki* – members of the security and military services] – an obsession with ferreting out spies imagined to fill the ranks of citizens.<sup>150</sup> There is former FSB Lt. Col. Mikhail Trepashkin, now an attorney who represented victims seeking state compensation after the 1999 Moscow apartment bombings only to find himself detained on highly suspicious firearms charges a week before he announced his intent to demonstrate the state's complicity in the bombings in open court.<sup>151</sup> He was ultimately sentenced to four years in prison, with an added charge for revealing state secrets.<sup>152</sup> These names can be added to those of Alexander Nikitin, Igor Sutyagin, Valentin Danilov, and many others who have been accused of espionage based on a law on state secrets and sometimes for the use of sources only subsequently classified as protected secrets. Sometimes the charges themselves have been partially kept from the accused on grounds of state secrecy.

This Article has not addressed the total legal vacuum that has existed in Chechnya since at least December 1994. The egregious violations of human rights there, and the sheer volume of violations, are enough to make anyone question Russia's assertion to be a rule-of-law state. There are also specific reasons to fear how the Chechen wars have retarded the development of the rule of law in the rest of the country. The episodic terrorism that these wars have sparked – the Nord-Ost hostage crisis, apartment bombings, and Beslan massacre the best known among them – has led to the sort of emergency legislation that justifies extraordinary police tactics in the name of fighting terrorism. As the Moscow Helsinki Group has observed, as well, Chechnya is also a proving ground for police who “share in the experiences of violence, lawlessness and absolute impunity,” and then return to their precincts “and take these practices with them.”<sup>153</sup>

The independence of the judiciary, the third principle discussed above, is the most concrete institutional representation of the three rule-of-law principles I've outlined. Putin has done much to improve the administration of the law in Russia by generally supporting indepen-

150. Fred Weir, *Russian Government Sets Sights On 'Subversion'*, CHRISTIAN SCI. MONITOR, June 1, 2005.

151. Alex Rodriguez, *Verdict Near on Sleuth Who Talked Too Much*, CHI. TRIB., May 18, 2004, at 4.

152. Kim Murphy, *Russian Ex-Agent's Sentencing Called Political*, L.A. TIMES, May 20, 2004; Victor Yasmann, *Court Sentences Ex-FSB Officer for Disclosure of State Secrets*, RFE/RL NEWSLINE, May 20, 2004, <http://www.rferl.org/newsline/2004/05/200504.asp>; Anatoly Medetsky, *FSB Critic Trepashkin Jailed for 4 Years*, MOSCOW TIMES, May 20, 2004, available at <http://www.cdi.org/russia/johnson/8215-3.cfm>.

153. Bivens, *supra* note 142 (quoting Tanya Lokshina, executive director of the Moscow Helsinki Group).

dent courts, trained jurists to preside over them, and a vibrant bar to attract citizens to use the courts to resolve disputes and trust in their impartiality in criminal matters. Putin has increased the salaries of judges and law enforcement personnel, and he has called for more funding for the courts.<sup>154</sup> These efforts have their origin, in part, in Putin's foreign policy goals of closer ties to Europe (e.g. Council of Europe) and the international legal order (e.g. the World Trade Organization, and the G-8 Group of Industrial Nations). They are also part of Putin's inheritance from the Yeltsin administration. Putin has found himself repeatedly pressed, as was his predecessor, to meet the demands of Russia's membership in the Council of Europe.

The Criminal Procedure Code, which was passed into law in November-December 2001, radically modernized Soviet practices that conflated executive and judicial branch roles in the administration of justice. Under the Soviet-era Code, whether to detain a suspect (*подозреваемый*) or an accused person (*обвиняемый*) was a decision entirely in the province of the prosecutor, not the judge. The new Code takes away this extraordinary executive power and requires a court of law to make the determination whether to issue a warrant for the arrest of an individual or the search of his property. Justice Ministry statistics indicated that courts released three thousand suspects during the first three months of the Code's operation, a thousand more than the entire previous calendar year.<sup>155</sup>

But despite what such relatively encouraging figures might suggest, these provisions have met with resistance from every level of the Russian state.<sup>156</sup> Russian lawmakers were themselves aware how difficult a change this would be for prosecutors to accept. They therefore

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154. Andrei Malosolov, *Russian Prime Minister Sums Up First Results of Judicial Reform*, RIA-NOVOSTI, Jan. 21, 2003; Julie A. Corwin, *Putin Calls For More Funding for Court System*, RFE/RL NEWSLINE, Nov. 29, 2000, <http://www.rferl.org/newsline/2000/11/281100.asp>. Many regional governments, however, still provide local judges their housing and other bonuses, obviously compromising their independence.

155. Farquharson, *supra* note 142. Farquharson cites these statistics as also indicating a 50% reduction in arrests in general, and an ongoing average of courts releasing detainees roughly 10% of the time.

156. *See, e.g.*, Julie A. Corwin, *Judges Cast Their Vote Against Judicial Reforms*, RFE/RL REPORTS, Mar. 19, 2001, <http://www.rferl.org/reports/rpw/2001/03/9-190301.asp> (reporting opposition to arrest and search warrant requirements from Prosecutor-General Vladimir Ustinov, Interior Minister Vladimir Rushailo, and FSB Head Nikolai Patrushev, leading Putin to withdraw initial proposal in January 2001); Julie A. Corwin, *Putin Backs 'Liberal' Amendments to Criminal Code*, RFE/RL REPORTS, Apr. 2, 2001, <http://www.rferl.org/newsline/2001/04/1-rus/rus-020401.asp> (reporting revival of judicial warrant proposal but resistance to implementation prior to 2003).



sought to delay this element of the Code eighteen months after the rest of the Code entered into force in July 2001. Although the RF Constitutional Court struck down that transitional period, that did not end the resistance.<sup>157</sup> This demonstrates that just as important as these specific provisions is the “ethos of restraint” that underlies them and that they are intended to promote.<sup>158</sup> It is in this area that judicial independence is the weakest and in which Putin appears to have had the least success and the least political interest in achieving a change from the *status quo*. Decades of deference to prosecutors, themselves working under the eye of the Party, has evaporated the sense of institutional independence among many judges.<sup>159</sup> Other institutional forces also put pressures on judges and threaten the independence of a politically neutral judiciary. For example, although the Criminal Procedure Code shifts the burden of proof to the state in criminal cases, the prosecution is still entitled to appeal criminal acquittals. In 2002, approximately 40% of acquittals were reversed by higher courts, as compared to 0.05% of convictions reversed on appeal.<sup>160</sup> This high rate of success for prosecu-

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157. O proverke konstitutsionnosti statei 90, 96, 122, i 216 Ugolovno-protsessual'nogo kodeksa RSFSR v svyazi s zhalobami grazhdan S.S. Malenkina, R.N. Martynova i S.V. Pustovalova (Mar. 14, 2002), available at [http://ks.rfnet.ru/pos/p6\\_02.htm](http://ks.rfnet.ru/pos/p6_02.htm). See also Ger P. van den Berg, *Constitution of the Russian Federation Annotated with Summaries of Rulings and Other Decisions of Constitutional (Charter) Courts: 1990-2001*, 27 REV. CENT. & E. EUR. L. 175 (2001). Ger P. van den Berg, *Constitutional Court: A Decade of Legal Reforms – Part 2: The Constitution of the Russian Federation Annotated*, 28 REV. CENT. & E. EUR. L. 273 (2002-3).

158. Kramer, *supra* note 143, at 327 (“Although the code’s specific guidelines are crucial, even more important is the ethos of restraint that develops over time as the key participants in a criminal justice system learn to play by the rules of the game.”).

159. According to Sergei Vitsin, a law professor and deputy chair of the Presidential Council on the Reform of the Justice System, “Judges do not see themselves as in any way separate from prosecutors and police. You can write democratic laws, but you have to follow them, too.” Peter Finn, *Fear Rules in Russia’s Courtrooms: Judges Who Acquit Forced Off Bench*, WASH. POST, Feb. 25, 2005, at A1. An experienced Moscow prosecutor, Sergei Tsirkun, confirmed this view:

Judges think of themselves as soldiers in the front line fighting crime. A judge is not going to pass an acquittal unless he is absolutely, 100 percent confident that someone is innocent. If he has the slightest suspicion that someone might be guilty, he will find them guilty even if he has to ignore problems with the evidence.

*Id.*

160. Kramer, *supra* note 143, at 328 (citing former judge Sergei Pashin of the Independent Council of Legal Experts for this statistic). Yuri Skuratov, RF General Procurator at the time of his remarks, defended the practice as a means “to supervise the legality of the proceedings by appealing against sentences and rulings. . . . By making the court take lawful, fair decisions, the Prokuratura effectively serves to establish the court’s authority and independence.” Yuri Skuratov,

tors on appeal creates subtle institutional pressures on lower court judges. Because the percentage of rulings overturned by higher courts is one of the key criteria by which lower court judges are evaluated for advancement, lower court judges face pressures to “err[] on the side of guilty verdicts” to conform to the preferences such statistics represent.<sup>161</sup> Such a behavioral shift can be expected to be even more difficult for the prosecutors driving this trend than for the judges meekly reacting to it.

These statistics point to a recurring theme in Russian history: reform from above is never enough. As Soviet era laws continue to be replaced by generally improved post-Soviet legislation, the reform of institutional cultures, old methods, and mindsets remains even more difficult and less has been accomplished.<sup>162</sup> The opposition of the *силовики* [*siloviki*] is taken for granted. Even as the KGB morphed into the FSB, the persistence of the old slang term *чекисты* [*chekisty*] that originated with the VCheKa remains standard usage – it is not expected that the sword and shield, the symbol of the states security organ, will be replaced in the same way as the hammer and sickle. Unlike the countries of Eastern Europe, no lustration process occurred in Russia, nor is one to be expected at this late stage. This behavioral legacy of the Soviet past, as the experience in reforming the Criminal Procedure Code suggests, is no less an obstacle to the establishment of the rule of law than structural reform. This is because the greatest abuses of the rights and processes to which citizens are entitled when confronted by the criminal justice system monolith occur not in the mansion of the court, but at the gatehouse of the police precinct.<sup>163</sup> It is at the earliest

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*Conceptual Questions Relating to the Development of the Prokuratura In the Period of Law Reform In the Russian Federation*, in THE PROKURATURA IN A STATE GOVERNED BY THE RULE OF LAW (Multilateral Meeting Organized by the Council of Europe in Conjunction with the General Prosecutor’s Office of the Russian Federation, Moscow, 8-9 January 1997) 16 (Council of Europe Pub., April 1998). Skuratov’s Orwellian view of the source of judicial independence evinced absolutely no understanding of the separation of judicial and executive authority.

161. Kramer, *supra* note 143, at 328. For recent anecdotal evidence of this pressure, see Finn, *supra* note 159. See also Robert Coalson, *Former Judge Appeals to Putin on Judicial Independence*, RFE/RL NEWSLINE, Mar. 14, 2005, <http://www.rferl.org/newsline/2005/03/140305.asp>; Jeremy Page, *Judges Take Stand Against Putin*, TIMES (UK), Mar. 19, 2005; Guy Chazan, *In Russia’s Courts, A Judge Speaks Up – And Gets Fired*, WALL ST. J., Aug. 5, 2004, at A1; Douglas Birch, *In Russian Trials, “Not Guilty” Often Is Not An Option*, BALTIMORE SUN, June 13, 2004, at 1A.

162. See J. Michael Waller, *Police, Secret Police, and Civil Authority*, in Sachs & Pistor, *supra* note 77, at 95, 97-98, 109.

163. I borrow these metaphors of the mansion and the gatehouse from their more common usage in the context of studies of American criminal procedure, and especially by Professor Yale Kamisar. As Professor Kamisar famously observed:

moments that a person comes under suspicion, is placed under arrest, or subject to interrogation, that observance of his legal rights matters most.

Civil law is not immune to these problems. The entrepreneur kept in a constant state of anxiety by the state's use of law as a tool is hardly to be expected to adopt a causeway mentality in his dealings with competitors and clients. What Kathryn Hendley has labeled a lack of reciprocity in legal relations is really nothing more than the failure to adopt a perspective on law based on its use as a causeway and not as a weapon. Commenting on her field research on how Russian firms use litigation to secure payments by debtors, Hendley observed a "come-and-get-me" attitude displayed by firms with regard to their own debt obligations coupled with simultaneous frustration with their own customer's debts to them. These seemingly irreconcilable attitudes suggest the interplay between a difficult economic environment, a weak state, and attitudes toward the rule of law:

For some reason, they seemed unable to connect the dots to see that this lack of reciprocity within the system was crippling it. No state can afford to enforce every single judgment of its courts affirmatively. The civil system works because most litigants pay voluntarily. The willingness to pay is motivated by a desire to avoid community censure and by a fear of the coercive power of the state. In post-Soviet Russia, reputational sanctions for not paying debts have been slow to develop. The widespread nature of the economic crisis has given rise to a business culture in which non-payment has become the rule rather than the exception. As a result, the burden on the state to affirmatively

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In the 'gatehouse' of American criminal procedure - through which most defendants journey and beyond which many never get - the enemy of the state is a depersonalized 'subject' . . . 'game' to be stalked and cornered. Here ideals are checked at the door, 'realities' faced, and the prestige of law enforcement vindicated. Once he leaves the 'gatehouse' and enters the 'mansion' - if he ever gets there - the enemy of the state is repersonalized, even dignified, the public invited, and a stirring ceremony in honor of individual freedom from law enforcement celebrated.

Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, from Escobedo to . . .*, in *CRIMINAL JUSTICE IN OUR TIME 1* (A.E. Dick Howard, ed., 1965), quoted in George C. Thomas III, *Missing Miranda's Story*, 2 *OHIO ST. J. CRIM. L.* 677, 682-83 (2005).

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enforce civil judgments is unusually high, and the state has staggered under the burden.<sup>164</sup>

As Hendley observes in a footnote, this attitude is a legacy of the Soviet-era expectation “to get around (*‘oboyti’*) the rules” rather than apply them for both protection against the claims of others and enforcement of ones’ own claims.<sup>165</sup> In other words, the Soviet legal system did not provide a causeway for citizens, and none has magically appeared in the consciousness of post-Soviet Russian businessmen.

In a throwback to the tsarist maintenance of the formal illegality against cartels and syndicates to ensure their obedience to the state, Putin’s Russia has maintained bankruptcy laws with extremely low requirements for the minimum size of the debt and the period of time in arrears before bankruptcy proceedings may be started against the debtor. The law has been used by competitor businesses as a tool for financial and political gain. The law works here as a tool and not as a causeway, because of the state’s involvement. Just like the tsarist ability to “seize a random victim” via its cartel laws, corrupt regional governments can throw their weight to influence the choice of receiver for the competitor-declared-bankrupt: “[t]he targeted company would then fall under the control of a court-appointed manager, who frequently looted the company or turned it over to a competitor.”<sup>166</sup> Unlike the tsarist system, however, the state may find itself not the lead actor but the foil in this drama: “the state frequently does not even act independently of large economic groups, but rather serves as a tool in their struggles with one another. . . . Major economic interests in Russia thus still use their access to national political power as a tool for capturing desirable assets.”<sup>167</sup>

These attitudinal, behavioral, and institutional failures of a rule-of-law state have a palpable effect on the consolidation of democracy. A legislature that looks no farther than its own positive procedures for the legitimacy of law is unlikely to present significant opposition to the other branches of government. When a party of power sits as a legislative majority, the combined effect can pave the way for rule through the tool of law, rather than the security of rule of law. Similarly,

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164. Kathryn Hendley, *Enforcing Judgments in Russia’s Economic Courts*, 20 POST-SOVIET AFF. 1, 61-62 (2004).

165. *Id.*

166. Andrew Barnes, *Russia’s New Business Groups and State Power*, 19 POST-SOVIET AFF. 160 (2003).

167. *Id.* at 178-79.

the civil society forced to grow in such an environment is unlikely to appreciate the relationships between state and society that a causeway application of law promotes. Economic society, of course, is particularly acutely affected, as Anders Aslund observed:

To be a big businessman in Russia requires [having] at least one representative in the State Duma, one in the Federation Council, and close links with regional governors, which means that every big businessman must be involved in politics, and thus be liable to legal persecution by the president. The persistent question is: Who is next?<sup>168</sup>

If that is the question on the minds of the oligarchs, what fears stir in the hearts of the medium or small-sized businessman, let alone the itinerant trader or desperate pensioner?

The Yukos affair encapsulates everything that the rule of law as a causeway opposes. The affair began long before Khodorkovsky's arrest at gunpoint in October 2003. In July 2000, Putin assembled twenty leading oligarchs in the Kremlin to deliver a simple message: stay out of politics and you may keep your assets.<sup>169</sup> This warning paralleled the limitations of the old Soviet civil codes and constitutions, which made "[t]he exercise of rights and freedoms . . . inseparable from the performance by a citizen of his duties" (Art. 59, 1977 Constitution) and protected private rights "except as they are exercised in contradiction to their social and economic purpose" (Section 1, 1922 Civil Code).<sup>170</sup> Gusinsky and Berezovsky were examples for Putin of oligarchs whose actions made their rights and freedoms subject to revocation. Potanin, Vekselberg, and other oligarchs who went out of their way to demonstrate their willingness to abide by the crude deal Putin presented them likewise demonstrated that they would not use their wealth in contradiction to the social and economic purposes that Putin prescribed. The constant threat that the government would revisit the legitimacy of property acquired through privatization hung over the heads of oli-

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168. Julie A. Corwin, *Putin to Renew Dialogue with Big Business*, RFE/RL RUSSIAN POL. WEEKLY, May 13, 2004, <http://www.rferl.org/reports/rpw/2004/05/18-130504.asp>.

169. *Taming the Robber Barons*, ECONOMIST, May 22, 2004, at 5.

170. By contrast, the 1995 RF Civil Code, like the civil codes of other countries, limits civil law rights only as necessary to protect the usual trio of health, welfare and morals. Beyond these narrow prohibitions, the first article of the first part of the civil code makes clear that citizens and juridical persons "effectuate their civil rights by their own will and in their own interest." *Grazhdanskiy Kodeks RF [GK] [Civil Code] art. 1 (Russ.)*.

garchs and less well-financed entrepreneurs alike.<sup>171</sup> Although sometimes couched as an offer of amnesty, this was nothing more than a threat of retroactivity.<sup>172</sup> This is in stark contrast to the guiding principles set forth in Russia's civil code, the commercial law of all Western democracies, and inherent in the causeway of the rule of law: individuals are entitled to utilize their civil rights at their own discretion, essentially unobstructed by the preferences of the state.

The prime example of this practice is the Yukos affair that culminated in criminal charges against Lebedev and Khodorkovsky of fraud, tax evasion, and misappropriations stemming from privatization deals in the early 1990s and a civil suit by the state for back taxes against Yukos. The privatization laws through which Khodorkovsky made his fortune and acquired the company – and that ultimately led to his arrest – are testaments to the opacity, confusion, and secrecy that are inimical to the rule of law. There was no causeway for Khodorkovsky and others to walk along during privatization. This principle translated into the primary argument Khodorkovsky's lawyers mounted in his defense: the charged conduct was not illegal at the time it occurred.<sup>173</sup> To the extent that the Yukos affair has turned on privatization deals that, however shady and unfair, were not proscribed by law at the time they were taken, those prosecutions have been in clear violation of this principle of the rule of law. The guilty verdicts and nine-year sentences for each defendant were largely viewed therefore as an example of the use of law as a tool to effectuate political goals.<sup>174</sup> So stark has this

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171. See Marshall Goldman, *The Economy of Russia*, in Timothy J. Colton, Marshall Goldman, Carol R. Saivetz, & Roman Szporluk, *Russia in the Year 2004*, 21 POST-SOVIET AFFAIRS 1, 9-10 (2005).

172. Jeremy Page, *Russia Hints at Eventual Amnesty for Oligarchs*, TIMES (UK), Apr. 19, 2004 at 21.

173. As Genrikh Padva, one of Khordokovsky's lead attorneys, summarized after the verdict was announced, "The event did happen but it was not a crime, at least according to the legislation of the time." Editorial, *No Decision On Reversing Khodorkovsky Judgment Due Until September*, RIA NOVOSTI, June 1, 2005.

174. As Nikolai Petrov commented, "You can state the Kremlin's aim in a decent and proper way. But the methods employed for this - the methods of a lawless state, not the rule of law but the use of law - have automatically undermined the goal that the Kremlin set out for itself." Steve Gutterman, *Khodorkovsky Trial Shapes Putin's Legacy*, ASSOCIATED PRESS, June 1, 2005, available at <http://www.comcast.net/news/international/europe/index.jsp?cat=EUROPE&fn=/2005/06/01/145537.html>; see also Editorial, *Kremlin's Win Is Russia's Loss*, MOSCOW TIMES, June 1, 2005, <http://web.themoscowtimes.com/stories/2005/06/01/005.html> ("Any remaining illusions that this trial had anything to do with the rule of law were swept away. What we were left with, after a year of testimony and volumes of documents, was a clear picture of a judiciary functioning as a tool of the state. Instead of the rule of law, we have the arbitrary use of law."); Editorial, *A Soviet Show Trial*, TIMES (UK), June 1, 2005 ("Mr Putin's insistence that business interests should not be

violation been that one of Putin's chief economic advisors saw "evidence that today the crossroads, where it would be possible to choose which path to go down, is already behind us. We are already living in a different country."<sup>175</sup> Illarionov understood, at least implicitly, the danger of retroactive legislation to the rule of law and to society: "When the Yukos case began," he said, "everybody was asking which will be the rules of the game. Now it is clear that there are no rules of the game."<sup>176</sup>

While Khodorkovsky remained in detention, the tax authorities obtained from the Moscow City Arbitration Court an order freezing Yukos assets in anticipation of the payment of back taxes and fines assessed for the use of tax loopholes (now closed) that were legal at the time they were employed.<sup>177</sup> This demand for injunctive relief to secure assets that few believed were reasonably in danger of flight was widely viewed as a shot across the bow, if not an attempt to drive the company into bankruptcy, and then reversion to state-friendly receivers.<sup>178</sup> That is precisely what happened: in December 2004, Yuganskneftegaz, Yukos' prime production unit, was forced onto the auction block and purchased by a front company for the state's interests in a move widely seen as its renationalization.

Khodorkovsky's conviction in May 2005 was presaged by President Putin's warning to the oligarchs back in July 2000. Since then, Putin has been unambiguous in his belief that political discretion is a *quid pro quo* for the exercise of civil rights in Russia. His recent restatement of his view that it is the "law-abiding" citizen who is entitled to reliable legal

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allowed to buy political influence - as happened so blatantly in the Yeltsin years - is defensible; yet his use of the law to emasculate political opposition and intimidate challengers is a harking back to Soviet thinking.").

175. Irina Granik & Nikolai Vardul, *God velikogo obloma*, KOMMERSANT, Dec. 29, 2004 <http://www.kommersant.ru/doc.html?docId=537109>.

176. David Holley & Sergei L. Loiko, *A Top Advisor to Putin Calls Oil Takeover the 'Scam of the Year'*, L.A. TIMES, Dec. 29, 2004, at A4.

177. Gregory L. White & Guy Chazan, *Yukos is Further Squeezed by Ban: Russian Court Bars Sales of Assets, As Authorities Seek Back Taxes and Fines*, WALL ST. J., Apr. 19, 2004, at A8.

178. See, e.g., the analysis of the April 15th Order by Peter Clateman, May 12, 2004, <http://www.cdi.org/Russia/Johnson/Yukos-order040511.pdf> ("If this Order stands it would tend to indicate that the courts are colluding with the tax authorities in attempting not only to collect taxes, but to punish Yukos without a legitimate legal basis. The Order would then appear to be a logical step in a plan, as some have speculated, to force Yukos into bankruptcy and then, through a 'controlled' bankruptcy, cause Yukos to be liquidated (despite the fact that it is clearly a going concern) and the bulk of its assets to be transferred to the state at discounted prices. In other words, the tax authorities, working with the prosecutor and the courts, would dismantle Yukos using one of the primary shady tactics of the corporate battles of the 1990s, which have themselves been sharply criticized by the presidential administration.").

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guarantees and state protection has been underlined by the state's prosecution of those considered not to have abided by Putin's unwritten but universally understood laws of state authority. Putin is following a long line of Russian rulers who used the law as a tool. New is Putin's insistence, insufficiently scrutinized by political scientists, that this approach is consonant with the rule of law.

### V. CONCLUSION: A RESEARCH AGENDA FOR THE RULE OF LAW AS CAUSEWAY

Nationwide surveys conducted in 1996, 1998, and 2000 to measure mass attitudes towards the rule of law revealed generally strong, albeit abstract, support for rule-of-law principles, at levels roughly comparable to those expressed by citizens in Western European countries.<sup>179</sup> But 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."<sup>180</sup>

The importance of the rule of law, apparent to Russian citizens asked to participate in these polls, has been understudied by political scientists and area studies specialists since the collapse of the Soviet Union. Ironically, disinterest in the details of the rule of law does not reflect the importance almost universally attributed by comparative political scientists to that component of a consolidated democracy. But, until recently, experts on Russia have rarely found the study of Russian law to be a fecund area of inquiry, and political science developed as a discipline with a felt need to distinguish its work from legal studies. As a result, analysts have been surprised by the difficulties experienced in Russia with the rule of law – both in its operation and in its failure to operate. "Privatize, privatize, privatize," was the mantra of Milton Friedman and many others in the early 1990s. "But I was wrong," he conceded. "It turns out that the rule of law is probably more basic than privatization."<sup>181</sup> How startling to consider that even this *mea culpa* is tinged with probability and hints of lingering doubt.

The rule of law, like electoral politics, civil society, or a functioning state bureaucracy, is essential to a consolidated democracy. The study of that variable should be no less rigorous or expansive than the study that has benefited our understanding of those other institutions. Much valuable work has already been done. Kathryn Hendley and Stephen Holmes have

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179. James L. Gibson, *Russian Attitudes Towards the Rule of Law: An Analysis of Survey Data*, in *LAW AND INFORMAL PRACTICES*, *supra* note 20, at 77, 88.

180. Rose, et al., *supra* note 3, at 200.

181. *Quoted in* Fukuyama, *supra* note 13.



each written about the prerequisites to the emergence of the rule of law in society.<sup>182</sup> Hendley has also demonstrated both the feasibility and utility of extensive field research to test hypotheses about the rule of law in Russia and seek the answers to questions as fundamental as they are simple and direct, such as “Is going to court a waste of time for Russian firms?”<sup>183</sup>

This Article has explored several facets of the rule of law both as theoretical principles and as empirically found (or, more frequently, found wanting) in Russian political history. In imperial, Soviet, and post-Soviet history, law has always been used primarily as a tool by the state. At its best, Russia has been able to establish only rule *by* or *through* laws, and then only for short periods of time. Such a *Rechtsstaat* is insufficient for the rule of law and it is an inadequate foundation to accept for the consolidation of democracy. That understanding of the rule of law implicitly accepts the use of law as a tool, so long as formalistic and positivist criteria for the law’s adoption are satisfied.

Law as a tool or weapon is not the only metaphor available, and in many ways it is the worst one for a struggling democracy. The rule of law also can be viewed as a causeway. In an imperfect world, in which reform is piecemeal, partial, and expensive, that metaphor is far better for conceptualizing the sort of rule of law that is most important for Russia to realize its self-professed goals as an emerging democracy. It emphasizes the essentials of a new form of relationship between state and society from the hierarchical system of Russia’s authoritarian past. It establishes ground rules of the game not just for electoral politics, but for the daily transactions and commercial necessities of individuals and entrepreneurs. It promotes civil and economic societies in which citizens can be secure in their knowledge of which activities are licit and which are prohibited. And it sets certain standards for law beyond its adoption by a majority in parliament.

Political scientists are well-equipped to analyze the degree to which Russia conforms to these principles and practices. That study should focus on how the rule of law builds a legal causeway for citizens and the multitude of obstructions that can be placed on that road by the state. As a Moscow defense attorney characterized the legal environment in which he

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182. See Hendley, *supra* note 23 at 181 (“The argument is that law will come to matter when society demands it and that the single most important factor in generating that demand is the rise of market-based economic activity.”). Similarly, Stephen Holmes has hypothesized that two conditions must simultaneously be present for the rule of law to emerge: “[W]hen the political ruler has a good reason to make his own behavior predictable and when profit seekers start asking for rules.” Holmes in Maravall & Przeworski, *supra*, note 11 at 45.

183. Hendley, *supra* note 164 at 61-62.

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worked: "Sometimes the law reminds me of a rope strung across the road. High-ranking officials, or those with a lot of money, can just step over it. Petty criminals can crawl under it. Only common citizens are caught by this rope."<sup>184</sup>

Thomas More happens to be the patron saint of lawyers. And although the real Thomas More's religious politics are, of course, ill-suited to our time, the metaphor that Bolt placed in his mouth of the rule of law as a causeway should be a guide for political scientists interested in the consolidation of Russian democracy.

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184. Birch, *supra* note 161.

