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## The Law is a Causeway: Metaphor and the Rule of Law in Russia

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## Chapter 15

# The Law Is a Causeway: Metaphor and the Rule of Law in Russia

Jeffrey Kahn

**Abstract** This chapter explores how a metaphor for the rule of law created by the playwright Robert Bolt captures the difficulty that Russia has experienced in its self-proclaimed pursuit of a rule-of-law state: “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.” In Russia, the failure to build a rule-of-law state has been, among other things, a failure to create what this metaphor describes as the essence of that concept. The essay concludes with a case study taken from the author’s experience as an expert invited to submit a report to the Russian President’s Council on the Development of Civil Society and Human Rights.

*We support the aspiration of citizens for the supremacy of law [право] and their demand for the observance of law [закон]. ... Russia does not have the right to repeat mistakes that have occurred at turning points in its History.*

*– Declaration of Members of the Russian President’s Human Rights Council, December 9, 2011.<sup>1</sup>*

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This essay was completed in fall 2013 while I was an O’Brien Fellow-in-Residence at the Centre for Human Rights and Legal Pluralism, Faculty of Law, McGill University. I wish to thank Ferdinand Feldbrugge, René Provost, Peter Solomon, and Marika Giles Samson for their helpful comments. I alone am responsible for the contents of this essay.

<sup>1</sup>Заявление членов Совета при Президенте Российской Федерации по развитию гражданского общества и правам человека, 09.12.2011. This essay adopts a short form of this official title.

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## 15.1 Introduction

What did the Russian President's Human Rights Council mean by distinguishing the supremacy of law – using the word *pravo* [право], akin to the Latin *jus* or French *droit* – from the observance of law – using *zakon* [закон], akin to *lex* or *loi*? Do Russian citizens live under either principle? Consider how three Decembers in Moscow shed light on the answer.

In December 2010, Mikhail Khodorkovsky, once Russia's richest man, was convicted of economic crimes.<sup>2</sup> This was Khodorkovsky's second trial, which revisited with new charges many of the claims that led to his first conviction in May 2005.<sup>3</sup> This second verdict was inexplicably postponed on the morning scheduled for its announcement, allowing then Prime Minister Vladimir Putin to discuss the case first on national television, concluding that "a thief should sit in jail."<sup>4</sup> Putin was widely believed to be behind Khodorkovsky's first arrest and conviction, which occurred during his first two terms as president. Khodorkovsky's case had become a cause célèbre, at least among the incipient Russian middle class and the gelded liberal opposition.

What a difference a year seemed to make. In December 2011, Moscow was convulsed by opposition rallies not seen in Russia since the collapse of the Soviet Union. Politicians across the political spectrum – from the billionaire Mikhail Prokhorov to Communist Party leader Gennady Zyuganov – declared their desire to free Khodorkovsky as they angled for advantage in upcoming presidential elections.<sup>5</sup> (The irony of Russia's top communist demanding the release of Russia's top plutocrat underscores the national significance of the case.) They were responding to the pronouncement of the Human Rights Council, which had advised President Medvedev that Khodorkovsky's second conviction should be annulled. The Council's recommendations, more than a year in the making, were the result of detailed analytical reports by six Russian experts and three foreign experts. I was one of the foreign experts.

One year later, the window for change opened by the Bolotnaya Square protests appeared to have closed. For the Khodorkovsky case, this was especially chilling. Putin denied that the case was either personal or political.<sup>6</sup> But in the first year of his

<sup>2</sup> Приговор Хамовнического районного суда г. Москвы от 27.12.2010 г.

<sup>3</sup> Приговор Мещанского районного суда г. Москвы от 16.5.2005 г.

<sup>4</sup> Transcript of "A Conversation with Vladimir Putin," which aired on TV channels "Rossiya" and "Rossiya 24," and radio stations "Mayak," "Vesti FM," and "Radio Rossiya" on Dec. 16, 2010: <http://archive.government.ru/docs/13427/>

<sup>5</sup> Maria Kuchma, "Russian presidential candidates play Khodorkovsky card," *RIA-Novosti*, Jan. 12, 2012. <http://en.ria.ru/analysis/20120112/170725351.html>; see also Alexandra Odyнова, "Rights Council: Free Khodorkovsky," *Moscow Times*, Dec. 22, 2011. <http://www.themoscowtimes.com/sitemap/free/2011/12/article/rights-council-free-khodorkovsky/450313.html>

<sup>6</sup> News Conference of Vladimir Putin, Moscow, December 20, 2012 (transcript at Johnson's Russia List # 5, January 8, 2013) ("As for Mr Khodorkovsky, there is no personal prosecution in this case. I remember very well how it developed. There still are attempts to present it as a political case. Was Mr Khodorkovsky engaged in politics? Was he a State Duma deputy? Was he a leader of a political party? No, he wasn't any of those things. It's a purely economic offence and the court made a ruling.")

new third term, at least five of the six Russian experts were ordered to appear for questioning by members of the Investigative Committee, the federal agency responsible for the investigation of criminal cases. Many of their homes and offices were searched, their papers, computers, phones and other property seized. Employees of a research institute tangentially associated with some of the experts received the same treatment and the institute was effectively closed down. Oddly, the search warrants were issued as part of the *first* Khodorkovsky case, opened in 2003. The warrants alleged that Khodorkovsky had financed the “deliberately false conclusions of specialists under the guise of independent public expertise by paying those who organized their production as well as the experts.”<sup>7</sup>

This essay examines these reprisals as a particular example of Russia’s rule-of-law failures. This harassment employed many powerful legal tools – subpoenas, search warrants, tax and regulatory inspections, *etc.* – but in ways that could hardly be considered consonant with the rule of law. Law remains an instrument of power in Russia, not a foundation on which to build (and constrain) government. Russia has become what Vladimir Putin long ago declared his goal: a “dictatorship of law.” Putin used the word *zakon*, suggesting the dictatorship of statutes and decrees, not the word *pravo* that conveys a sense of lawfulness and justice beyond mere positivism.<sup>8</sup> It is now clear that Putin meant precisely what he said: the power of the state to rule *through* law, not a state empowered, paradoxically, by the constraining force of the rule of law.

## 15.2 A Metaphor for the Rule of Law

A metaphor conveys what more formal definitions of the rule of law obscure. The metaphor comes from Robert Bolt’s play, *A Man For All Seasons*, about Thomas More, executed for high treason when he would not support Henry VIII’s break with the Roman Catholic Church. More’s crime was political, and the charge was as much a weapon used against him as was his executioner’s axe. Vladimir Putin is not Henry VIII, nor do the Human Rights Council’s experts claim the mantle of Thomas More. But like More, those who have fallen out of favor with the Russian president because of their legal advice find Russian law turned against them.

Although the importance of the rule of law is widely accepted, its precise meaning remains contested (as this book’s existence attests). Some definitions emphasize high-level constitutionalism, searching for specific features in founding documents, with little attention to the underlying, everyday legal culture required to support them.<sup>9</sup>

<sup>7</sup>See Letter from Mikhail Fedotov, Chairman of the Human Rights Council, to Jeffrey Kahn, Feb. 13, 2013 (quoting warrant).

<sup>8</sup>Открытое письмо Владимира Путина к российским избирателям, 25.02.2000, *Коммерсантъ*, <http://www.kommersant.ru/doc/141144>

<sup>9</sup>See, for example, Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (1996). Johns Hopkins University Press, Baltimore, Maryland, at 10.

Others privilege particular institutions (such as courts), substantive rights (such as free expression), characteristics (such as stability), values (such as equality), processes (such as notice and hearing), and sometimes even values *about* processes (like efficient administration).<sup>10</sup> These definitions overlap in some places, and leave gaps in others.

To use a metaphor to examine the marginality of the rule of law in Russia is not to call for an end to the definitional struggle. But metaphor has a special power to advance discussion.<sup>11</sup> Generally speaking, “metaphor enrich[es] the range of phenomena available for systematic philosophical reflection and analysis, and provide[s] hints of the truth which we could not envision if we relied only on the machinery of formal inference.”<sup>12</sup> More specifically, Richard Fallon observed (metaphorically): “It is a mistake to think of particular criteria as necessary in all contexts for the Rule of Law. Rather, we should recognize that the strands of the Rule of Law are complexly interwoven, and we should begin to consider which values or criteria are presumptively primary under which conditions.”<sup>13</sup>

A few words of history are helpful. In 1529, a legatine court convened in London to determine the validity under canon law of the marriage between Henry VIII and Catherine of Aragon. Henry preferred Anne Boleyn for reasons of both a personal nature and matters of state.<sup>14</sup> He therefore sought legal advice on his “great matter” from the finest lawyer in the realm, Thomas More, whom he named Lord Chancellor after the prior office-holder failed to persuade the Pope to grant an annulment.<sup>15</sup>

More was praised for his legal reasoning, which emphasized the constraint that precedent and legal authority placed on personal judgment. But he also “epitomized, in modern terms, the apparatus of the state using its power to crush those attempting to subvert it.”<sup>16</sup> More was an accomplished interrogator, comfortable in the Star

<sup>10</sup> See, for example, Rachel Kleinfeld, “Competing Definitions of the Rule of Law,” in *Promoting the Rule of Law Abroad: In Search of Knowledge*, Thomas Carothers, ed. (2006). Carnegie Endowment for International Peace, Washington, DC, at 31–73; Martin Krygier, “Rule of Law,” in *The Oxford Handbook of Comparative Constitutional Law*, Rosenfeld & Sajó, eds. (2012). Oxford University Press, Oxford.

<sup>11</sup> This claim is contested. Compare, *Berkey v Third Ave. Ry. Co.*, 244 N.Y. 84, 94 (1926) (Cardozo, J.) (“Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”).

<sup>12</sup> Elizabeth Camp, “Two Varieties of Literary Imagination: Metaphor, Fiction, and Thought Experiments,” in *Midwest Studies in Philosophy: Poetry and Philosophy XXXIII*. Howard Wettstein, ed., (2009), at 128.

<sup>13</sup> Richard H. Fallon, Jr., “‘The Rule of Law’ as a Concept in Constitutional Discourse,” 97 *Colum. L. Rev.* (1997) at 6.

<sup>14</sup> Enchanted by Boleyn and needing a son to secure Tudor succession, the King claimed that his heirless marriage contravened Leviticus: he had married his brother’s wife (albeit by papal dispensation). Pope Clement VII refused an annulment, perhaps because canon law forbade it or perhaps because he was a virtual prisoner of Catherine’s nephew, the Holy Roman Emperor Charles V. This seemingly theological dispute thus raised enormous political and legal issues for England’s domestic and international affairs. Peter Ackroyd, *The Life of Thomas More* (1998). Doubleday, USA, at 263–275; Richard Marius, *Thomas More* (1984). Alfred A. Knopf, New York, at 213–16.

<sup>15</sup> Ackroyd, at 266–68; Marius, at 216.

<sup>16</sup> Ackroyd, at 302.

Chamber, who pursued those he feared would destroy the social order. His network of spies, surveillance, and surprise raids would be familiar to present-day spymasters. There is thus irony in using his story as a metaphor for the rule of law.

The King pressed More to endorse his convenient opinion that the Pope lacked any jurisdiction in England. More reports that the king told him “to look and consider his great matter, and well and indifferently to ponder such things as I should find.”<sup>17</sup> Unable to agree with his king, More resigned his office only to find himself a defendant in successive specious prosecutions, first for bribery, then for conspiracy with a traitorous nun, and last for his own high treason himself. More easily refuted the first two charges on the evidentiary record alone.

Having refused to swear an oath concerning the King’s supremacy, and carefully silent regarding his reasons, More was put on trial for high treason. He relied on a legal defense. The statute setting forth the crime required treasonous “words or writing.” More argued that the law required that his silence be construed as loyalty, not treason.<sup>18</sup> Perhaps a century later, Cardinal Richelieu provided the most succinct explanation for such prudence: “If you give me six lines written by the hand of the most honest of men, I will find something in them which will hang him.”

Bolt’s climactic trial scene prepares us for the metaphor:

- CROMWELL The oath was put to good and faithful subjects up and down the country and they had declared His Grace’s title to be just and good. And when it came to the prisoner he refused. He calls this silence. Yet is there a man in this court, is there a man in this country, who does not *know* Sir Thomas More’s opinion of the King’s title? Of course not! But how can that be? Because this silence betokened – nay, this silence was *not* silence at all but most eloquent denial.
- MORE Not so, Master Secretary, the maxim is “qui tacet consentire.” The maxim of the law is “Silence gives consent.” If, therefore, you wish to construe what my silence “betokened,” you must construe that I consented, not that I denied.
- CROMWELL Is that what the world in fact construes from it? Do you pretend that is what you *wish* the world to construe from it?
- MORE The world must construe according to its wits. This Court must construe according to the law.<sup>19</sup>

Now the metaphor. Its focus is not on *definition* of the rule of law, but on its *application*.

- CROMWELL I put it to the Court that the prisoner is perverting the law – making smoky what should be a clear light to discover to the Court his own wrongdoing!

<sup>17</sup>Letter from More to Cromwell, March 5, 1534, reprinted in *A Thomas More Source Book*, Gerard Wegemer & Stephen Smith, eds. (2004) at 358.

<sup>18</sup>*Id.*, at 353 (*Paris Newsletter* account of the trial, August 4, 1535).

<sup>19</sup>Robert Bolt, *A Man For All Seasons* (1960), Act II (stage directions omitted).

MORE 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>20</sup>

This metaphor describes the essential purpose toward which so many different definitions of the rule of law all aim. In other words, it describes the *how* and the *why* of the rule of law, not the precise *what*.<sup>21</sup>

Contrast this metaphor with another in the play. When his future son-in-law urges him to abuse his office to arrest a “bad” man, More refuses: “And go he should, if he was the Devil himself, until he broke the law!” More rejects the younger man’s metaphor of law as a weapon because of its dangerous double edge:

ROPER So now you’d give the Devil benefit of law!

MORE Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER I’d cut down every law in England to do that!

MORE Oh? And when the last law was down, and the Devil turned round on you – where would you hide, Roper, the laws all being flat? This country’s planted thick with laws from coast to coast – man’s laws, not God’s – and if you cut them down – and you’re just the man to do it – d’you really think you could stand upright in the winds that would blow then? Yes, I’d give the Devil benefit of law, for my own safety’s sake.<sup>22</sup>

The purpose of the rule of law is not to empower one group over another but to create a safe space for all in which the individual is respected as an intelligent, reasoning creature with inherent value.<sup>23</sup> The causeway metaphor highlights this purpose. Once built, a causeway provides safe passage for *all* who travel it. Its maintenance – the rules and standards for its use, the institutions and processes that make it useful – are part of the state’s *raison d’être*.

When law is conceived as an instrument, it has only instrumental value. Such a view devalues the human subjects of law. Law-as-instrument is a selective device for oppression and control; it has no limit but the power of the one who wields it and no values external to the wielder that might constrain his actions. The rule of law is not the rule of *zakon* alone, but a rule imbued with a sense of the state’s own limitations, of *law*’s limitations, to enter a precious, private sphere uninvited.

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

<sup>21</sup> Others have noted that the rule of law may be approached in this way. See Iain Stewart, “From ‘Rule of Law’ to ‘Legal State’: A Time of Reincarnation?” *Macquarie Law Working Paper* (Nov. 2007) at 4 (“[I]t appears to be far easier to say what ‘the rule of law’ does than to state what it is.”).

<sup>22</sup> *Id.*, Act I.

<sup>23</sup> Jeremy Waldron, “The Rule of Law and the Importance of Procedure,” *New York University School of Law Public Law & Legal Theory Research Paper Series*, Working Paper No. 10-73 (Oct. 2010) at 14 (“Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with.”).

### 15.3 The Rule-of-Law Causeway in Russia

One can point to formal principles, institutions, and procedures codified in Russian law that rule-of-law scholars would recognize and approve. One can also identify ordinary Russians willing to trust the legal system with their grievances.<sup>24</sup> One can even recognize lawmaking that assesses proposals against accepted principles, debates publicly, and declares prospective, consistent, general rules for all.

Yet few academic lawyers and practicing attorneys would compare Russia favorably to states long associated with a high degree of conformity to the rule of law. That is because there is no causeway in Russia upon which, so long as he keeps to it, a citizen may walk safely, freely, and with dignity. In other words, law in Russia remains a tool and a weapon. It is this instrumentalism that is the problem of the rule of law in Russia, captured not by precise definitional adjustments but by a metaphor.

The selective use of law-as-weapon creates a “dual state” in Russia in which one may find law and lawlessness, often in the same place. This concept was made famous by Ernst Fraenkel.<sup>25</sup> For ordinary commercial cases or private disputes, the courts are not only functional, but at some levels functioning quite well and professionally. But when a political case arises, or one in which the participants are exceptionally powerful or in league with those in power, one enters a different world. This is not a world of *pravo*, but one of pliable *zakon*, manipulable institutions, and dispensable principles and procedures. All of the elements of every rule-of-law definition may be in place in Russia, from time to time. But they may be disregarded when powerful interests so desire. That is why empirical research and survey data discern an uncanny skill in the average Russian citizen to realize when legal recourse is useful, when it is futile, and when it is dangerous.<sup>26</sup>

Russian aphorisms capture the sense that law is a tool manipulated by powerful forces.<sup>27</sup> All reference *zakon*, not *pravo*. Imperial Russia was known more for the

<sup>24</sup>The best empirical work in this area is by Kathryn Hendley. See Kathryn Hendley, “The Puzzling Non-Consequences of Societal Distrust of Courts: Explaining the Use of Russian Courts,” 45 *Cornell Int’l L.J.* (2012) at 523.

<sup>25</sup>Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (1941). I first heard this term used with reference to post-Soviet Russia by Professor Kim Lane Scheppele on a panel I organized, “The Dictatorship of Law: The Khodorkovsky Case, Human Rights, and the Rule of Law in Russia,” AALS National Conference, Washington D.C., January 6, 2012. In personal correspondence, Professor Peter Solomon noted to me that in the 1970s specialists on Soviet law debated the applicability to Soviet institutional hierarchies of Fraenkel’s divisions between the normative and prerogative states in Nazi Germany.

<sup>26</sup>Kathryn Hendley, “Varieties of Legal Dualism: Making Sense of the Role of Law in Contemporary Russia,” 29 *Wis. Int’l L.J.* (2011) at 233.

<sup>27</sup>Consider a few: “Где закон, там и обида” (“Where there is a law, there is an offense.”) inverts the classic Latin maxim *Nullum crimen sine lege* (“No crime without law”) from a defensive stance against power to an offensive tool of the powerful, emphasizing the use of law to find fault. A similar tone is found in “Если бы не закон, не было бы и преступника” (“If there were no law, then there would be no criminal.”). Consider, too, “Закон, что паутина: шмель проскочит, а муха увязнет” (“The law is like a spider’s web: the bumble-bee tears through but the fly gets stuck.”)



crushing weight of its laws than for their systematic application to protect or promote civil society. In Soviet times, instrumentalism was elevated to the realm of high theory. The first Commissar of Justice, Nikolai Krylenko, explained that a court, like a rifle, is just another weapon of the ruling class.<sup>28</sup> Law-as-weapon applied both to the substance of the laws and to the procedures that governed law-making and judicial activity. The rigid procedural exactitude of Soviet justice provided no succor for the accused or for the society from which they were purged.

Gorbachev came closest to replacing these instrumentalist notions of law with causeway-building ones. His early economic legislation adopted a new approach to the relationship between state and society: "Of the two possible principles, 'You may do only what is permitted' and 'You may do everything that is not forbidden', priority should be given to the latter inasmuch as it unleashes the initiative and activism of people."<sup>29</sup> Gorbachev characterized the concept of subordinating the state to law as a key to his reforms.

Perhaps optimism sparked by such a progressive thought was ill-advised in the face of so much history. As Bernard Rudden evocatively put it, with a simile, "[d]uring the last years of its life the Soviet Union turned to law like a dying monarch to his withered God ... and the Congress and Supreme Soviet enact[ed] and amend[ed] statutes with the fervour of one who sees in legislation the path to paradise."<sup>30</sup> A hallmark of the 1990s and first part of the twenty-first century in Russia was the rapid development of new laws and legal codes. This was nothing short of staggering. In the first 10 years of post-Soviet life, there came into being at least fifteen new codes of law, both substantive and procedural.

And yet, such enlightened legal views did not triumph in the aftermath of the collapse of the Soviet Union. The combination of new law-on-the-books with old personnel and practices, mixed together in the economic maelstrom that characterized the first post-Soviet decade, did not produce the rule of law. It could not dislodge an instrumentalist tradition of rule *through* law that Vladimir Putin slowly strengthened. Gorbachev focused on *pravo*, an abstract notion of justice. Putin famously declared that democracy was the dictatorship of law, that is, *zakon*, legislation. This formulation has worked well for him, given his control over institutions beyond the federal executive branch. The result, according to William Partlett, was a "seductively simple" use of law as a weapon and means of control:

[I]n return for elite adherence to informal rules and personal loyalty, the state tolerates corrupt activities. Meanwhile, the regime closely documents this corruption, building dossiers on key members of the system, which then goes after them. ... These formal legal sanctions are a powerful incentive for ensuring elite cohesion and personal loyalty: a

and "Закон – дышло: куда захочешь, туда и воротнишь" ("The law is a wagon's shaft: where you want to go, there you turn it."). Владимир Даль, *Пословицы русского народа* (1957) at 245.

<sup>28</sup> Vladimir Gsovski, *Soviet Civil Law System*, Vol. 1 (1948) at 241.

<sup>29</sup> Vladimir Kudryavtsev, Director of the Institute of State and Law and a frequent advisor to Gorbachev, as quoted in Archie Brown, *The Gorbachev Factor* (1996) at 146.

<sup>30</sup> Bernard Rudden, "Civil Law, Civil Society and the Russian Constitution," 110 *L.Q.R.* (1994) at 56.

disobedient individual faces the prospect of jail time as well as full-scale seizure of all of his or her wealth.<sup>31</sup>

A side effect of such a system is a body of law and set of institutions that are fairly effective at resolving commercial disputes and punishing criminals that are of no political interest. There is no disputing that numerous codes of law promulgated in the Yeltsin and Putin presidencies have been great leaps forward (especially in the areas of criminal procedure, property law, and a modernized civil code). Court reform and legal education efforts have improved the quality of bench and bar. But this, at best, has created a system in which the resolution of disputes and the trial of crimes *can* be done according to law, but only if the matter does not pique the interest of a powerful official. When such is the case, law becomes just one option among many, a tool or a weapon at the official's disposal.

Notice that, unlike the use of law in Soviet Russia, this cynical attitude toward law has ceased to be the exclusive possession of the state. New capitalists saw opportunity in the anarchy of weak state enforcement and transitional legal structures. In the worst cases, the unscrupulous or criminal-minded "commissioned" the criminal prosecution of their adversaries by paying off state officials. More intrepid, and more corrupt, law enforcement officials opened specious criminal cases against entrepreneurs as a means of rent extraction.<sup>32</sup> "Corporate raiding" (рейдерство) may combine these techniques with other manipulations of courts and legal processes to strip state or private enterprises of their assets. Thomas Firestone, who as Resident Legal Advisor at the U.S. Embassy-Moscow observed these and other techniques first-hand, described them metaphorically: "Using the law as both sword and shield, the perpetrator turns the victim into a legal defendant, misappropriates the state's legal enforcement power for private ends, and obtains a cover from liability through the claim that he is merely enforcing a legal right."<sup>33</sup>

Firestone (probably the most expert and accomplished Justice Department official to hold the office of resident legal advisor in Moscow was declared *persona non grata* in May 2013 and forced to leave his legal practice in Moscow shortly after leaving public service)<sup>34</sup> does not consider base corruption to be either a necessary or sufficient cause of the proliferation of such legal abuses. Rather, it is the instrumentalist legacy of Soviet law (and, one might say, pre-Soviet Russian law) that Firestone notes as a prime cause: "the notion that law is an instrument of political rule rather than a neutral system for the arbitration of disputes."<sup>35</sup>

<sup>31</sup> William Partlett, "Putin's Artful Jurisprudence," *The National Interest*, Jan. 2, 2013. <http://nationalinterest.org/article/putins-artful-jurisprudence-7882>

<sup>32</sup> See Thomas Firestone, "Armed Injustice: Abuse of the Law and Complex Crime in Post-Soviet Russia," 38 *Denv. J. Int'l L. & Pol'y* 556-59 (2010) at 556-59; Thomas Firestone, "Criminal Corporate Raiding in Russia," 42 *Int'l Law* (2008) at 1207.

<sup>33</sup> Firestone, "Armed Injustice," *supra* note 31, at 556.

<sup>34</sup> David M. Herszenhorn & Mark Mazzetti, "Russia Expels Former American Embassy Official," *N.Y. Times*, May 19, 2013. <http://www.nytimes.com/2013/05/20/world/europe/russia-expels-former-american-embassy-official.html>

<sup>35</sup> Firestone, "Armed Injustice," *supra* note 31, at 572.

The causeway metaphor rejects this instrumentalism. A public road is carefully constructed for the use of all. Like all good roads, this causeway provides a safe path to many destinations. All may use it freely and know in advance where it leads. The causeway, as Bolt's More notes, provides a path that the citizen may walk *safely*. This may be understood in several ways. Substantively, the citizen knows the limits of his free movement and can plan life accordingly. Procedurally, the citizen may rely upon the state both to protect the causeway against the harm other travelers may cause him and also to provide redress against interference by the state itself. In addition, as Bernard Rudden observed, "in every human life there are vast areas better left to the conscience of the individual and the sense of the relevant community: there is a precious sphere of non-law." The rule-of-law causeway does not run to every aspect of human life: "[I]f people act in good faith and stay licit, the State will stay away."<sup>36</sup>

Russia seems farther than ever from the causeway conception of the rule of law. The offense of slander, decriminalized in December 2011 by then President Dmitrii Medvedev, returned to the Criminal Code slightly more than a month after Vladimir Putin's May 2012 inauguration as president.<sup>37</sup> A few months later, the crime of treason was both broadened to criminalize more acts and narrowed to require less in the form of proof that the security of the Russian state has been compromised.<sup>38</sup> New laws concerning non-governmental organizations led human rights groups and other monitors of civil society to be officially branded as "foreign agents" (a term redolent with sinister meaning in post-Soviet society) or suffer a range of legal liabilities.<sup>39</sup> Sergei Magnitsky, a lawyer who gained fame first for accusing tax authorities of corruption

<sup>36</sup>Rudden, *supra* note 29.

<sup>37</sup>Article 129 (slander) and Article 130 (Insult) were decriminalized in December 2011 under President Medvedev. *See* Article 1(45) in Федеральный закон от 7 декабря 2011 г. N 420-ФЗ. Slander was returned to the Criminal Code under a new Article 128.1 by President Putin roughly 8 months later. *See* Федеральный закон от 28 июля 2012 г. N 141-ФЗ "О внесении изменений в Уголовный кодекс Российской Федерации и отдельные законодательные акты Российской Федерации."

<sup>38</sup>Федеральный закон от 12 ноября 2012 г. N 190-ФЗ "О внесении изменений в Уголовный кодекс Российской Федерации и в статью 151 Уголовно-процессуального кодекса Российской Федерации". In its previous version, Article 275 of the Criminal Code defined treason as "espionage, the delivery of a state secret or other assistance to a foreign state, foreign organization, or their representatives in carrying out hostile acts to damage the foreign security of the Russian Federation." Федеральный закон от 27 декабря 2009 г. N 377-ФЗ. The new law expands treason to include the rendering of "financial, material-technical, consultative, or other assistance to a foreign state, international or foreign organization or their representatives in activity directed against the security of the Russian Federation." The limiting element in the previous version, requiring damage to Russia's "foreign security" ("ущерб внешней безопасности"), has been narrowed by deleting the qualifier to acts "that are directed against the security" of the state.

<sup>39</sup>Федеральный закон от 28 декабря 2012 г. N 272-ФЗ, "О мерах воздействия на лиц, причастных к нарушениям основополагающих прав и свобод человека, прав и свобод граждан Российской Федерации"; Федеральный закон от 20 июля 2012 г. N 121-ФЗ "О внесении изменений в отдельные законодательные акты Российской Федерации в части регулирования деятельности некоммерческих организаций, выполняющих функции иностранного агента".

and then for dying in custody following his accusation, was tried and convicted not just in absentia, but posthumously – a first in recorded Russian history.<sup>40</sup>

The substantive merit of each of these laws and legal actions may be debated. But what matters here is not their normative value but their instrumental use – these are laws and legal processes that are used by the state to project power, not to create a space for the flourishing of individuals and society. Or, to put this metaphorically, there is no path set down by law on which the citizen can walk safely.

#### 15.4 Case Study: The President's Human Rights Council

Thomas More, the King's trusted advisor, found himself accused of treason when his counsel ceased to satisfy the sovereign. So, too, distinguished lawyers and scholars in Russia today find themselves threatened after giving their opinions to their president, by invitation of the President's own Human Rights Council, on his "great matter," the case of Mikhail Khodorkovsky. The Presidential Council on the Development of Civil Society and Human Rights (abbreviated here to the "Human Rights Council") claims a distinguished historical pedigree but possesses no legal independence. Its legal status comes from presidential decree (*ukaz*); it has never known any stronger legal authority than that. Its real authority comes from the reputation of its members.<sup>41</sup>

<sup>40</sup>David M. Herszenhorn, "Russian Court Convicts A Kremlin Critic Posthumously," *N.Y. Times*, July 11, 2013. It is worth noting that the Human Rights Council examined Magnitsky's case immediately prior to its work on the Khodorkovsky case. It gathered experts who wrote a high-quality and methodically rigorous report that returned public attention to the case. The Council's work was cited by the United States Congress. See Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112-208, § 402(8), 126 Stat. 1496, 1503 (2012).

<sup>41</sup>The Council traces its origin to the Human Rights Commission established (by decree) by Boris Yeltsin in 1993 and led by the well-known Soviet-era dissident Sergei Kovalev. See <http://president-sovet.ru/about/>. The author knows of no scholarship published in English or Russian on the Human Rights Council in its current incarnation. Kovalev resigned his post in 1996 in opposition to Yeltsin's war in Chechnya. See Sergei Kovalev (trans. by Catherine A. Fitzpatrick), A Letter of Resignation, *New York Review of Books* (Feb. 29, 1996). For much of Vladimir Putin's first two terms in office and the first half of Dmitrii Medvedev's presidency, there existed a Presidential Council on Assistance in the Development of Institutions of Civil Society and Human Rights. But again, the Council lacked real autonomy; its existence depended entirely on presidential decree. See Указ Президента Российской Федерации от 6 ноября 2004 г. № 1417 "О Совете при Президенте Российской Федерации по содействию развитию институтов гражданского общества и правам человека". The Council could hardly have been considered overly successful during Putin's first two terms as President. But as Medvedev entered the twilight of his presidential term, the Council appeared to have been given a new lease on life. Mikhail Fedotov was named chair of the Council in October 2010. See Указ Президента Российской Федерации от 12 октября 2010 г. № 1234 "О Председателе Совета при Президенте Российской Федерации по содействию развитию институтов гражданского общества и правам человека". And Medvedev signed a new decree in February 2011 that seemed to expand the Council's powers and confirmed a membership composed of the leading lights of the Russian human rights movement. See Указ Президента Российской Федерации

As in More's case, the initial allegations seemed easy to bat away. But now, as this chapter is being written, they wait and wonder about their fate. At least one Russian expert has fled Russia in fear for his safety, explaining that "Paris is better than Krasnokamensk," the Siberian location of one of the prison camps that housed Khodorkovsky.<sup>42</sup>

Khodorkovsky was once one of Russia's wealthiest entrepreneurs, the CEO of the Yukos Oil Company.<sup>43</sup> The first of several criminal investigations into his activities and those of his company began in June 2003. In May 2005, Khodorkovsky was convicted of fraud, causing property damage by deceit or breach of trust, and tax evasion. In December 2010, he was convicted of embezzlement and money laundering. Detained since his arrest in October 2003, Khodorkovsky was scheduled to be released in August 2014. In a surprise move, Putin pardoned Khodorkovsky on December 20, 2013; Khodorkovsky immediately left Russia for Germany.

Although the cases were opened separately, the time period and much of the evidence for these different charges were the same. The European Court of Human Rights has issued numerous judgments finding violations of the European Convention on Human Rights concerning the arrest, detention, search, access to counsel, inhumane treatment, and property interests of Khodorkovsky and his fellow defendants.<sup>44</sup> Other judgments by the Court and further applications by various defendants are pending. The Parliamentary Assembly of the Council of Europe expressed its concern for rule-of-law shortcomings revealed by the prosecutions.<sup>45</sup>

Several weeks after the verdict in the second case, President Medvedev met with his Human Rights Council in Ekaterinburg. Several Council members expressed

от 1 февраля 2011 г. № 120 "О Совете при Президенте Российской Федерации по развитию гражданского общества и правам человека".

<sup>42</sup> Christian Neef and Matthias Schepp, Exiled Economic Adviser: "Putin Is Afraid of the Public," *Der Spiegel*, June 10, 2013. <http://www.spiegel.de/international/europe/russian-economist-sergei-guriev-putin-fears-all-opposition-a-905306.html>

<sup>43</sup> Detailed factual background may be found in numerous publications, including my report, reprinted in 4 *Journal of Eurasian Law*, No. 3 (2011).

<sup>44</sup> See *Lebedev v. Russia*, App. No. 4493/04 (Oct. 25, 2007); *Vasilii Aleksanyan v. Russia*, App. No. 46468/06 (Dec. 8, 2008); *Khodorkovsky v. Russia*, App. No. 5829/04 (May 31, 2011); *OAO Neftyanaya Kompaniya Yukos v. Russia*, App. No. 14902/04 (September 20, 2011); *Khodorkovskiy & Lebedev v. Russia*, App. Nos. 11082/06 & 13772/05 (July 25, 2013). It should be noted that, in this latest judgment, the Court did not find a violation of Convention Article 18, which prohibits the restriction of protected rights "for any purpose other than those for which they have been prescribed," e.g. political cases. The Court observed that "Article 18 is rarely invoked and there have been few cases where the Court declared a complaint under Article 18 admissible, let alone found a violation thereof," while, with remarkable understatement, it also acknowledged "that the circumstances surrounding the applicants' criminal case may be interpreted as supporting the applicants' claim of improper motives." *Id.* at 898, 901. However, the Court refused to depart from its extremely high standard of direct proof for such allegations and thus declined to find a violation of the Convention. *Id.* at 897-909.

<sup>45</sup> Parliamentary Assembly Resolution 1418 (Jan. 25, 2005), *The Circumstances Surrounding the Arrest and Prosecution of Leading Yukos Executives*.

concern about the Khodorkovsky case.<sup>46</sup> Tamara Morshchakova, a retired justice of the Russian Constitutional Court, noted the Council's intention to provide the President with "expert legal conclusions" on issues raised by "concrete cases."<sup>47</sup> At the conclusion of the meeting, President Medvedev invited the Council to act:

You know, I think that practically no one at this table has read the entire case file for Khodorkovsky, Magnitsky, or still others simply because it is not possible. ... But it seems to me important, please, here I would be grateful, if the expert community tried to prepare a very legal analysis of these decisions. That would represent something of definite value, because every person who wishes to examine in those things, needs to be guided by the opinions of specialists. ... The opinions of different people on these questions is very important for me as the head of state.<sup>48</sup>

This enlightened view was reportedly shared by the chairmen of Russia's three highest courts.<sup>49</sup>

#### 15.4.1 *Work of the Human Rights Council and Its Experts*

The Human Rights Council took the President's words to heart. A working group chaired by Morshchakova drafted guidelines for this work. The protocol of one of their meetings, in early May, noted that thirteen experts had been invited to participate in the analysis, materials had been sent to them and, "after the anticipated decision of the cassational instance, a session of which is scheduled for May 17, it is expected that the preparation of the experts reports will intensify in order that the work be completed in the course of summer 2011."<sup>50</sup>

<sup>46</sup>Стенографический отчёт о заседании Совета по развитию гражданского общества и правам человека, 1 февраля 2011 года, 12:00, Екатеринбург, [http://www.president-sovet.ru/meeting\\_with\\_president\\_of\\_russia/meeting\\_with\\_president\\_in\\_yekaterinburg\\_01\\_02\\_2011/verbatim\\_report/index.php](http://www.president-sovet.ru/meeting_with_president_of_russia/meeting_with_president_in_yekaterinburg_01_02_2011/verbatim_report/index.php). Sergei Karaganov, Tamara Morshchakova, and Irina Yasina raised the issue in their recorded remarks.

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

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

<sup>49</sup>Елена Масюк, Тамара Моршчакова: "Я не могу оставить свою землю, на которой я выросла," *Новая газета*, 08.06.2013, <http://www.novayagazeta.ru/politics/58532.html> (Morshchakova: "The Chairmen of the Constitutional Court, Supreme Court, and Supreme Arbitration Court declared, when the Council showed such initiative and announced this to the President, that yes, society has the right to such a public analysis, that courts, like other state structures, are not exempted from public control, that society has the right to know and understand what occurs in the activity of every organ of power."); see also Речь члена Совета Т.Г. Моршчаковой на пресс-конференции 06 февраля 2013 года, [http://president-sovet.ru/structure/group\\_6/materials/rech\\_chlena\\_soveta\\_t\\_g\\_morshchakovoy\\_na\\_press\\_konferentsii\\_06\\_fevralya\\_2013\\_goda.php](http://president-sovet.ru/structure/group_6/materials/rech_chlena_soveta_t_g_morshchakovoy_na_press_konferentsii_06_fevralya_2013_goda.php)

<sup>50</sup>See Протокол заседания Рабочей группы по гражданскому участию в судебной-правовой сфере (совместно с рабочей группой по делу Магнитского), 5 мая 2011 г., at: [http://www.president-sovet.ru/structure/group\\_8/materials/meeting\\_of\\_the\\_working\\_group.php](http://www.president-sovet.ru/structure/group_8/materials/meeting_of_the_working_group.php)

As one of those experts, I did not know the identities of the others at the time. This was deliberate and, I now realize, done to protect the integrity of the experts and their work. On April 1, 2011, I received a letter signed by Mikhail Fedotov, the Chairman of the Human Rights Council, and Tamara Morshchakova, as Chairwoman of the Working Group.<sup>51</sup> The letter invited me “to participate in an independent public expert analysis of official documents and proceedings” concerning the second conviction.<sup>52</sup> The analysis would be limited to the text of the verdict, the record of the proceedings which took place in the Khamovnichesky Court, and other court materials. I was invited to write an opinion within my area of expertise concerning any “legal question which you believe to be pertinent within judicial practice in connection with the case at hand.”<sup>53</sup>

This was consistent with the principles that the Council had set for itself in this matter, which included a decision that the experts had no mandate to make any “political appraisal” of the case.<sup>54</sup> The Council set itself other principles for the selection of experts, too, including that:

1. The experts should possess high qualifications recognized in law and other academic areas that are confirmed by their published scholarly works;
2. No expert should have a conflict of interest, including past participation in this case;
3. The preparation of the expert reports would be completely voluntary and without any payment by or contract with the Council;
4. The content of the reports were exclusively the prerogative of the individual expert and, regardless of their content, included in the analysis of the Council, presented to the President, and made available to the public.<sup>55</sup>

These principles were put into direct effect, as the letter I received made crystal clear.<sup>56</sup> As promised, I worked without any interference, or even communication, from the Human Rights Council. I was not paid. I did not know the identity of my fellow experts, their opinions, or the Council’s recommendations before this information was publicly announced on December 21, 2012.<sup>57</sup> Other experts report

<sup>51</sup> Letter to Jeffrey Kahn from M.A. Fedotov and T.G. Morshchakova, April 1, 2011.

<sup>52</sup> *Id.*

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

<sup>54</sup> See Принципы организации экспертизы (правового анализа) судебных актов по уголовному делу Ходорковского М.Б. и Лебедева П.Л. (“Привлекаемые Советом при Президенте РФ эксперты не имеют мандата на то, чтобы выступить с политической оценкой по поводу состоявшегося процесса.”), at: [http://www.president-sovet.ru/structure/group\\_6/materials/principles\\_of\\_organization\\_of\\_expert\\_legal\\_analysis\\_of\\_judicial\\_decisions\\_in\\_the\\_criminal\\_case\\_of\\_mb.php](http://www.president-sovet.ru/structure/group_6/materials/principles_of_organization_of_expert_legal_analysis_of_judicial_decisions_in_the_criminal_case_of_mb.php)

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

<sup>56</sup> Letter to Kahn from Fedotov and Morshchakova, *supra* note 50.

<sup>57</sup> Изложение основных тем, составивших предмет общественной научной экспертизы по уголовному делу М.Б. Ходорковского и П.Л. Лебедева, 21.12.2012, [http://president-sovet.ru/structure/group\\_6/materials/izlozhenie\\_tem.php](http://president-sovet.ru/structure/group_6/materials/izlozhenie_tem.php)

the same experience.<sup>58</sup> When I did learn the identities of my fellow experts, I was pleased to be in the company of such accomplished individuals:

1. Sergei M. Guriev, Rector of the New Economic School (Moscow);
2. Anatolii V. Naumov, Professor at the Academy of the General Procurator's Office (Moscow);
3. Oksana M. Oleinik, Chair of the Department of Entrepreneurial Law, National Research University Higher School of Economics (Moscow);
4. Alexei D. Proshliakov, Chair of the Department of Criminal Procedure, Urals State Law Academy (Ekaterinburg);
5. Mikhail A. Subbotin, IMEMO, Russian Academy of Sciences (Moscow);
6. Astamur A. Tedeev, National Research University Higher School of Economics (Moscow);
7. Ferdinand Feldbrugge, Professor of Law, University of Leiden (the Netherlands);
8. Otto Luchterhandt, Professor of Law, University of Hamburg (Germany).

The experts' reports were evaluated by the Council, which then made its own observations and recommendations.<sup>59</sup> All of these were compiled into a 427-page, three-volume hardbound set that was personally delivered to President Medvedev in the Kremlin by the Chairman of the Council, Mikhail Fedotov, on December 27, 2011, the first anniversary of Khodorkovsky's conviction.<sup>60</sup> Fedotov reminded the President that he himself had directed this work to be done.<sup>61</sup>

The Council recommended a number of substantive and procedural reforms that had been advanced in other forums. Some, it is now clear, were the seeds for reforms subsequently adopted.<sup>62</sup> The Council also made recommendations concerning the

<sup>58</sup> Sergei Guriev, "Why I Am Not Returning to Russia," *N.Y. Times*, June 5, 2013. <http://www.nytimes.com/2013/06/06/opinion/global/sergei-guriev-why-i-am-not-returning-to-russia.html>. Howard Amos, "Russian Scholars Wary After Top Economist Flees Country," *RIA Novosti*, reprinted in Johnson's Russia List # 102 (June 6, 2013). In personal correspondence, Professor Feldbrugge stated to me that in his reply to Mr. Fedotov he had stressed that he had never received directly or indirectly any money or favours from anybody in connection with the experts' reports, that it would in any case be very unlikely that he would ever be selected as the beneficiary of Mr. Khodorkovsky's benevolence, in view of the negative views he had expressed in the past about Khodorkovsky's activities, and that the panel members, including himself, all had written individual reports and there was no co-ordination at any time between the panel members (at least where he was concerned).

<sup>59</sup> Пресс-релиз к заседанию Совета при Президенте Российской Федерации по развитию гражданского общества и правам человека 21.12.2011, [http://president-sovet.ru/structure/group\\_6/materials/ukos\\_2.php](http://president-sovet.ru/structure/group_6/materials/ukos_2.php)

<sup>60</sup> Рабочая встреча с советником Президента, председателем Совета по развитию гражданского общества и правам человека Михаилом Федотовым, 27 декабря 2011 года, <http://news.kremlin.ru/news/14153>

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

<sup>62</sup> The Council recommended expanded use of juries for certain crimes; the elaboration of bases for the exclusion of judges due to conflicts of interests, including the appearance of influence by law enforcement officials; greater rights to confront witnesses and present evidence; limits on prosecution for certain crimes; limits on pre-trial detention; reform of parole and pardon, and an amnesty for those convicted of certain economic crimes. See Рекомендации по итогам проведения общественной экспертизы, 21.12.2011, [http://president-sovet.ru/structure/group\\_6/materials/rekomendazii\\_po\\_itogam.php](http://president-sovet.ru/structure/group_6/materials/rekomendazii_po_itogam.php)



fate of Khodorkovsky himself. Namely, the Council recommended that the Procurator General of the Russian Federation seek the repeal of the 2010 verdict and that the Investigative Committee of the Russian Federation seek reexamination on the basis of newly discovered circumstances, namely, “fundamental violations in the course of the proceedings” resulting in “a miscarriage of justice.”<sup>63</sup> The report was referenced by the European Court of Human Rights in its most recent judgment in *Khodorkovsky and Lebedev v. Russia*.<sup>64</sup>

#### 15.4.2 Reprisals Against the Human Rights Council and Its Experts

On March 4, 2012, Vladimir Putin was elected to a third term as president. Almost immediately, the Council found itself under threat. Its membership was swollen with new members, diluting its ability to act and deliberate. In response, fifteen of the previous members (almost a quarter of the original cadre) – including the highly respected Lyudmila Alexeyeva – resigned.<sup>65</sup>

On April 1, Vladimir Markin, a representative of the Investigative Committee, smeared the integrity of the Council’s report, alleging to the mass media in conclusory fashion that some of the participants in the examination of the case may have received funding from Yukos in the past.<sup>66</sup> Around the same time, government authorities conducted an unscheduled audit of the Center for Law and Economic Studies (CLES), a think tank through which a number of members of the Human Rights Council and some of the experts had participated in high-level discussions of law reform in the past.<sup>67</sup>

On July 23, the Basmani District Court in Moscow issued a decision permitting investigative searches in the continuation of Criminal Case № 18/41-03 – the first investigation of Khodorkovsky, opened in 2003.<sup>68</sup> The court’s order was sought by V.A. Lakhtin, among others, who had been a lead prosecutor in the second Khodorkovsky case.<sup>69</sup> The court’s order, by its nature, received no press attention and thus was subject to no public discussion.

<sup>63</sup> See Рекомендации, *supra* note 61.

<sup>64</sup> *Khodorkovskiy v. Lebedev v. Russia*, App. Nos. 11082/06 & 13772/05 (July 25, 2013).

<sup>65</sup> Tom Balmforth, “Putin Packs Presidential Human Rights Council,” *Radio Free Europe/Radio Liberty*, Nov. 12, 2012. <http://www.rferl.org/content/putin-appoints-new-members-presidential-human-rights-council-russia/24768384.html>

<sup>66</sup> Interfax.ru, “Федотов о заявлении СК РФ по экспертизе дела ЮКОСа: “учите матчасть,”” Apr. 1, 2012, <http://www.interfax.ru/news.asp?id=238756>; Экспертов СПЧ преследуют за доклад по второму делу “ЮКОСа”, 06.02.2013, <http://grani.ru/Politics/Russia/yukos/m.211325.html>

<sup>67</sup> Леонид Никитинский, Третье дело ЮКОСа, о “печеньках,” Новая газета, 08.02.2013, <http://www.novayagazeta.ru/politics/56623.html>

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

<sup>69</sup> *Id.*

The searches themselves began in September. The first targets were the CLES offices and three apartments. Investigators seized electronic media and cell phones.<sup>70</sup> The investigators appeared to be searching for connections between the Russian experts, CLES, and Khodorkovsky. CLES had been responsible for a number of progressive legal reform projects in which several of the experts and Council members had participated in the past, including several large monographs on the rule of law.<sup>71</sup> The warrant issued by Judge Skuridina of the Basmannyi Court described the investigators' apparent theory that the Center had received funds from Khodorkovsky that were in turn passed to members of the Council and the experts in exchange for legal opinions favorable to them.<sup>72</sup>

One of the experts targeted was Mikhail Subbotin, a senior researcher at IMEMO and the deputy director of CLES. As he recalled:

They came at half past eight in the morning on September 7. They presented the search warrant. Typically, a witness is invited, but they do not burst into his house with witnesses. So, evidently, it is all the more serious. ... Five warrants (still one more was planned, but did not occur) in one morning in one research center at different addresses.<sup>73</sup>

Subbotin noted how the investigators refused the request of the executive director to call a lawyer. The investigators seized everything from diplomas to a passport, computers, flash drives, professional archives and working papers, bringing the Center's work to a standstill.<sup>74</sup> The CLES accountants and other employees were questioned for several days.<sup>75</sup>

In February 2013, Tamara Morshchakova revealed what was happening at a press conference: "At a minimum, two of the experts have already been subjected to different types of persecution ["преследование"]: one in an official capacity, the other in the form of criminal procedure."<sup>76</sup> Noting the apparent theory of the case – that the NGO used Khodorkovsky's money to fund false expert reports and pervert the course of the criminal proceedings – Morshakova expressed herself forcefully: "The accusation is senseless, fictitious, even more, this Center never conducted any kind of expert examination; it publishes monographs."<sup>77</sup>

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

<sup>71</sup> Речь члена Совета Т.Г. Моршчаковой на пресс-конференции 06 февраля 2013 года, [http://president-sovet.ru/structure/group\\_6/materials/rech\\_chlena\\_soveta\\_t\\_g\\_morshchakovoy\\_na\\_press\\_konferentsii\\_06\\_fevralya\\_2013\\_goda\\_.php](http://president-sovet.ru/structure/group_6/materials/rech_chlena_soveta_t_g_morshchakovoy_na_press_konferentsii_06_fevralya_2013_goda_.php)

<sup>72</sup> Постановление Басманного районного суда города Москвы о разкушении производства выемки документов, содержащих информацию, составляющую тайну переписки, 9 апреля 2013 года.

<sup>73</sup> Михаил Субботин, "Разбитые зеркала," 08.02.2013, [http://www.gazeta.ru/comments/2013/02/08\\_a\\_4957537.shtml](http://www.gazeta.ru/comments/2013/02/08_a_4957537.shtml)

<sup>74</sup> *Id.*; "Yukos Report Authors to Face Questioning," *The Moscow Times*, June 26, 2013. <http://www.themoscowtimes.com/news/article/yukos-report-authors-to-face-questioning/482250.html>

<sup>75</sup> Ellen Barry, "Economist Flees as Russia Aims Past Protesters," *N.Y. Times*, May 29, 2013.

<sup>76</sup> Lenta.ru, СПЧ пожаловался на преследования докладчиков по второму делу "ЮКОСа," 6 февраля 2013, <http://lenta.ru/news/2013/02/06/experts/>

<sup>77</sup> *Id.*; Мир 24 TV, СПЧ заявили о преследовании экспертов, готовивших доклад по второму делу ЮКОСа, 06.02.2013, <http://mir24.tv/news/society/6396581>

In April and May, investigators increased their pressure. Russian and Kazakh investigators searched the apartment of Elena Novikova, the Director of CLES, who was caring for her elderly father in Kazakhstan. They seized computers, phones, and papers and questioned Novikova for more than 3 days as a witness. At least once, the session stretched past midnight. Her lawyers complained about the absence of a warrant and their exclusion during the investigative actions, but to no avail.<sup>78</sup>

Another expert to come under pressure was Sergei Guriev, the Rector of one of Russia's premier academic institutions, a member of the Board of Directors for Sberbank, and one of the most prominent and well-respected economists in Russia. After gradually increasing attention, investigators abruptly demanded that he submit 5 years of e-mail correspondence and accede to searches of his office and home.<sup>79</sup> Instead, Guriev fled to Paris in self-imposed exile. "The truth," he wrote in *The New York Times*, "was that I could not come back to Russia because I feared losing my freedom."<sup>80</sup> After describing his work for the Human Rights Council, he turned to his treatment at the hands of investigators:

As for me, interrogations started in February 2013. After that, I heard that in February, a colleague of Mr. Putin had talked to him about my situation, and the president had reassured the colleague that I had nothing to worry about. This did not stop the investigation – I was interrogated twice and received demands for all sorts of documents and personal information. Moreover, the investigators introduced "operative measures" – the police euphemism for surveillance. ... Interestingly, during the interrogations the investigators asked me to produce "alibis," though they did not explain for what, and insisted that I was a "witness," not a "suspect."<sup>81</sup>

Not only Guriev, but also his institution, the Higher School of Economics, was pressured. "Simultaneously with my questioning in the Investigation Committee, a tax audit and a Rosobrnadzor (Federal Education and Science Supervisory Service) inspection were, indeed, performed. They both began at the very time that (my) interrogation began: the tax audit, in January-February, the Rosobrnadzor inspection, in March. We were told that both were normal scheduled inspections. But there had never been anything of the sort earlier."<sup>82</sup>

Guriev noted that his treatment changed for the worst at the end of April. Instead of another scheduled session of questioning, investigators produced a court warrant for all of Guriev's e-mail traffic since 2008: "The warrant gave no specific reasons why my e-mails had to be seized, yet concluded they had to be seized. When I complained to the investigators, one of them said that I was better off than Andrei Sakharov,

<sup>78</sup> Леонид Никитинский, Подробности третьего "дела ЮКОСа": Следственный комитет проводит обыски в Казахстане с санкции Басманного суда, *Новая газета*, 31.5.2013, [www.povayagazeta.ru/politics/58386.html](http://www.povayagazeta.ru/politics/58386.html)

<sup>79</sup> Ellen Barry, "Economist Who Fleed Russia Cites Peril in Politically Charged Inquiry," *N.Y. Times*, May 31, 2013.

<sup>80</sup> Sergei Guriev, "Why I Am Not Returning to Russia," *N.Y. Times*, June 5, 2013. *supra* note 57.

<sup>81</sup> *Id.*

<sup>82</sup> Ольга Проскурнина, "Персона – Сергей Гурьев, бывший ректор Российской экономической школы," *Ведомости*, 11.06.2013 (translation from Johnson's Russia List # 107, June 13, 2013, # 11).

the Soviet dissident who was sent to internal exile in Gorky.”<sup>83</sup> The investigators suggested that they also had a warrant to search his home, leading Guriev to conclude “the investigators can produce any search warrant they want without any respect for my rights, and [] they can do it without warning.”<sup>84</sup> Guriev later told interviewers from *Der Spiegel*:

The same mistakes, in terms of names and spelling, were made on both the court order and the documents the investigators presented. In other words, the court in question simply copied the investigators’ documents, with their absurd accusations, and will continue to do so in the future. I felt that it was too dangerous for me to stay.<sup>85</sup>

My review of the documents Guriev referenced supports the truth of this allegation. It also resonates with a disturbing fact I noted in my report about the verdict in the second Khodorkovsky case: while ostensibly written by Judge Danilkin, it was riddled with similarly brazen copying, including typographical errors, from the prosecutor’s indictment.<sup>86</sup>

After Guriev’s departure, the pressure continued to mount. Subbotin was ordered to reappear for more questioning. He estimated that the sum of his interrogations lasted twelve hours.<sup>87</sup> Then, on June 27, Tamara Morshchakova, the retired Constitutional Court justice who chaired the Council’s working group on the Khodorkovsky case, was questioned by the Investigative Committee. She summarized the investigators’ theory as revealed by their questions to her: “The investigators have formed a definite version in agreement with which the financing of experts occurred through the payment for the publications of their book, participation in scientific conferences and even parliamentary hearings, although such of course is impossible.”<sup>88</sup> The efforts of the Investigative Committee were not limited to the Russian experts. Otto Luchterhandt, a professor of law at the University of Hamburg who contributed a report, was warned at the last minute not to board a plane from Hamburg to Moscow because the Investigative Committee had requested the assistance of the German Government to question him.<sup>89</sup>

Tamara Morshchakova summarized the first year of President Putin’s third term from the point of view of the experts who had advised his predecessor on his great matter: “Complaints were leveled at Anatoliy Naumov, a classic of Russian criminal

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

<sup>84</sup> *Id.*

<sup>85</sup> Christian Neef and Matthias Schepp, “Exiled Economic Adviser: ‘Putin Is Afraid of the Public,’” *Der Spiegel*, June 10, 2013. *Supra* note 41.

<sup>86</sup> See Report, *supra* note 42. An appendix to the report reveals this cutting-and-pasting between indictment and verdict.

<sup>87</sup> “Yukos Report Authors to Face Questioning,” *The Moscow Times*, June 26, 2013. Софья Самохина, “Экспертов допросили по второму делу ЮКОСа,” *Коммерсантъ-Online*, 28.06.2013.

<sup>88</sup> Самохина, *supra* note 86.

<sup>89</sup> “Rough Justice: Will Khodorkovsky Face Trial Again?” *Der Spiegel*, 43/2013 (October 21, 2013), <http://www.spiegel.de/international/europe/russia-appears-to-be-preparing-a-new-case-against-khodorkovsky-a-929017.html>

law – he worked at the Academy of the Office of the Prosecutor General. He has now been dismissed. Searches were carried out at the home of Mikhail Subbotin, Astamur Tedeyev was visited at his department in the Higher School of Economics National Research University. Documents and computers were confiscated. Some of them were questioned. Oksana Oleynik, director of the Higher School of Economics Business Law Department, was also summoned to an investigation, but it has not taken place for some reason or other.<sup>90</sup> With the addition of Sergei Guriev, five of the six Russian experts are publicly known to have been ordered to questioning, subject to search, or both.

## 15.5 Conclusion

On February 13, 2013, I received another letter from Mikhail Fedotov, the Chairman of the Council. The letter informed me of the investigation, noting that it was ostensibly being conducted under the criminal case opened against Khodorkovsky in 2003 (and for which he had already been convicted in 2005), “but now it is based on the facts of financing by the convicted persons [i.e. Khodorkovsky and Lebedev] of deliberately false conclusions of specialists under the guise of independent public analyses by way of paying those persons who organized its realization and the experts.”<sup>91</sup> Fedotov concluded: “I consider it my duty to inform you about this and that the Council will intently follow the developing situation, actively conveying its view to the leaders of the country.”<sup>92</sup>

The basis for the warrant that Fedotov identified was patently absurd. The 2003 investigation had been closed after producing 162 volumes of material that served as the basis for a conviction in a case that had been finally adjudicated in 2005. Even if the insinuated payments had occurred (a fact repudiated by numerous members of the Council, as well as several of the experts, including myself),<sup>93</sup> that fact could not possibly constitute a crime under Russian law. The implication – sometimes insinuated and sometimes more overtly stated – that the work of the Council obstructed justice was particularly odd. In an interview Morshchakova gave shortly after President Medvedev charged the Council with its work, she emphasized that analysis of the case “could only begin after the cassational appeal will be completed and the sentence enters into legal force.”<sup>94</sup> And so it did.

<sup>90</sup> See Проскурнина, *supra* note 81.

<sup>91</sup> See Letter from Mikhail Fedotov to Jeffrey Kahn, *supra* note 6.

<sup>92</sup> *Id.*

<sup>93</sup> Jeffrey Kahn, “In Putin’s Russia, Shooting the Messenger,” *N.Y. Times*, Feb. 25, 2013. <http://www.nytimes.com/2013/02/26/opinion/in-putins-russia-shooting-the-messenger.html>

<sup>94</sup> Андрей Камакин, “Судите сами,” *Журнал “Итоги”*, 21.02.11, <http://www.itogi.ru/russia/2011/8/162040.html> (“Что же касается дела Ходорковского и Лебедева, то анализ можно начать только после того, как оно пройдет кассационную инстанцию и приговор вступит в законную силу.”).

But perhaps the warrant and the theory behind it, like the 2010 verdict that led to the work of the Council in the first place, were not intended to make *legal* sense. Perhaps they were meant to send a message about the use of power. Or, more precisely, the use of law as an instrument of power. Certainly, the investigators' message was not lost on the experts. "I thought that a Russian citizen was entitled to express his viewpoint," Sergei Guriev wrote. "I believe now also that you cannot be afraid to tell the truth. But I know now that such behavior is attended by substantial risk. ... I have done nothing wrong and [] there are no grounds for depriving me of freedom. Nonetheless, I disagree [with President Putin] that in present-day Russia this confers guarantees of security."<sup>95</sup>

The message was also not lost on the Council members who organized the work of the experts. On June 6, the Council published an apology:

We express our apologies to all of the Russian experts invited by us for the anxiety and humiliation that has been caused them by the actions of our country's organs of law enforcement. Unlike these organs, we have no doubts about our conscientiousness in the selection of the experts, nor in their honesty or competence. We underline that their public analysis is not a procedural document, possessing legal effect, nor a final verdict of civil society, but only the result of serious analytical work by those who organized and carried it out. A result of high quality is possible only through guaranteeing to experts the possibility to fearlessly express their independent opinion. In this, in fact, is the essence of the idea of public control and the contract between civil society and power.<sup>96</sup>

Tamara Morshchakova put the matter more bluntly: "The Council does not have the moral right to appeal to experts if it cannot guarantee to them that their free expression will not be punished."<sup>97</sup>

Many scholars would find little difficulty concluding that the aftermath of the Council's expert investigation was an affront to the rule of law. As T.R.S. Allan noted, "those freedoms associated with the citizen's ability to criticise the laws, and question the justice of the government's actions and policies, must be accounted an integral part of the rule of law."<sup>98</sup> Others would label such a claim too normative a conclusion about individual liberty, or otherwise outside the narrower procedural boundaries that contain the concept of the rule of law.

More's metaphor of a causeway redirects these scholarly debates by avoiding precise definitions of the rule of law or prioritizing substance over process, values over institutions, the quotidian over constitutional moments. The law-as-causeway metaphor recognizes that the state must articulate the boundaries of lawful conduct in

<sup>95</sup> See Проскурнина, *supra* note 81.

<sup>96</sup> Заявление Совета, в связи с ситуацией, сложившейся вокруг Сергея Гуриева и других экспертов, привлеченных Советом для общественной научной экспертизы по "второму делу ЮКОСа", 06.06.2013, [http://president-sovet.ru/council\\_decision/council\\_statement/v\\_svyazi\\_s\\_situatsiey\\_slozhivsheysya\\_vokrug\\_sergeya\\_gurieva\\_i\\_drugikh\\_ekspertov.php](http://president-sovet.ru/council_decision/council_statement/v_svyazi_s_situatsiey_slozhivsheysya_vokrug_sergeya_gurieva_i_drugikh_ekspertov.php)

<sup>97</sup> Елена Масюк, *supra* note 48.

<sup>98</sup> T.R.S. Allan, *The Rule of Law as the Rule of Reason: Consent and Constitutionalism*, 115 *L.Q.R.* 225 (1999); *Id.* at 238 ("The rights to receive information and to exchange and debate ideas, whenever such information and ideas concern the content of the laws and the nature of government actions and policies, are integral features of the constitutional interpretation of the rule of law.").

order to construct the social order it desires to create, and the citizen must perceive those boundaries in order to organize his conduct and affairs with a proper understanding of social risk and personal safety. Just as a real causeway provides form and structure, these physical attributes parallel the formal principles and institutions that some rule-of-law definitions prioritize. And just as a real causeway requires travelers to possess a shared understanding of the "rules of the road," the rule-of-law causeway also requires predictable processes, standards as well as rules, and the opportunity to move fluidly within these boundaries. These attributes similarly parallel the emphasis other scholars place on procedure and the opportunity for individuals to be defendants or litigants empowered by legal process and endowed with dignity.

No worse metaphor has been devised for law than to depict it as a sword or a shield, metaphors that emphasize the instrumental use of law. The better metaphor is law as a two-way street, especially in a society struggling under the legacy of recent authoritarian history. The rule-of-law is a causeway. Unfortunately, Russia has always suffered from notoriously bad roads.