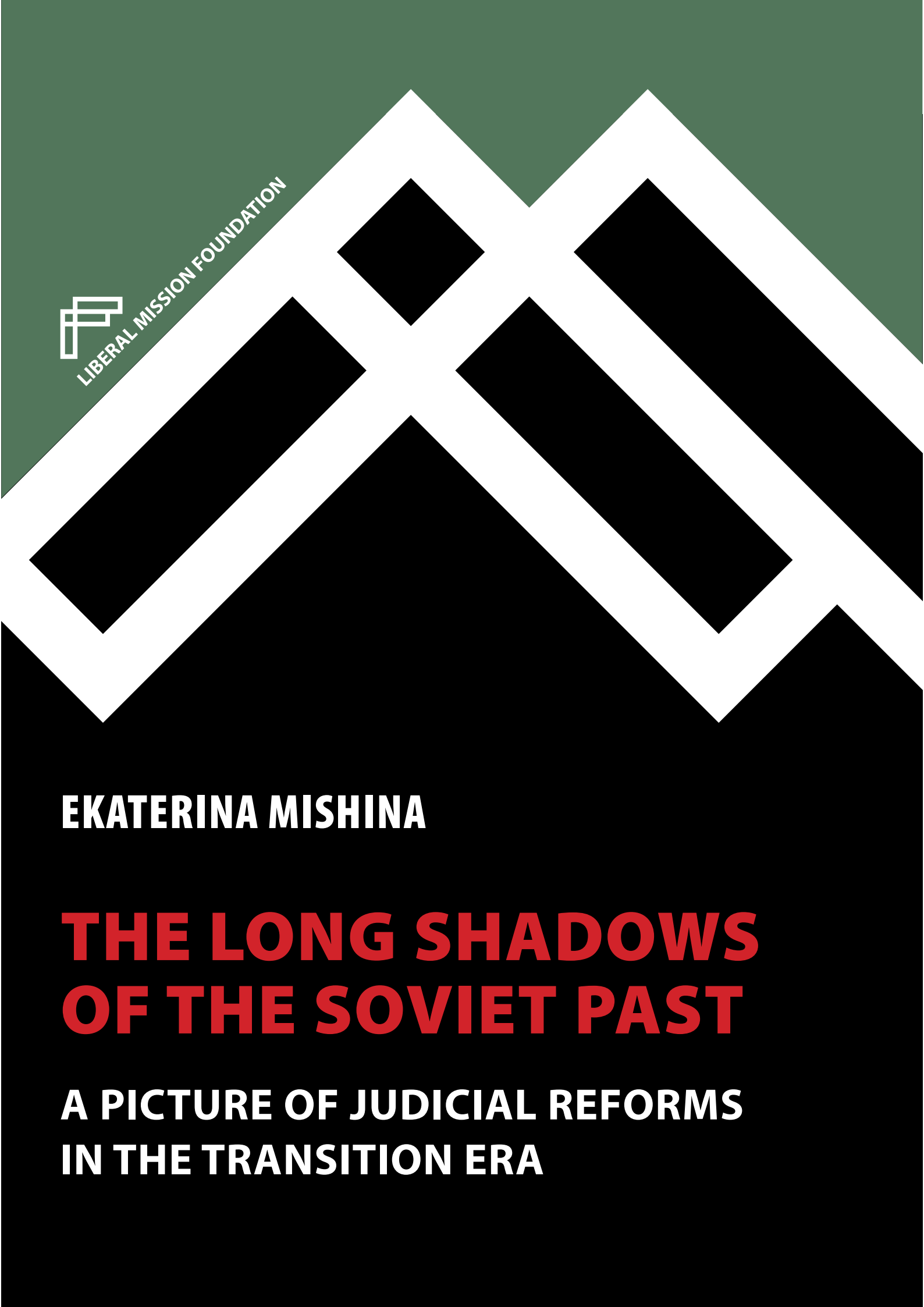

EKATERINA MISHINA

THE LONG SHADOWS OF THE SOVIET PAST

A PICTURE OF JUDICIAL REFORMS IN THE TRANSITION ERA

LIBERAL MISSION FOUNDATION

Ekaterina Mishina

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Mishina E. The Long Shadows Of The Soviet Past: A Picture Of Judicial Reforms In The Transition Era / E. Mishina. — Moscow : Liberal Mission Foundation, 2020. — 196 p.

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The book addresses the specifics of the Soviet Constitutions and Soviet law (including early Soviet criminal law and family law). Special attention has been given to Soviet courts and the phenomenon of Soviet judicial mentality. The author depicts the priorities of post-Soviet transformation and comments on judicial reforms in Russia, Estonia, Latvia, Lithuania, Georgia, Ukraine, Kyrgyzstan and Kazakhstan. The scope of analysis includes constitutional transformation, lustration efforts, police reform and certain legislative developments (mainly criminal law and criminal procedure). The focal point of the analysis is the impact of the path dependence factor on the post-Soviet transition of the countries of study. Commenting on the current situation in the Russian Federation, the author discusses the signs of re-birth of certain traditions and approaches of Soviet criminal law in modern Russia. The book also provides analysis of Vladimir Putin's constitutional amendments that came into force in July of 2020.

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PREFACE

We know too little about the legal systems of former Soviet bloc countries. Ekaterina Mishina has been working actively to remedy this problem. This book is a primer on the efforts by a cross-section of formerly Communist countries to build truly independent courts. It is a worthy follow-up to *Transformatsiia rossiiskoi sudebnoi vlasti: Opyt kompleksnogo analiza*, the 2010 book that summarized the findings from a comprehensive study on which she collaborated with several colleagues at INDEM, a Moscow public policy institute. In the interim she has periodically opined on the prospects for judicial reform in Russia on the website of the Institute for Modern Russia. This book draws together her arguments and brings them to the attention of English-language readers.

Mishina focuses on eight of the former republics of the Soviet Union (Russia, Estonia, Latvia, Lithuania, Georgia, Kazakhstan, Kyrgystan, and Ukraine). The broad geographic sweep of her research is welcome. To date, most of the scholarly literature on the judicial systems of the countries of the former Soviet Union has dwelled on Russia. Given the size and geopolitical influence of Russia, this emphasis is understandable, but unfortunate. To her credit, Mishina does not use Russia as a yardstick, either for progress or backsliding. Although she devotes more space to the analysis of Russia, she treats it as one her many cases.

Mishina recognizes that the declarations of independence from Communist pasts by the leadership of the countries she is studying did not create an institutional tabula rasa. Instead, each had to grapple with the legacy left behind. In Mishina's capable hands, the danger of taking a deterministic approach to the aftermath of Soviet experience is avoided. Although she does a superb job of setting the historical stage, with a magisterial recounting of the twists and turns in the legal system during the early decades of Communist control, she recognizes that, despite the seeming similarity of the experiences of her case study countries with Soviet power, this legacy has played out in very different ways. Hers is a sophisticated version of path dependence that recognizes the relevance of many factors other than the overarching institutional structure of the Soviet-era constitutions and codes. She reminds us that there can be many routes to the shared goal of independent courts and that success is not guaranteed by any route. She does, however, agree with Alexander Hamilton that without a clear and genuine separation of the judiciary from the other branches of government, independence is destined to be elusive.

The analysis of the experience of these eight countries confirms the importance of integrating a focus on the "law in action" with a rigorous investigation in-

to the law on the books. Over and over again, Mishina documents the contrast between the constitutional language that, on its face, guarantees the inviolability of the courts to encroachments from extra-legal forces, and the sad reality of courts that are vulnerable to outside interests. In many countries, efforts have been made to affirm this constitutional guarantee through legislation and regulations, to little avail. In the Soviet era, judges danced to the tune of the Communist Party. More recently, judges have sometimes been found to pay more attention to the wishes of influential actors than to the letter of the law. The common theme over time is the ability of power (both economic and political) to corrupt the judicial process. Mishina lays out the many efforts to stem this tide, none of which have been entirely successful. In her view, the persistence of judicial dependence has its roots in the Soviet era, but she also assigns blame to more contemporary factors, including the cravenness of judges themselves and the unwillingness of those with power to live within the law.

Without question, Mishina's meticulous descriptions of the reform efforts of each country are the book's most important contribution to our knowledge. For readers who are unfamiliar with the post-Soviet history of courts, the book provides a pithy summary. For those who may be familiar with several but not all of her cases, it allows for an extension of their knowledge. She has mined the primary sources with aplomb. Particularly notable is her attention to constitutional development across the region. After setting the stage with a thorough analysis of the multiple Soviet constitutions, she digs into the constitutional history of each country, explaining their initial post-independence choices and the subsequent changes. In each case, she demonstrates how the Soviet past influenced, but did not dictate, the paths taken. The reader comes away with a better understanding of why constitutions thrive in some, but not all, of these countries. It reminds us that merely having a constitution does not ensure that its guarantees will be respected.

Closely related is the analysis of judicial reform. Mishina assiduously works through the wide variety of institutional frameworks adopted by the case study countries. Most have broken up with the Soviet past by introducing judicial review in some form. Many have followed the German example of having a standalone constitutional court. But, as Mishina details, the meaningfulness of such courts has waxed and waned, both within individual countries and across the region. She also explores the variation in the institutional structure of ordinary courts, as well as in the underlying procedural codes. She notes that taking the time to prepare a blueprint, which is surely the advice given to all these countries by experts from development agencies, has not proven to be particularly helpful. Two of her cases with such documents, Russia and Ukraine, turned out to be among the least successful reform efforts. Once again, the gap between the law on the books and the law in action emerges as a potent theme, particularly as to criminal procedure. Efforts to rein in the police by making them answer to judges

have had only mixed success. Along similar lines, the informal alliance between the bench and the officials of the criminal justice system that was a hallmark of the Soviet Union has been remarkably resilient, leading to very low acquittal rates within the region. Unsurprisingly, public opinion polls find that many ordinary citizens are distrustful of their courts.

As this suggests, the specter of corruption hangs heavy over the analysis. Mishina explores the many efforts to curb it. These range from the wholesale replacement of the police force in Georgia to the innumerable campaigns against corruption in Russia and elsewhere. While extolling the Georgian approach, which resulted in a dramatic decrease in corruption among police, she is careful to note that it did not have the hoped-for ripple effect. Other aspects of legal reform in Georgia stalled, just as they did elsewhere. But she finds that the practice of announcing anti-corruption efforts with great fanfare, often accompanied by new legislation and regulations, typically dissipates with little to show for it other than deepening the cynicism of ordinary citizens.

Mishina implies that, for many residents of these eight countries, the post-Soviet reforms in the legal arena have been a triumph of form over substance. Constitutions, legislation, and regulation were rewritten to give them a democratic veneer. But less effort has been placed on the hard work of eliminating the mindset that allowed Communism to flourish for many decades. Changing the way people think about law and about their expectations of law is difficult. Not only is it difficult to break the habit of those in power of manipulating the law to serve their narrow interests, but it is just as difficult to convince ordinary citizens that law can serve their interests. To undertake both simultaneously is exponentially more difficult. Mishina argues that, absent a mindful effort to deal with the excesses of the past, it is a fool's errand. Among the countries she studied, only the Baltics engaged in lustration. Much like the Georgian police reform, this allowed for the replacement of Soviet-era officials with a new generation of judges and other officials. Mishina argues that, without this, the dependence of judges would have persisted.

The book is infinitely richer in empirical detail and analytical creativity than I can begin to capture in this short preface. My primary goal has been to whet the appetite of readers for what is to come.

Kathryn Hendley,
William Voss-Bascom
Professor of Law and Political Science,
University of Wisconsin – Madison

INTRODUCTION

The idea of this book resulted, *inter alia*, from my strong desire to complete one of the tasks which the INDEM foundation was planning to fulfil as a part of the comprehensive project "Judicial reform in Russia: institutional/societal analysis of transformation, assessment of the results and future perspectives" (2007–2009). The international component of the project was dedicated to the analysis of the transformation of the judicial branches in the group of transitioning countries which have previously experienced authoritarianism\totalitarianism. Five countries of study included Chile, Latvia, Ukraine, Poland and Bulgaria. National experts from these countries developed reports with a focus on judicial reform. In parallel, the INDEM team, which included sociologists, political scientists, legal scholars, and statisticians, developed a special questionnaire, which was circulated among the members of different legal branches in the countries studied. Based on the country reports and the collected sociological data, the INDEM team made several important findings. Oftentimes, judicial reform was not a priority compared to other reforms in transitioning countries. In some countries, reforms occurred in parallel with the rebirth of legislation that had been adopted before authoritarianism/totalitarianism was established. The departure from the socialist (or totalitarian) past and the transition to the market economy occurred in various forms, and the public opinion was not always in favor of judicial reform. In the countries studied, judges displayed different levels of decisional independence[1].

The workplan of the component included a more comprehensive study of judicial reforms in the post-socialist countries and the development of a course on the same topic. That task was not completed due to *force-majeure* circumstances, which came in the form of certain acts of state bodies which made the further continuation of the project impossible.

When I first started working on this book, the number of countries studied was modified and enlarged. Now it includes Russia, Estonia, Latvia, Lithuania, Georgia, Kazakhstan, Kyrgyzstan, and Ukraine. The sociological data that was collected and processed over the course of the INDEM project clearly demonstrated that the Soviet past had an obvious impact both on the legislative developments and on the mentality of law enforcers. Legal practitioners who worked both under the Soviet rule and after the break-up of the USSR repeatedly addressed the issue of the persistence of Soviet approaches and attitudes. That was the reason why the anal-

1 These findings were presented in the course of discussion of the project results at the seminar, "Specific features of transformation in Russia and transition countries: what's next?" on 30 June 2009, at the Institute of Contemporary Development, Moscow, Russia.

ysis of specific features of Soviet law, Soviet courts and Soviet judicial mentality was added to the scope of my research. The phenomenon of *path dependence* apparently works for the post-Soviet transition, though there is no uniformity. Some post-Soviet countries are less affected by the "history matters" factor, whereas others, with Russia in the first place, display a continuation of the worst traditions of early Soviet years. The scope of the analysis was also extended and now includes judicial reform, constitutional transformation, lustration efforts, police reform and certain legislative developments (mainly criminal law and criminal procedure).

I began working on the Russian (non-identical) version of this book in 2013, so I would like to start the acknowledgements with the names of my colleagues from the INDEM foundation — Georgy Satarov, Vladimir Rimskiy and others, who gave me the inspiration to continue working on this subject. Professor Mikhail Krasnov, Dr. Elena Abrosimova and Dr. Olga Schwartz provided extremely important comments on the manuscript and helped me to make it better.

I cannot thank enough the "Liberal Mission" Foundation, its President Professor Yevgeny Yasin, the executive director Igor Razumov and all members of the Board for their valuable comments and the possibility to publish the initial Russian version of the book.

Special thanks go to the University of Michigan Law School and its dean Professor Mark West, who let my dream come true and invited me to teach a full-fledged course "Judicial Reforms in the post-Soviet Countries" in the Fall of 2012 and 2013. I am extremely grateful for the possibility to also have taught this course in my then home institution of National Research University — the Higher School of Economics in Moscow in 2013–2014, and at the Department of Political Science of the University of Michigan that provided me with a lucky chance to teach this course three more times in 2014–2016.

My Father's longtime friends Professor Donald Barry, Professor Oles Smolansky and Professor Nicholas Balabkins were constantly encouraging me when I started working on the English version of the book. They urged me to re-write the book in English instead of translating it, to alter its structure and change the accents in order to make it more interesting for English readers. Their help was priceless. Professor Kathryn Hendley offered excellent advice when I was working on the manuscript and organized the presentation of the book in the University of Wisconsin-Madison. Another presentation was organized by the Institute of Modern Russia at the NYU.

Patrick Murphy, a brilliant expert on Russia and a wonderful editor, prepared the manuscript for publication. He was amazingly helpful and supportive, and the editing he provided significantly improved the manuscript.

I'd like to extend special thanks to Cholpon Omurkanova, Julia Bogdanova, Adylbeck Sharshenbaev and Kairat Osmonaliev, my dear friends and colleagues from Kyrgyzstan. Without them, I would not be able to complete the chapter ded-

icated to the Kyrgyz Republic. Dr Oleksandr Yevsieiev was extremely helpful when I was looking for resources for my chapter on Ukraine.

My beloved family — my husband Dmitriy Stolyarov and my daughter Elizaveta Agarkova — supported, encouraged and inspired me while I was working on the manuscript. Without their love, help and understanding this book would not have been finished.

I dedicate this book to the memory of family members who are not with us anymore — my wonderful parents Avgust Mishin and Zoya Sirotkina, and my incredible brother Alexey Mishin.

Ekaterina Mishina

PART I. THE DIAGNOSIS

CHAPTER 1. MAIN FEATURES OF THE SOVIET CONSTITUTIONAL SYSTEM

THE DIARCHY OF 1917. THE 1918 CONSTITUTION OF THE SOVIET RUSSIA

The Russian revolutions of 1917 marked the end of one of the largest empires of its era and paved the way for the world's first socialist state of workers and peasants. The period between the February and October revolutions is usually called *the diarchy* or *dual power*, a joint rule between among the Provisional Government and the Petrograd Soviet, which W. Pomerantz labels as "an anathema to the unified state's long-standing governing principle of a single sovereign"[1]. The term "*dual power*" suggests an unclear and overlapping government authority, the negative connotations of which recall the economic devastation and political turmoil of 1917, when Russia found itself on the edge of chaos. Despite the confusion, hardship and calamity that defined this moment in Russian history, certain positive developments were taking place. Consider, for instance, the first legislative initiatives of the Russian Provisional Government. In early March of 1917, Alexander Kerensky, then the Minister of Justice who in short order became the head of the Provisional Government, started by proclaiming an amnesty for all political prisoners. As William Pomeranz points out, much was expected of the Provisional Government, including promoting political change, resolving an unpopular war, and restoring stability on the home front[2].

The new regime quickly followed through with other ambitious reforms, including reforms granting women political rights. The Pale of Settlement for the Jewish population was also abolished by the Provisional Government Decree of March 20, 1917, *On the Abolition of Confessional and National Restrictions*. Specifically, the decree lifted restrictions that the Pale of Settlement imposed on the political rights of Jews, granting the Jewish population civil rights equal to those of other peoples of the former Russian Empire. The new government set other am-

1 William E.Pomeranz. Law and the Russian State. Russia's Legal Evolution from Peter the Great to Vladimir Putin. The Bloomsbery History of Modern Russia series. London, Great Britain, 2019. P. 69.

2 William E.Pomeranz. Op. cit., p. 69.

bitious reform goals, particularly the revision of criminal and civil legislation, procedural laws and the laws governing the judiciary.

Criminal law reform turned out to be an urgent task: after the amnesty was granted to political prisoners, regular convicts staged nationwide riots demanding better living conditions in prisons or, in some cases, outright amnesty. On March 17, 1917, a Provisional Government Decree entitled *On the Mitigation of the Fate of Persons Who Have Committed Criminal Offences* introduced major changes in conditions of imprisonment for non-political convicts. Those with short sentences were released immediately, and persons sentenced to perform hard labor saw their sentences cut in half. Furthermore, the death penalty was replaced with 15 years of imprisonment with hard labor. The immediate and most visible consequence of this non-political amnesty was the rampant escalation of crime. The resulting level of street crime overwhelmed the newly established people's militia that lacked the experience, training and professionalism of the pre-revolutionary police force that it replaced. At times, law enforcement appeared helpless before the situation. But this was only the beginning of the Provisional Government's woes: the flood of crime also brought political instability. The Provisional Government and the Petrograd Soviet, the two branches of diarchy, were ineffective at managing the crisis, distracted by power struggles and competition for legitimacy that lasted several months. In the meantime, the First World War dragged on, and the Russian Army continued to suffer horrific losses. Factory workers went on strike all over the country. Shortages of food and supplies were critical, and widespread hunger was becoming a real threat.

On September 1, 1917, the Provisional Government issued a Decree which proclaimed Russia a republic: "Due to the urgent necessity to terminate the current ambiguity of our system of power, given how unanimously and enthusiastically the republican idea was supported at the Moscow National assembly, the Provisional Government declares that the state order of Russia shall be the republican order and proclaims the Russian Republic. An urgent necessity to undertake immediate and firm measures to restore the unbalanced state order compels the Provisional Government to transfer the entirety of its powers to five of its members together with the Minister-Chairman."[1] The key items on the domestic agenda of the new republic became the "Restoration of state order and the combat efficiency of the Army. "As stated in the decree, the Provisional Government functioned as the supreme body of both legislative and executive power. The Provisional Council of the Russian Republic was initially designed as the representative body of all Russian political parties, and it was intended to play the role of a Provisional Parliament until the convocation of the Constituent Assembly.

1 Decree of the Provisional Government on proclaiming Russia a republic [*Postanovleniye O Prpvozglashenii Rossii respublikoy*] 01 September 1917. Translated. Retrieved from http://constitution.garant.ru/history/act1600-1918/5203/

The Russian Republic turned out to be a short-lived political entity. Its official government proved incapable of asserting control, and the Russian Republic found itself on the edge of anarchy by the end of October. This situation set the stage for a political explosion that became known as "The Great October Socialist Revolution." Sadly, the latter revolution did not bring relief — it merely replaced one governance disaster with another.

As with the February Revolution, the October Revolution did not result in a clear statement of a Fundamental Law to lay out the principles of governance in the new political entity. However, some Russian constitutional scholars assert that the first Decrees of Bolsheviks in fact constituted the initial basic law of the Soviet Russia. In support of this view, Elena B. Abrosimova writes:

> "The following decrees hold constitutional importance: the Appeal to Workers, Soldiers and peasants of November 7, 1917; the Decree on Land of November 8, 1917; the Decree on Peace of November 8, 1917; the Decree on the Entirety of the Power of the Soviets of November 8, 1917; the Decree on the Establishment of the Council of People's Commissars of November 8, 1917; the Declaration of the Rights of the Peoples of Russia of January 25, 1918; the Declaration of Rights of the Working and Exploited People of January 25, 1918; the Resolution of the Third All-Russia Congress of Soviets 'On Federal institutions in the Russian Republic' of January 28, 1918; [and] the three Decrees on the Courts and the decrees on Revolutionary Tribunals of 1917–1918. In practice, all of these acts served as founding documents of the new political entity, since they envisaged the system and principles of operation of state agencies of a new Russia and the legal status of the individual in this new state. In other words, the 'October Decrees'[1] compose the small provisional constitution of the Soviet Russia."[2]

The first formal constitution of the new regime came into effect in July of 1918. In contrast to the legalistic phrasing usually associated with the operation of a Fundamental Law, the 1918 Constitution used markedly emotional and nakedly ideological language familiar from the texts of other early documents of the Soviet Russia. Consider, for example, the following excerpt from Chapter 3 of Section 1: "Expressing its absolute resolve to liberate mankind from the grip of capital and imperialism, which flooded the earth with blood in this present and most

1 Due to the discrepancy between the Gregorian and the Julian calendars, the Bolshevik revolution is usually referred to as the "October revolution".

2 E. Abrosimova. "Constitutional (State) Law of the Russian Federation" [*Konstituzionnoye (gosudarstvennoye) Pravo Rossiyskoy Federazii]*. Course Outline 2001–2002. Moscow, Russian State Humanities University. The higher school of economics, administration and law, 2001, 5, 29. Punctuation modified for readability.

criminal of all wars."[1] These passages serve as context for the purpose and function of the more traditionally legalistic sections of the document. Section I of the Constitution, entitled "The Declaration of Rights of the Working and Exploited People," declared Russia to be a republic of the Soviets of the Representatives of the Workers, Soldiers, and Peasants. This chapter conveyed the central and local authority to these Soviets, and it outlined the organization of Russian Soviet Republic in a form of a federation of Soviet national republics, understood as a voluntary union of free nations. Private property rights on land were abolished, and the newly nationalized land confiscated from the former owners was to be apportioned among peasants (part 3 (a) of Chapter II). "All forests, mineral treasures and waters of utility to the general public, all implements, whether animate or inanimate, of model farms and agricultural enterprises are declared to be national property" (part 3 (b) of Chapter II). The same chapter introduced the universal duty to work "for the purpose of eliminating the parasitic strata of society and organizing the economic life of the country" (Chapter 2 of Section 1).

This is only one example of how the Bolsheviks' nationalization efforts were firmly founded on class-based ideology. In another instance, the transfer of the banking sector under the control of the Government of the Workers and Peasants was thought to be a necessary condition for "the liberation of the toiling masses from the yoke of capital" (part 3 (e) of Chapter II). The stated goals of these and other well-known Bolshevist measures were to eliminate exploitation of man by man, create a classless society and ensure the world-wide victory of socialism. The question of whether other world countries would benefit from socialism was, of course, never raised.

A sense of punitive class warfare informed the further sections of the 1918 Constitution. Chapter 4 proclaimed that at the decisive moment in the battle of the proletariat with its exploiters, the members of the exploiter class were banned from holding official positions in any branch of the Soviet Government. Naturally, the exploiters were also prevented from voting. Article 65 contained an explicit list of categories of individuals deprived of the electoral rights. The connections of some of these categories to the "exploiter class" are tenuous at best:

- (a) Employers hiring workers for profit;
- (b) Persons receiving non-labor income, such as interest income and rents;
- (c) Private merchants, trade and commercial brokers;
- (d) Monks and clergy of all denominations;
- (e) Former members and informants of the police force, the gendarme corps, and the Czar's secret service, as well as members of the former reigning dynasty;

1 Constitution of the RSFSR 10 July 1918. Translated. Retrieved from http://www.hist.msu.ru/ER/Etext/cnst1918.htm

- (f) Persons who have been legally declared demented or mentally deficient, as well as persons under guardianship;
- (g) Persons convicted for committing profit-motivated or dishonorable offenses.[1]

Chapter 13 of Section 4 granted all the non-exploiter citizens of Russia with the right to elect and to be elected as the Soviets of People's representatives. Voting rights were granted irrespective of gender, religion, ethnicity or resident qualification. Workers, peasants and other employees of industry, agriculture and trade, Cossacks, soldiers, and members of their families over 18 years old on the day of elections were all granted voting rights.

In terms of practical governmental structure, the 1918 Constitution seems designed for efficiency rather than deliberative decision-making. The supreme power in the Russian Socialist Federative Soviet Republic was vested in the All-Russian Congress of Soviets of Workers, Peasants, Cossacks and the Red Army Representatives (Chapter 6, pp. 24 and 26). The Congress was to assemble at least twice a year, with the All-Russian Central Executive Committee (CEC) exercising the supreme power between subsequent convocations of the Congress (p. 30 of Chapter 6). The Central Executive Committee was elected by, and subordinate to, the All-Russian Congress of Soviets. The regional authority belonged to the local Councils of People's representatives. Just as with the All-Russian Congress, these Councils did not operate on permanent basis, relying on their Executive Committees to exercise power between Council sessions.

The administrative power belonged to the Bolshevik Government, called the Council of People's Commissars (Sovnarkom) (Chapter 8), which was "entrusted with the general management of the affairs of the RSFSR" (p.37) and had to take "all steps necessary for the proper and expedient conduct of the government affairs" (p.38). Chapter 8 also included the list of ministries, called People's Commissariats, each headed by a designated People's Commissar (narkom). Narkoms had broad individual discretion to make all decisions under the jurisdiction of their Commissariats. Narkoms' decisions could be appealed either to the Council of People's Commissars or to the Presidium of the All-Russia Central Executive Committee; however, the implementation of appealed decisions was allowed to continue throughout the appeal process (p. 45).

Despite its complexity, this new constitutional framework was not based on the principle of the separation of powers between the legislative, executive and judicial branches. There was no legislature acting on the permanent basis, and courts were not even mentioned in the Constitution. This does not seem surprising, however, given the difficult circumstances around the time when the new Constitution was adopted, and the provisional nature of law as understood by the Bolsheviks. Because law and the state were assumed to be in the

1 Op. cit., 257.

process of withering away in the face of the birth of world communism, the framers of the 1918 Constitution probably did not believe it needed to be built to last.

THE NEW ECONOMIC POLICY

From the very first days of the Soviet rule, prosecution of dissent and disregard for human dignity always lurked in the subtext of the Bolshevist idealistic declarations of equality, brotherhood and non-exploitation of man by man. Relatedly, the total lack of respect for private property as another pillar of Soviet ideology originated at the same time. As an illustration, the notorious policy of "War Communism" was issued shortly before the 1918 Constitution was adopted. Its key measures included militarization of labor, strict workplace discipline for the workers, compulsory labor duty for non-proletarians, forcible confiscation of most agricultural output from the peasants as well as other efforts aimed at the liquidation of private enterprise and expropriation of property and financial assets. The Bolsheviks believed that these confiscation and redistribution measures could stem the escalating economic crisis and quell political instability. However, these policies not only did not succeed in solving the country's problems, but instead made the situation even worse. In the face of ongoing crisis, the War Communism's economic policies were officially terminated in March of 1921 during the X Congress of the Russian Communist party of Bolsheviks, when War Communism was replaced by the New Economic Policy (NEP).

The introduction of the NEP amounted to the first official admission that the previous Bolshevik economic policies had failed. At the same time, this decision can be read as evidence of flexibility of Bolshevik ideology. Soviet legal theorists had to improvise as the party's core economic program underwent several radical changes, from war communism to the New Economic Policy (NEP) to industrialization/collectivization[1]. When the complete economic collapse became a tangible possibility, instead the die-hard crusaders against capitalist exploiters and private property decided to reinstate certain elements of private enterprise. By 1921, the Russian economy was devastated by a decade of wars and revolutions. The Bolsheviks realized that the hungry and exhausted people needed something more substantial to fill their stomachs than slogans and promises of the approaching worldwide victory against of the dictatorship of proletariat.

The Decree of the All-Russia CEC of March 21, 1921, was the first normative act of the NEP era. The confiscatory "surplus appropriation" system in agriculture was replaced by the in-kind agricultural tax "in order to ensure correct and peaceful farm management and to entitle agriculturalists to more flexible disposal of their products and assets, to strengthen peasant households and increase their

1 Pomerantz. P. 73

productivity."[1] The decreed rate of the agricultural tax was to be gradually reduced in coordination with the process of rebuilding transportation and industrial infrastructures, "which would allow the Soviet government to get agricultural products in exchange for manufacturing and handicraft goods." The poorest peasant households were partially or completely exempted from all types of in-kind tax (art. 4 of the Decree); moreover, the state assumed control over food supply to the poorest rural population groups. Remarkably, the decree also introduced economic incentives for the most productive peasants and punishments for the sluggish ones: the former received tax benefits, while the latter were subject to penalties to be imposed by the Soviet authorities.[2]

Several other key legislative acts shaped the guidelines of the Russian NEP. The Sovnarkom Decree "On Consumers' Cooperatives" of April 7, 1921, allowed the cooperatives to store various agricultural products. The Decree allowed RSFSR citizens to form "consumer associations" (art.1), whose role was "to exchange and buy excess agricultural products and handicraft goods and also to sell them" (art. 5). In addition, cooperatives were allowed to enter into binding contracts with manufacturers to purchase, supply, process, store, refine, or adjust goods. Individuals were granted a right to set up production and processing enterprises, for example, to plant orchards or to open dairy farms.[3]

The Sovnarkom Decree "On Exchange" of May 24, 1921, legalized barter, purchase and sale of agricultural products left over after withholding of the in-kind tax. Article 1 extended these trading rights to all handicraft goods and items. As a result, individuals and cooperatives were allowed to exchange, purchase and sell goods in farmers' markets and other shopping premises (art.2).[4]

The key transformative document was the Decree of the All-Russia CEC of May 22, 1922, "On Fundamental Private Property Rights recognized in the RSFSR, protected by its laws and qualified for legal remedy in the RSFSR courts."[5] The Decree granted to the Russian citizens a variety of property rights including the right to set up private production or trade enterprises and to engage in all professions and activities allowed by the current law. The Decree established private owner-

1 The Decree on Replacement of the surplus appropriation system by the in-kind tax [*O Zamene Prodovolstvennoy y Syryevoy Razverstki Naturalnim Nalogom*] 21 March 1921. Translated. Retrieved from http://istmat.info/node/46014

2 Op. cit., 6, Art. 7.

3 The Sovnarkom Decree "On Consumers' Cooperatives" [*O Potrebitelskoy Kooperazii*] 07 April 1921. Translated. Retrieved from http://istmat.info/node/46017

4 The Sovnarkom Decree "On Exchange" [*Ob Obmene]* of 24 May 1921. Translated. Retrieved from http://istmat.info/node/46124

5 The Decree of the All-Russia CEC "On Fundamental Private Property Rights recognized in the RSFSR, protected by its laws and qualified for legal remedy in the RSFSR courts" [*Ob Osnovnykh Chastnykh Imuschestvennyh Pravah, Priznavaymyh RSFSR, Ohranyaemyh Ee Zakonamy Y Zaschischaemyh Sudami RSFSR*] 22 May, 1922, Translated. Retrieved from http://www.consultant.ru/cons/cgi/online.cgi?req=doc;base=ESU;n=6590#0

ship of urban or rural structures that were not previously municipalized by the local Soviets (art.1), leasing of land in urban and rural areas for a term of up to 49 years under the agreements with the local authorities in charge of land use (art. 2), private ownership of productive assets, equipment and means of production, agricultural and industrial products, goods allowed for possession by civilians, financial assets, household articles and personal use items (art.3), and the right to enter into contractual agreements not expressly prohibited by the current law. Art.5 envisaged intellectual property rights including claims on inventions, copyright, design and trademarks within the limits established by "special pieces of legislation". Article 7 also reintroduced the concept of binding contractual agreements and the right to enforce contracts in court and prescribed the rules for voiding the contracts. Foreign enterprises of various types and legal forms of organization were granted the right to become a legal entity on the RSFSR territory. In addition, any foreign entity, regardless of its legal entity status in the RSFSR, could seek court remedies for claims involving defendants that are subjects of RSFSR jurisdiction.

Nonetheless, the Decree did not envisage restitution for the former property owners whose assets were "expropriated in accordance with revolutionary law" prior to adoption of the Decree.

The above Decree stands apart among the early Soviet legislative acts not just because of its content, but also in terms of its use of legal concepts and language. The fact that the Decree embodies the constitutional principle that "Anything which is not forbidden is allowed," and its apparent concern for improving the business climate for foreign companies, supports the view that one of the legislative intents of the Decree was the positioning of the Soviet State as a civilized counterparty in economic affairs at the national and international levels.

Hence the NEP appears to have pursued broader economic, social and political goals apart from rebuilding the war-ravaged national economy and preventing economic collapse and mass starvation. In contrast to other Soviet legal instruments, NEP policies seem to suggest a recognition that law is not simply a stopgap measure in the transition to a stateless society, but that law will be an at least semi-permanent feature of Soviet society. The NEP policies were instrumental in addressing social problems, especially riots among the poorest peasants. Potential political gains from the NEP included breaking the international isolation of the Soviet Russia and establishing diplomatic and economic ties with foreign nations.

THE USSR CONSTITUTIONS OF 1924, 1936 AND 1977

The next Soviet Constitution referred to the Union of Soviet Socialist Republics, comprised of RSFSR, Ukrainian Soviet Socialist Republic (SSR), Belorussian SSR and Transcaucasian SSR, with the latter consisting of Georgia, Armenia and

Azerbaijan. By the time the USSR was formed, each constituent republic already had its own Constitution; however, a new Fundamental Law was required to govern the Soviet Union as a broader entity. The first Constitution of the USSR was adopted on January 31, 1924, by a resolution of the Second Congress of the Soviets of the USSR. The document had two parts: The Declaration of Formation of the USSR and the USSR Formation Treaty.[1] In keeping up with the traditions of the 1918 Constitution, the language of the new law was vivid, emotional and evocative, especially in the Preamble. In terms of its legal structure, the new Constitution contained an extensive list delimiting the scope of authority of the federation. Importantly, the language of the Constitution used the term "sovereignty" deliberately, and its provisions limited the sovereignty of constituent republics only "to the extent specifically stated in the present Constitution and in matters under the jurisdiction of the Union" (Article 3, Chapter 2). Each republic retained the right to unilaterally leave the union (Article 4). The annual Congress of Soviets of the USSR was declared the supreme governing body of the federation, with the Central Executive Committee (CEC) of the USSR holding supreme power between subsequent congresses. The CEC was a bicameral body with both legislative and executive authority, consisting of the Soviet of the Union and the Soviet of Nationalities.

The first chamber, the Soviet of the Union, was an organ representing the republics, and its members were elected by the Congress of the Soviets of the USSR. The other chamber, the Soviet of Nationalities, represented more than a hundred national and ethnic groups within the USSR. In the periods between CEC sessions, the 21-person Presidium of the CEC was considered the supreme governing body, which was, in the language of the document itself, a "supreme legislative, executive and directive organ of governance in the USSR" (art. 29).

The Council of People's Commissars, the composition and competence of which were enshrined in Chapter 6 of the Constitution, served as an auxiliary regulatory body of the CEC. For the first time in Soviet Russia, the status, formation order and jurisdiction of the Supreme Court of the USSR were outlined on the constitutional level. Established "in order to maintain revolutionary legality within the territory of the USSR," the Supreme Court was conceived as a subordinate body to the USSR CEC, both de jure and de facto. The wording of art. 43 could not be more clear: "the Supreme Court was a structure created for the needs of the Central Executive Committee". In the structure of the USSR, the Supreme Court was vested with a duty "to examine and repeal the resolutions, decisions, and verdicts of the Supreme Courts of the member Republics, if they contradict federal laws, or affect the interests of other Republics." Chapter 9 also established a new governmental body tasked with managing state security, the Unified State Politi-

1 The Constitution of the USSR 31 January 1924. Translated. Retrieved from http://constitution.garant.ru/history/ussr-rsfsr/1924/red_1924/185480/

cal Administration, or the notorious OGPU. For decades, the mere mention of this acronym made Soviet citizens tremble. Article 61 stated that

> "With the goal of unifying the revolutionary efforts of the member Republics in their struggle against political and economic counter-revolution, espionage and banditry, there shall be created under the jurisdiction of the C.P.C. of the U.S.S.R., a Unified State Political Administration (O.G.P.U.) of which the Chairman shall be a consulting member of the C.P.C. of the U.S.S.R."

With such a broad mandate and direct connections to the upper echelons of government policy-making, it is of little surprise that the OGPU became the tool of choice for government control and repression.

The USSR Constitution of 1924 did not mention even once the rights or freedoms of the Soviet citizens. In this sense, this Fundamental Law offered a contrast to the next Constitution of the USSR — the infamous Stalin Constitution of 1936. Stalin's Constitution put a clear demarcation line between the periods of constitutional evolution of the Soviet Union. The time of the *dictatorship of the proletariat* was over, and its mission was accomplished. Now it was time to celebrate the *victory of socialism*. The main purpose of the 1936 Constitution was to legitimize the fundamentals of the socialist system and, at the same time, to present the new regime as a real democracy. The political elite of 1930s had a clear understanding of the necessity to deflect attention of both the Soviet people and the foreign states away from what was actually happening in the Soviet Union. The stark and emotionally rich revolutionary rhetoric of the first years of Bolshevism was no longer in demand; instead, the USSR needed a new Fundamental Law that would include a wide scope of human and civil rights and freedoms together with other seemingly democratic provisions.

The last traces of the NEP disappeared in the new Constitution, which officially proclaimed the victory of socialism in the Soviet Union. The national economic system was defined as socialist, where most means of production belong to the state, and only some were owned by kolkhozes or cooperatives. The new Constitution boldly declared that

> "The socialist system of economy and the socialist ownership of the means and instruments of production firmly established as a result of the abolition of the capitalist economic system, the abrogation of private ownership of the means and instruments of production and the abolition of the exploitation of man by man."[1]

Structurally, the 1936 Constitution also multiplied the number of member republics of the Soviet Union. Armenia, Georgia, Azerbaijan, Kazakhstan and Kyr-

1 Art. 4 of the USSR Constitution 05 December 1936. Translated. Retrieved from http://constitution.garant.ru/history/ussr-rsfsr/1936/red_1936/3958676/

gyzstan obtained the status of member republics. In 1940, Moldavia, Estonia, Latvia, Lithuania and Karelo-Finnish republic were made part of the USSR under the same Constitution.

The 1936 Constitution introduced important changes to the system of state bodies of power. The Supreme Soviet of the USSR was made the highest organ of state authority of the Soviet Union[1]. Article 32 stated that "the legislative power of the U.S.S.R. is exercised exclusively by the Supreme Soviet of the U.S.S.R". The USSR Supreme Soviet had a bicameral structure similar to that of the discontinued USSR CEC. Houses of the Supreme Soviet had the same names as the houses of the Central Executive Committee and enjoyed an equal status. The Supreme Soviet was elected for a four-year term. Sessions of the Supreme Soviet of the U.S.S.R. were convened by the Presidium of the Supreme Soviet of the U.S.S.R. twice a year[2]. These sessions rarely lasted longer than two weeks per year, and members of the Supreme Soviet kept their full-time jobs. Given such a low level of activity, it is hardly possible to say that the Soviet Union had a real Parliament. Article 64 established the Council of People's Commissars (which was sometimes referred to as the USSR Government or Sovnarkom) as the supreme executive and administrative authority of the land, which was accountable to the Supreme Soviet.

On paper, the electoral system underwent essential democratization, and the universal suffrage was provided on the constitutional level. Restrictions on voting stipulated in the 1918 Constitution, intended to protect a vulnerable revolutionary government, were not needed in the country of victorious socialism. However, for the first time in the constitutional history of the Soviet Union, the leading role of the Communist party was outlined in the Constitution:

> "The Communist Party of the Soviet Union (Bolsheviks) is 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"[3].

The Constitution does not say a word about banning other political parties. However, its phraseology gives no opportunities to parties other than the Communist party to operate freely in the Soviet Union. This constitutional provision served as a cornerstone of the unassailable dominance of the Communist party.

Unlike the 1924 Constitution, which established only the competences of the Supreme Court of the USSR and ignored other elements of the country's judicial system, the 1936 Constitution addresses this issue in detail. The overarching role of the Supreme Court in the structure of the USSR was modified: if under the 1924 Constitution it was set up "in order to maintain revolutionary legality on the territory of the USSR," the 1936 Constitution introduces the legal notion

1 Art. 30 of the USSR Constitution of 1936.
2 Art. 46. of the USSR Constitution of 1936.
3 Art. 126. of the USSR Constitution of 1936.

of *justice* and establishes that said justice shall be administered by all constituent elements of their Soviet judicial system from the People's Courts to the Supreme Court of the USSR[1]. The status of the Supreme Court was also changed: it became an autonomous structure and not an auxiliary agency for another body of state power. In accordance with the principle of electivity of judges, people's courts had to be popularly elected, and upper courts were elected by the Soviets of appropriate level. For the first time the Fundamental Law of the USSR provided that judges were independent and subject only to the law (art. 112). Pursuant to Article 111, "in all courts of the U.S.S.R. cases are heard in public, since the law does not provide for exceptions, and the accused is guaranteed the right to be defended by Counsel." These democratic provisions strongly contrasted with the phraseology of previous Constitutions and other pieces of Soviet legislation.

The scope of constitutional rights and freedoms envisaged in Stalin's Constitution was unique not only for Russia, but, to a certain extent, for that historic period in general. Unlike the previous Soviet Constitutions, the 1936 Constitution provided for a comprehensive list of political, economic and social rights. Certain economic rights stipulated in Stalin's Constitution were missing in the Fundamental laws of many Western democracies of that time. Chapter X, "The Fundamental Rights and Obligations of Citizens," looked very impressive, especially in the view of what was really happening in the Soviet Union at that time. Article 125 provided that "in accordance with the interests of the working people and in order to strengthen the socialist system" Soviet citizens were guaranteed "a) the freedom of speech; b) the freedom of the press; c) freedom of assembly and meetings; d) freedom of public processions and demonstrations."

The Constitution stated that these rights of the Soviet citizens were ensured by "providing the working people and their organizations access to printing facilities, paper supplies, public buildings, streets, communications, and other material conditions necessary for the exercise of the aforementioned rights." The implied meaning of this constitutional provision is a clear demonstration of the cynicism of Stalin's lawmakers: Soviet citizens were vested with vital political rights, but the enforcement of these rights was conditional. Realization of constitutionally envisaged rights was possible only within the established limits, where strict compliance with the interests of the working people and the goals of strengthening of the socialist system — as defined by the Soviet authorities — was obligatory.

Other provisions also failed to live up to their own standards. Under Article 127, Soviet people enjoyed personal immunity, and could not be arrested without a court order or a warrant. Article 128 provided that the inviolability of residence and the privacy of correspondence were protected by law. At the time of the Great Purge, these constitutional provisions were of course openly ignored. After

1 Art. 102 of the USSR Constitution of 1936.

Stalin's death, the enforcement of these norms, especially those addressing personal immunity and privacy of correspondence, was still far from perfect. Attempts to exercise freedom of speech could result in criminal prosecution and conviction for "anti-Soviet agitation." Interestingly, the framers of Stalin's Constitution did not bother to include the freedom of movement in the text of the Fundamental Law.

The 1977 Constitution of USSR and Republic Constitutions of 1978 declared the successful building of the full-fledged socialism and nationwide socialist state. The Preamble and Art,1 of the Union Constitution envisage the creation of a "new historical community of people — the Soviet people"[1]. All power in the USSR belonged to the "people, …who exercise state power through Soviets of People's Deputies, which constitute the political foundation of the USSR"[2]. Both the 1977 Constitution of the USSR and the 1978 Constitution of the RSFSR envisaged the special constitutional status of the Communist party of the Soviet Union as "the leading and guiding force of the Soviet society and the nucleus of its political system" . Both Constitutions also enshrined the principles of building and operating the Soviet state, namely, the unlimited powers of the Soviets of People's Deputies, which express the will of the people (art.2), democratic centralism (art. 3), and socialist legality (art.4).The comprehensive list of rights, freedoms and obligations of Soviet citizens was envisaged in Chapter 7 of the USSR Constitution. Article 39 stated that

> "citizens of the USSR enjoy the entirety of socio-economic, political and individual rights and freedoms envisaged and guaranteed by the USSR Constitution and Soviet law. The social system secures extension of rights and freedoms, consistent improvement of living conditions of citizens in accordance with implementation of programs for socio-economic and cultural development. Rights and freedoms shall not be enforced in breach of interests of the society, the state or the rights of other citizens".

Article 59 contained additional explanations: realization of rights and freedoms shall be inseparable from the fulfillment of obligations. Similar list of rights, freedoms and obligations was envisaged in Chapter 6 of the RSFSR Constitution[3].

The 1977 Constitution of the USSR was repealed when the Agreement on Creation of the Commonwealth of Independent States was adopted on December 8, 1991, which was then ratified by the RSFSR Supreme Soviet. The 1978 Constitution of the RSFSR was repeatedly amended and altered until eventually it was replaced by the new Constitution of Russia on December 12, 1993.

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1 Preamble and Art. 1 of the Constitution of the USSR 07 October 1977. Translated. Retrieved from http://constitution.garant.ru/history/ussr-rsfsr/1977/red_1977/5478732/

2 Art. 2 of the 1977 Constitution of the USSR.

3 Constitution of the RSFSR 12 April 1978. Retrieved from http://constitution.garant.ru/history/ussr-rsfsr/1978/red_1978/5478721/chapter/6/

CHAPTER 2. MAIN FEATURES OF SOVIET LAW AND SOVIET COURTS

A COMPLICATED RELATIONSHIP WITH LAW

The phenomenon that became known as Soviet law came into existence shortly after the October Revolution of 1917. Purporting to eliminate everything related to the previous regime, the Bolsheviks planned to repeal the pre-revolutionary legislation in its entirety. At the same time, they understood that it was impossible to create a brand new legal system from scratch, and from the very beginning, Soviet law appeared to be a mixture of pre-revolutionary law, Marxist-Leninist ideology, and *revolutionary legal consciousness*. Marxist-Leninist ideology was the pillar of the new system of law; it penetrated into all areas of law, supplementing them with a class approach. Marxism/Leninism viewed law as a tool intended to maintain the dominance of the working class over non-proletarians. No wonder that from the very beginning, Soviet law was unequal in its application[1]. According to the theories of Marx and Lenin, law was essential for a bourgeois society, where it was a tool of capitalist domination and a reflection of bourgeois values. There was no point in disregarding law at the time of the dictatorship of the proletariat and the transition to socialism and then to communism, during which law was needed as a temporary tool used in the best interests of the working people. The idea of Marx and Lenin was that after the creation of a classless society, law would not be needed anymore and would inevitably disappear.

Pre-revolutionary Russian legislation was typical for an autocracy, which had no Constitution, no parliament (until 1905), under which the Tsar was not bound by law, and where the police enjoyed unlimited authority. The impact of Western law became apparent after the Great Reforms of Alexander II (1860s–1870s). The Great Reforms included emancipation of the serfs in Russia; military reform; reform of local self-government; reform of education; and judicial reform, which turned out to be a real breakthrough in the process of modernization of the Russian Empire. Alexander II vested the judiciary with the status of a comparatively independent authority. For the first time in Russian history, the courts were separated from administrative agencies, and Article One of the first act of judicial reform approved on 20 November 1864 began with the words "Judicial power…"

In the course of this reform, a new unified court system based on the French model and a completely new order of legal proceedings were established. The re-

1 Pomeranz, p. 77.

form introduced such fundamental democratic principles of administration of justice as equality of the parties, public hearings, adversary nature of the judicial process, equality of all persons before the court, administration of justice only by the courts, independence of courts and judges, irremovability of judges, and separation of the courts from the state prosecutorial function.

It would be naïve to assume that all these principles worked well in practice, especially the principle of equality of all persons before the court. This principle simply could not work well in a country that had the infamous Pale of Settlement, with the Jewish population residing there granted a narrow range of rights, including the rights to legal remedies. However, the very fact that these principles were proclaimed constituted an important first step in Russian judicial reform. Other achievements in this realm included the introduction of jury trials, the institution of professional advocates or attorneys, which were independent from the state, and the establishment of the bar association.

It is clear that Russian imperial legislation on the judiciary was a decent legacy on which to build. But that was exactly the part of pre-revolutionary legislation that the Bolsheviks planned not to use. The key message of the new regime was that the socialist legal system had nothing to do with the separation of powers and the rule of law, so these Western concepts were abolished, together with guarantees of protection of property rights. Early Bolshevik legislation was based on the principles of Marxism-Leninism and inspired by the class-based policy of the Soviet government. It established one of the fundamental Bolshevik principles: the interests of the state always prevail over the interests of the individual. However, despite the desire of the new government to depart from the pre-revolutionary past, shortly after the revolution the impossibility of completely repealing the imperial legislation and disregarding pre-revolutionary lawyers became obvious. Drafting new legislation would take months, and the training of a new generation of lawyers — Soviet lawyers — would take years. The new government could not afford to wait. It found itself in desperate need of new legislation and new lawyers. They had no other choice than to use the "bourgeois experience" and the help of lawyers who practiced or taught in pre-revolutionary Russia and agreed to cooperate with the new regime.

Civil law. The draft of the first Civil Code of Soviet Russia was developed and came into legal force in 1922, when War Communism ended. It was the time of the New Economic Policy, when nationalization was temporarily suspended, and elements of private enterprise were temporarily allowed by the government. The Code was prepared in a hurry — it was too early to systematize the effects of the socialist revolution on law or to utilize lessons from living under Socialism. The concepts and the terminology used in the first Soviet Civil Code were based on those of the civil law systems of Western Europe.

In the early 1920s, Soviet civil law faced two scarcely compatible tasks. On one hand, new Soviet civil law was expected to regulate and encourage the develop-

ment of the market-based exchange of goods, the formation of a new national economy, and the development of private enterprise. At the same time, drafters of the new code were vested with the task of erecting secure barriers to any attempt of any private person to profit from the unfavorable economic situation in state-run enterprises. The new Civil Code granted equal rights to all citizens of the RSFSR irrespective of their gender, race, ethnicity, religion, and origins. Private ownership was allowed only for small enterprises. At the same time, due to the requirements of ideology of that time, the new Civil Code imposed strict limitations on freedom of entrepreneurial activity and lacked guarantees of stability of civil law relations. Art. 58[1] stated that owners enjoyed the right to possess, use and dispose of their property within the limits established by law. Art. 59 envisaged that "an owner is entitled to request remedial actions", but no legal remedies for protection of property rights were mentioned in the Code. Addendum 1 to Art. 59 stated that "*former owners whose property was expropriated based on revolutionary law or who came into possession of the working people before May 22 of 1922, have no right to demand recovery of their property*".

The Code stipulated a variety of ambiguously formulated grounds for invalidating transactions. Art. 30 defined an invalid transaction as a transaction "*concluded with illegitimate purpose or by improper means, as well as a transaction entailing direct damage to the state*»[2] (the absence of a clear definition of "direct damage" constituted grounds for arbitrary and usually broad interpretation of this provision). Art. 33 vested "proper authorities and public organizations" with the right to request invalidation or termination of the transaction by a court, if an individual was compelled to enter into an obviously bad transaction as the result of an extreme need. By virtue of these provisions, the possibility of uncontrolled interference by public authorities in economic relations was established in the legislation of that time.

The 1922 Civil Code envisaged three types of property: state-owned property (nationalized and municipalized), cooperative, and private. Art. 54 listed possible items of private property including "*non-municipalized buildings, commercial and industrial enterprises that have a number of hired workers not exceeding the limit envisaged in special legislation; tools and means of production, money, securities, and other valuables including gold and silver coins, household and personal articles, consumer goods allowed for sale by law, and any property not withdrawn from civil circulation*".

The supremacy of state-owned property was established as a fundamental principle of Soviet civil law. Certain elements of capitalism and private enterprise were allowed but not protected, and those who decided to engage in entrepreneurial activity faced high risks. These features of a market economy did not last

1 See Civil Code of the RSFSR [*Grazhdansky Kodeks RSFSR*] of 1922 (author's translation). Retrieved from http://docs.cntd.ru/document/901808921

2 *Ibid*.

for a long time — all elements of private enterprise were eliminated after the termination of the New Economic Policy.

Certain provisions of the Civil Code were initially vested with a propagandistic function. An addendum to Art. 8 stated that "foreign stock companies, partnerships etc., acquire the rights of a legal entity in the RSFSR by special permission of the government… Foreign legal entities that are not authorized to conduct transactions on the territory of the RSFSR enjoy the right to a legal remedy in the RSFSR resulting from claims that arose outside the RSFSR and involved defendants located in the RSFSR only on a mutual basis" (in the wording of 23 November 1922).

Obviously, implementation of these provisions entailed a variety of problems and bureaucratic hurdles. However, those who knew very little about the Soviet realities of the early 1930s usually noticed in the first place that the Soviet Civil Code allowed foreign companies to obtain the status of a legal entity in Russia. There are sufficient grounds to state that the 1922 Civil Code was legislative window-dressing intended to impress foreign observers and demonstrate the stability of the new regime. The repeatedly altered and amended 1922 Civil Code stayed in force until the 1964 Civil Code of the RSFSR came into effect.

The Fundamentals of Civil Legislation of the Soviet Union were passed in 1961 under dramatically different political and economic circumstances, when, as it was stated in official sources, a *developed socialist society* had been successfully created in the USSR. Socialist ownership of the means of production in the form of state-owned and kolkhoz-cooperative property constituted the basis of the national economy. Individual property was a derivative of socialist property; its main purpose was to be one of the means for satisfaction of Soviet people's needs. The Fundamentals declared that in the times of transition to Communism, commodity-money relations manifest a different meaning. "*The Soviet State manages the national economy according to the governmental plans of economic and social development with due regard to the branch-wise and territorial principles, where centralized management is combined with economic self-determination and the initiative of enterprises, associations, and other organizations*"[1]. As was stated in the Preamble, Soviet civil legislation served as a regulator of property and non-property relations "*for the purposes of the creation of the material and technical basis of communism and the even more complete satisfaction of the material and spiritual needs of Soviet citizens*". In addition, Soviet civil legislation was vested with the important function of "further strengthening of legality in the realm of property relations and protection of rights of Soviet organizations and citizens". The main task of Soviet civil legislation was "active assistance in fulfilling the tasks of building Communism".[2]

1 The Fundamentals of Civil Legislation of the USSR and the Member Republics of 1961 [*Osnovy Grazhdanskogo zakonodatelstva Soyuza SSR y Soyuznikh respublic*] (author's translation) . Retrieved from http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=ESU;n=241;dst=100391

2 *Ibid*.

The new Civil Code of the RSFSR was adopted in 1964. Compared to the previous one, the 1964 Code was a much more detailed and comprehensive act. The 1964 Code included separate chapters on property rights, obligations, copyright law, patent law, and inheritance law. Chapter 2 introduced definitions of legal status and capacity and established the list of subjects of civil law relations.[1] Art. 93 listed the types of property allowed in the Soviet Union: *socialist property,* which included state-owned or public property, kolkhoz and cooperative property, and property of trade unions and other public associations*,* and *personal property* of Soviet citizens. It is remarkable that the legislation of that time established the maximum size of *personal property* that Soviet citizens were allowed to possess (Chapter XI of the 1964 Civil Code).[2]

The provisions of Art. 93 explicitly stated that "the state protects the socialist property and creates conditions for its increase". The protection of personal property of Soviet citizens was not even mentioned. Art. 95 enumerated objects of exclusive public domain including land, its mineral and water resources, forests and main means of production in industry, construction and agriculture, means of transportation and communication, banks, property of state-owned commercial and other enterprises, and main urban housing stock. The chapter on obligations regulated various aspects of the creation, performance and termination of obligations, regulated the conclusion of transactions, and envisaged different types of contracts including sale and purchase contracts, exchange contracts, gift contracts, supply contracts, loan agreements, state purchase contracts, independent-work contracts, shipping contracts, and other types of contracts typical for continental law countries.

The early Soviet acts regulating family issues appear even more interesting. The main ideological goal of these acts was to repeal the pre-revolutionary system of entering into and terminating marriages. In pre-revolutionary Russia, both women and illegitimate children suffered from an unenviable legal status. There was no codified family law in the multinational and multi-religious Russian Empire. In order to get married, both bride and groom, irrespective of their ages, had to obtain parental consent. Marriages and divorces were handled by the church. Couples that belonged to different confessions and wanted to get married had to seek the approval of the Tsar and of the churches they belonged to. In most cases, either the bride or groom had to convert. Divorces were hard to get and disapproved of by the church and the society. Divorces were handled by specialized church courts. Sometimes the party at fault was prohibited from getting married in the future.

Up to 1917, Russian law recognized the right of religious authorities to control marriage and divorce. According to state law, a wife owed her husband complete

1 The Civil Code [*Grazhdansky Kodeks*] of the RSFSR of 1964. Retrieved from http://www.consultant.ru/document/cons_doc_LAW_1838/?frame=2

2 *Ibid*.

obedience. A father held almost unconditional power over his children. Only children from a legally recognized marriage were considered legitimate, and illegitimate children had no legal rights. Up to 1902, when the state enacted limited reforms, a father could recognize an illegitimate child only by special imperial consent, and up to the last years of the Russian Empire, illegitimate children were deprived of most rights.

The Russian Orthodox Church considered marriage a holy sacrament, and divorce was almost impossible. It was permissible only in cases of adultery (witnessed by two people), impotence, exile, or unexplained and prolonged absence by a spouse[1]. Women were accorded few rights by either church or state. A wife was compelled to live with her husband, take his name, and assume his social status[2]. Up to 1914, when limited reforms permitted a woman to separate from her husband and obtain her own passport, a woman was unable to take a job, get an education, receive a passport for work or residence, or execute a bill of exchange without her husband's consent[3]. Family law cried out for urgent and comprehensive reforms, and the initial legal developments in this realm under the new regime were very progressive.

Joint Decree of the All-Russia Central Executive Committee (VTsIK) and Soviet of People's Commissars (Sovnarkom) on Divorce of 16 (29) December 1917, was the first act of the new regime that introduced fundamental changes in the area of family law. Divorce procedure was simplified; divorces were subjected to the jurisdiction of local courts. All pending divorce cases or cases in which decisions had not entered into legal force were invalidated, and case materials had to be transferred for keeping to local courts[4]. Parties were entitled to bring up new divorce requests under the new Decree.

Another Joint Decree of VTsIK and Sovnarkom, "On Civil Marriage, Children and Vital Office Records" followed on 18 (31) December 1917. This act was also a breakthrough in the area of family law. Civil marriage officiated by a representative of the state was proclaimed the only form of marriage that was officially recognized in Soviet Russia. Marriage requirements were made very simple: mutual consent of bride and groom and an age requirement: 18 years of age for men and 16 years for women. For the native population of the Transcaucasian area, the requirements were dif-

1 N.A. Semiderkin. Church marriage and the October Revolution in Russia. Herald of Moscow University. Series 11 Law (1980), No 2, 30–31; Wendy Z. Goldman, *Women, the State and Revolution: Soviet Family Policy and Social Life, 1917–1936* (Cambridge University Press, Cambridge, 1993), 50.

2 Goldman, *op. cit*. note 7, 49.

3 William Wagner. "In Pursuit of Orderly Change: Judicial Power and Conflict over Civil law in Late Imperial Russia". Unpublished Ph.D. dissertation, Oxford University (1981), 2–7.

4 Article 12 of the Decree on Divorce of 16 (29) December 1917 (author's translation) . Retrieved from http://www.hist.msu.ru/ER/Etext/DEKRET/17-12-16.htm

ferent: 16 years old for men and 13 years old for women[1]. Marriage was strictly prohibited if one of the couple was mentally ill or was married with that marriage still in force. Marrying an immediate family member was not allowed. The Decree provided equal rights both to legitimate children and to children born out of wedlock. These provisions were very progressive for that time.

The Code on Marriage, the Family, and Guardianship[2] (hereinafter referred to as The 1918 Family Code) was put into effect in October of 1918. Being a follow-up to the Decrees on Divorce and Civil Marriage, the Code embraced the Bolshevik idea on the temporary nature of law in general and family law in particular. The remarkably progressive Art. 133 eliminated the concept of illegitimacy, and children of unmarried couples were granted rights equal to those of children of officially married parents. Provisions of this article applied also to children who were born out of wedlock before the Decree on Civil Marriage of 18 December 1917.

A number of provisions of the new Code aimed at the elimination of the "bitter legacy of the czarist regime" in the family law realm. If one of the spouses changed the place of residence, the other was not required to do the same. Art. 105 provided that marriage did not result in communal/joint property, so a married woman remained the owner of the property that belonged to her before marriage. At the same time, spouses were allowed to enter into all property and contractual relations permitted by law. Interspousal agreements aimed at denial of property rights of one of the spouses were invalid and not binding both as to third persons and between the spouses in question[3]. Per Art. 107, an impecunious spouse incapable of work was entitled to financial support to be rendered by the other spouse in the event the latter could afford to do so. This right was preserved after divorce in case the circumstances constituting grounds for financial support persisted[4]. Only civil marriages registered in a Vital Records Office established the rights and duties of spouses[5]. Marriages concluded by a religious ceremony or by a clergyman entailed no rights and duties unless registered as provided by law. Religious marriages concluded before 10 December 1917 in accordance with Art. 3, 5, 12, 20, 31, or 90 of the Code of laws (part 1 of vol. X) had the legal force of registered marriages.

The Code confirmed the simplified divorce procedure established by the Decree of 16 December 1917, and established uncontested divorce and divorce at

1 Article 2 of the Decree on Civil Marriage, Children and Vital Records Offices of 18 (31) December 1917. [*Decret VTsIK I SNK O Grazhdanskom Brake, O detyah Y O Vedenii Knig Aktov Sostoyaniya*] Retrieved from http://www.hist.msu.ru/ER/Etext/DEKRET/17-12-18.htm

2 The Code of Laws on Vital Records, Marriage, the Family, and Guardianship [*Kodeks Zakonov ob Aktah Grazhdanskogo Sostoyania, Brachnom, Semeynom Y Opekunskom Prave*] 22 October 1918. Retrieved from http://www.7ya.ru/article/Semejnyj-Kodeks-1918-goda-Sobranie-uzakonenij-i-rasporyazhenij-Rabochego-i-Krestyanskogo-Pravitelstva/

3 *Ibid*., Art. 106.

4 *Ibid*, art. 130

5 *Ibid*, Art. 52.

the request of a spouse. Under Art. 88, divorce requests could be executed in writing or expressed orally and then put on record.

Some provisions of the 1918 Code aroused mixed feelings. Article 144 of the code stipulated that "if the court finds that, at the time of conception, the child's mother had sexual relations with the person mentioned as the father, but also with other men, the court brings the latter as respondents and demands that they participate in expenses" related to (as mentioned in Article 143) "pregnancy, childbirth and child support."

Article 183 was even more striking, providing that, "From the moment of the entry into force of the present law, the adoption of either one's own or someone else's children is not allowed. Any such adoption made after the time specified in this Article does not entail any responsibilities or rights for [either] the adoptive parent [or] the adoptee." The abolition of the institution of adoption in a country where hundreds of thousands of children had been left orphaned as a result of the First World War, the revolution, and the Civil War, was not only unreasonable and cruel, but also primarily ideological.

Russia was then a largely agrarian country, and it was claimed that peasants often adopted orphans in order to exploit them in farm labor. In this context, the abolition of adoption was proclaimed a necessary and temporary measure for the prevention of child exploitation. This justification did not, however, prevent the authorities from extending universal labor duty to all children aged 16 or older. Per Article 4 of the 1918 Labor Code, students had to exercise their labor duty in the schools. The ideological explanation for this discrepancy was that the Soviet state aimed to abolish child labor, but in view of the Civil War and a severe shortage of schools and orphanages, the prohibition of child labor would inevitably result in a rise in juvenile crime. No one explained why it was acceptable for children to be assigned labor duty but unacceptable for them to live in an adoptive family in the countryside and work on a farm. The abolition of adoption in 1918 unequivocally demonstrated how the unceasingly proclaimed policy of the government's care for children worked in practice.

On 1 January 1927, the 1918 Code was officially replaced by the RSFSR Code on Marriage, Family and Guardianship, which was adopted in November of 1926. The new code stipulated that marriages *de facto* had almost the same status as did marriages duly officiated in the Vital Records Offices. Provisions on property of married couples applied to the property of persons, "who cohabit, but are not officially married, if they recognize each other as spouses or if the fact of marital relations was established by court".[1] Divorce procedure was made even simpler. It was not necessary to go to court anymore: divorces were brought under the competence of the Vital Records Offices.

1 Art. 11 of the Code on Marriage, Family and Guardianship of the RSFSR [*Kodeks Zakonov O Brake, Semye I Opeke*] 19 November 1926. Retrieved from http://ppt.ru/newstext.phtml?id=32274

Moreover, the new Code legalized the termination of marriage in the absence of one of the spouses. The absent spouse had to be informed about the fact of divorce. According to another provision of the new Code, a single mother had a right to indicate the father of the child in the birth certificate without any proof. The only requirement was that she had to submit an application to the Vital Records Office. After the issuance of such a birth certificate, the father had to be informed about it. He also had a right to contest it in court. With the aim of protecting the rights of children, mothers were entitled to submit an application indicating the father's first and last name and place of residence to a Vital Records Office before or after childbirth[1]. A person indicated as a father had to be notified of it by a Vital Records Office and, in the absence of objections from him, after 30 days he was included on the birth certificate as the father.

The 1926 Code reintroduced adoption, which was no longer considered dangerous. The formal procedure had to be performed by the guardianship authorities and then registered in a Vital Records Office[2]. Adopted children and adoptive parents had the same individual and property rights and responsibilities as did the members of regular families. The Code addressed guardianship as an extremely important function that was regulated in details in its Chapter III.

In the early 1940s, it became obvious that certain provisions of the 1926 Code had become non-enforceable. This happened due to a variety of reasons, with World War II being the key factor. The war completely changed every aspect of life in the Soviet Union including the demographic landscape. The Great Purge and World War II cost tens of millions of young men's lives. A great number of children were left fatherless.

An 8 July 1944 Decree of the Presidium of the USSR Supreme Soviet abolished the previous equality between registered and informal marriages. The 10 November 1944 Decree "On the procedure of recognizing informal marriage in the event of one of the partners dying or going missing" stipulated that a preexisting informal marriage could be legally acknowledged. But this provision was hypocritical, because not many people knew about it, only a few could provide evidence of a preexisting informal marriage, and even fewer were ready to take their case to the courts, which usually acted as punitive agencies. Meanwhile, only those children whose deceased military parents had been legally married were eligible to receive a state benefit.

At the same time, the previous equality between illegitimate children and children born into a registered marriage was abolished. It was no longer possible to establish paternity from a registry or by a court order. A single mother's right to file a judicial claim for the recovery of alimony for a child born outside of wedlock was annulled as well.

1 *Ibid*, Art.28–29.

2 *Ibid*, Art. 59.

Divorce procedures were also modified. The function of termination of marriage was returned to the courts. At that time, courts were playing an excessively active role in deciding whether it would be reasonable to preserve a particular marriage. Families with underage children could not get an uncontested divorce in a Vital Records Office. Instead, they continued to live together, because judges were instructed to save as many marriages as possible. In order to do that, in any divorce case a judge had to give the parties a so-called "reconciliation period" at least twice. The average length of such a period was 6 months. People's attitude towards divorce also changed and became hostile. Gradually divorces became a public matter and were widely criticized. Local Communist Party committees discussed divorce cases in all their juicy details, and character references of every divorced Soviet citizen contained the same wording: "The Communist Party Committee is aware of the fact of divorce". The Soviet state had been totally indifferent to the fact of a person's divorce in the 1920s and 1930s; in the 1940s, a divorce became a negative characteristic incompatible with the moral code of a builder of communism.

All progressive developments in the area of Soviet family law were repealed within a rather short period of time, a fact for which the 1969 Code on Marriage and Family of the RSFSR serves as the best proof. The 1969 Code established that only marriages officiated in Vital Records Offices were legal.[1] Religious marriages and other religious ceremonies entailed no legal consequences. Uncontested divorce was possible in the absence of underage children and property disputes. Such divorces were handled by Vital Records Offices; in all other cases, divorces were subject to the jurisdiction of courts.

Courts were expected to undertake all possible measures for the reconciliation of spouses; marriage was to be terminated only "if the court found that further cohabitation and preservation of the family were impossible"[2]. After divorce, a mother was usually made the custodial parent, and the father had to pay child support. If the father failed to make regular payments, a notation indicating his duty to pay child support had to be put in his passport by an official of the Ministry of Internal Affairs[3]. The 1969 Code also introduced the concept of joint property of spouses (matrimonial assets purchased after marriage)[4]. Art. 48 envisaged the possibility of establishing paternity in court.

The first Soviet Code of Labor Laws (the Labor Code) of 10 December 1918 arouses mixed feelings. Many provisions of this act are remarkably progressive. Based on the requirement of the 1866 Geneva Congress of the First International,

1 Art. 6 of the Code on Marriage and Family of the RSFSR [*Kodeks O Brake Y Semye*] 30 July 1969. Retrieved from http://www.consultant.ru/document/cons_doc_LAW_3261/

2 *Ibid*., Art. 33.

3 Art, 4 of the Regulations on the Passport System [*Polozheniye O Pasportnoy Systeme v SSSR*] in the USSR, 28 August 1974. Retrieved from http://dokipedia.ru/document/5288587

4 Op. cit. note 19, Art. 20..

for the first time in the world, the Code established that a working day could not exceed 8 hours during the daytime or 7 hours during the nighttime[1]. A 6-hour working day was established for persons under 18 years old and also for those involved in especially hard or insalubrious areas (art. 85). All working people who had uninterruptedly worked in a certain position for one year were entitled to an annual paid vacation. An addendum to art. 5 established the rules of qualifying for disability, and sick benefits were regulated by an addendum to art. 78. The Code envisaged a state regulation of salaries based on the rates developed by trade unions and allowed labor organizations to participate in hiring and discharge issues. Art. 21–30 addressed the issues of providing work for the unemployed and provided for establishing labor exchange offices.

Given the circumstances of that period in the history of Soviet Russia, the right to work granted by the Labor code to all Soviet citizens could not be guaranteed by the Bolsheviks, but the fact of establishing this right was of great political importance. The right to work was accompanied by a duty of compulsory labor that applied to all citizens from 16 to 50 years old with certain exceptions[2]. The key economic and ideological tasks were to assure the maximum involvement of people in "socially useful labor". For purposes of registration of the working-age population and in order to make sure that no one would be able to avoid "socially useful labor", the Bolshevik government introduced work record cards. Under War Communism, these work record cards were the most important documents of the Soviet people — almost as important as Communist Party membership cards in the times of Leonid Brezhnev, Yury Andropov and Konstantin Chernenko (the period that became known as the Era of Stagnation). During the first years of Soviet rule, work record cards served as identity papers for the citizens of Soviet Russia. The economic reasons determining the importance of these documents were even stronger. The Decree of the Soviet of People's Commissars of 5 October 1918 provided that only those Soviet citizens who had work record cards could get food stamps (the possession of a work record card serving as proof of fulfillment of the compulsory labor duty). During the period of War Communism, it was almost impossible to survive without food stamps, so work record cards were treasured.

Of course, the first Soviet Labor Code could not ignore children. During the Civil war, the child labor problem was a hot issue on the Bolsheviks' domestic agenda. Initially Soviet lawmakers aimed to abolish child labor for a number of reasons. But given such circumstances as the Civil War, economic disaster, and the severe shortage of schools and orphanages, they decided against it. Drafters of the Labor Code thought that it would be reasonable to grant the right to work to all children. The ideological explanation was that without such a provision, an increase

1 Art. 84 of the Code of Labor Laws [*Kodeks Zakonov O Trude*] 10 December 1918. Retrieved from http://www.hist.msu.ru/Labour/Law/kodex_18.htm

2 *Ibid*, Chapter I.

in the number of street children and the escalation of juvenile street crime were almost inevitable. Universal labor duty was extended to all children age 16 or older. Per Article 4 of the 1918 Labor Code, students had to exercise their labor duty in the schools. As noted above, no one could explain why it was permissible for children to be assigned labor duty but forbidden for them to live in an adoptive family in the countryside and work on a farm. Also, extending the right to work to all children proved to be an inefficient preventive measure: the number of street children and the level of juvenile crime escalated sharply.

The end of the Civil War, the replacement of War Communism by the new Economic Policy, and rapid changes in the national economy called for changes in the regulation of labor relations. The Second Soviet Labor Code was adopted on November 9, 1922. Unlike the language of the first laws of the Bolshevik regime, the language of this Code was not emotional and highly ideological. The new Code perfectly complied with the requirements of the time, with ideology being temporarily set aside. The necessity to provide a legislative underpinning for the new economic policy, which included certain elements of private enterprise, became the key task. The 1922 Labor Code envisaged the possibility to terminate the labor contract both upon the request of the employee and upon the request of the employer, and established an exhaustive list of reasons for firing an employee (including complete or partial liquidation of an enterprise, disciplinary offenses, absence from the workplace for more than three days without valid excuse, and systematic failure to perform one's labor functions). The length of the workday was six hours for those younger than 18 years old, for miners, and for employees involved in intellectual or office work. The provision on the 8-hour workday from the previous Code was replicated in the 1922 one and applied to all other categories of workers. The new Code introduced the concept of overtime work, which required additional payments. The minimal length of annual vacations was 2 weeks.

In early Soviet criminal legislation the juridical categories of **crime**, **punishment**, and **guilt** were replaced by sociological categories. The phrases "socially dangerous act" and "measure of social defense" were substituted for such fundamental categories as "crime" and "punishment"[1]:

"the criminal legislation of the RSFSR has as its aim the protection of the Socialist State of Workers and Peasants, and the legal order established therein, from socially dangerous acts (crimes) by means of application to persons who committed them of the measures of social defense indicated in the present Code"[2].

Fault was declared to be a bourgeois criterion: «measures of social defense» were to be applied in accordance with the best interests of the «Workers'-and-Peasants' State,» as determined by the «revolutionary legal consciousness» of the

1 Harold J.Berman, "Principles of Soviet Criminal Law",56 Yale Law Journal, (1947), 803–836, p 804.

2 Article 1 of the 1926 Criminal Code of the RSFSR. Op. cit., 804.

judges[1]. Article 23 of the 1922 Criminal Code of the RSFSR introduced the principle of retroactivity of Soviet criminal law. The same principle was envisaged in Art. 6 of the 1929 Decree of the Presidium of the USSR Central Executive Committee of 21 November 1929, "On Outlawing of the Soviet officials who joined the enemies of the working class and the peasantry abroad and refused to return to the USSR" . Such refusal of a Soviet official to return to the Soviet Union was qualified as high treason and was punishable by confiscation of all property of the convicted and execution by shooting within 24 hours from the moment of establishment of identity. By virtue of the aforementioned Art. 6, provisions of this Decree applied also to those Soviet officials who refused to return to the USSR before the day of enactment of this Decree. The doctrine of nullum crimen, nulla poena sine lege ("one cannot be punished for doing something that is not prohibited by law») (which is now stipulated at the international level in Article 7 of the European Convention for Human Rights) became an object of sharp criticism, and instead the principle of analogy was introduced[2]: if an act or omission was considered socially dangerous—even though no specific statute prohibited it—the judge could apply a statute prohibiting an analogous act or omission[3]. That is how courts and judges were instructed to operate: "Local courts shall handle cases in the name of the Russian Republic and shall be guided by the laws of the overthrown governments which have not been repealed by the Revolution and are not in breach of revolutionary conscience and revolutionary consciousness"[4]. In a year, a sort of legislative basis of the new regime was formed, and guidelines for judges were modified in the following way: "While handling all cases, People's Courts shall apply the decrees of the Workers' and Peasants' Government, and in the event of absence or insufficiency of such decree shall be guided by socialist legal consciousness"[5].

There is a theory that Soviet lawyers who drafted early pieces of Bolshevik criminal law were under the strong influence of the book *Criminal sociology*, which was published in the Russian Empire in 1908[6]. *Criminal sociology* was the most important work of the famous Enrico Ferri, an Italian criminologist, who was a student and a follower of the even more famous Cesare Lombroso. In his study

1 Berman, *op. cit.* note 25, 803.
2 *Ibid*, 803.
3 Article 10 of the Criminal Code [*Ugolovniy Kodeks*] of the RSFSR 01 June 1922. Translated. Retrieved from http://www.consultant.ru/cons/cgi/online.cgi?req=doc;base=ESU;n=3006;frame=83#0
4 Par. 5 of the Decree on Courts [*Dekret O Sude*] No 1 (22 November 1917). Retrieved from http://www.hist.msu.ru/ER/Etext/DEKRET/o_sude1.htm
5 Art. 22 of the Decree on People's Courts [*Dekret O Narodnom Sude RSFSR (Polozheniye)*] of the RSFSR of 30 November 1918. Retrieved from http://istmat.info/node/31884
6 Prof. Harold Berman was of the same view. See the work cited at note 25 above, and also Harold Berman, *Soviet Criminal Law and Procedure: the RSFSR Codes* (Harvard University Press, 1972).

of the causes of crime, Ferri moved significantly further than his teacher, who had studied mainly psychological and anthropological factors that have an impact on criminal intent and the formation of offenders' identity. The focus of Ferri's scientific analysis, besides psychological, anthropological, and physical factors (among which he included geographical features, weather conditions, and climate), was mainly social and economic factors. According to Ferri's concept of social defense, the function of justice was to protect society from socially dangerous elements. Ferri denied such basic elements of criminal law as crime, punishment, guilt, responsibility, and the objective examination of a crime, and strongly advocated for the personification of punishment, or the determination of a punishment based on the personality of the offender, not on the offense. A key role in determining punishment was to be played by judges. In this view, criminals were considered a separate species of the human race[1]. Recognized as one of the brightest representatives of the positivist school of criminology, Ferri was a controversial and contradictory figure. During World War I, he headed the Italian commission charged with drafting a criminal code, the underlying ideas and positions of which were later incorporated into the Criminal Code of 1930, passed during fascism's heyday in Italy. By the end of his life, he had become a devoted supporter of Benito Mussolini and considered fascism to be the fullest realization of socialism's ideals. Soviet scholars (e.g., A. A. Piontkovskiy, in the collection of articles entitled *Marxism and the Criminal Law*[2]) angrily rejected the assumption that Enrico Ferri's theories had a significant impact on the formation of early Soviet criminal law. They considered it shameful to acknowledge that the concepts and conceptual and categorical apparatus of Soviet criminal law were formed under the pronounced influence of the teachings of an odious bourgeois scholar, a Mussolini apologist who had actively collaborated with the fascist regime. But you cannot hide the obvious: the resemblance was too close. Is it any wonder that Ferri's *Criminal Sociology* was not reprinted in Russia for nearly a hundred years?

The concept of "revolutionary justice" also played a huge role in the formation of early Soviet criminal law. In the period of War Communism (1917–1920), criminal law was almost entirely in the hands of semi-judicial and non-judicial bodies[3]. Given that the majority of these quasi-judicial institutions' staffs lacked a legal background, they had little trouble carrying out the tasks assigned to them: rejection of the concept of guilt, rejection of the principle of objective analysis of a

1 See E.Ferri. Criminal Sociology [*Ugolovnaya Sociologiya*] Moscow, Moscow. Infra-M Publishing House (2013). 110–111.

2 See the article by A.A. Piontkovsky "Enrico Ferri: fascism and the positive school of criminal law", in *Marxism and Criminal Law* On Certain Disputable Issues of Criminal Law Theory [A. Piontkovskiy. *Marksism I ugolovnoye pravo. O nekotoryh spornyh voprosah teorii ugolovnogo prava*]. Moscow, Juridical Publishing House of the People's Commissariat of Justice of the USSR, (Moscow 1927), 111–131.

3 Berman *op. cit.* note 25, 803–836, at 803.

crime, and the establishment of the principle of determining punishment on the basis of revolutionary consciousness, depending not on the offense but on the personality of the offender. Soviet jurists interpreted the extensive use of the analogy principle, the rejection of basic elements of criminal law, and the replacement of the rule of law with the revolutionary sense of justice not only as a response to the emergency situation of those years, but also as a result of the need to protect the young Soviet state against internal and external enemies[1].

Borrowed from Ferri's theory, the idea of the defensive nature of criminal law, designed to protect society from socially dangerous elements, gained a strong following in the practice of "administration of revolutionary justice." Replacement of the basic concepts and categories of criminal law with sociological definitions, and the overall implementation of the principles of analogy and revolutionary legal consciousness, were construed by Soviet jurists as a kind of prelude to the planned "withering away" of criminal law. But expectations were not met, because the Soviet criminal law proved to be a surprisingly useful tool: the state appreciated it, began to enjoy it, and ultimately decided to keep it.

The 1922 Criminal Code envisaged two main types of crimes: "Crimes directed against the fundamentals of the new legal order established by the power of workers and peasants or recognized as the most dangerous by the Soviet regime", and "all other crimes"[2]. That is how the key Marxist-Leninist principle of supremacy of interests of the state over the interests of an individual was envisaged on the legislative level and became a fundamental principle of Soviet criminal law. Art. 10 introduced the principle of analogy, stating that if a particular type of crime is not explicitly envisaged in the Criminal code, punishment or measures of social defense should be applied under the Code's provisions envisaging similar types of crime with due regard to the rules established in the General Part of the Code. "The court practice had led to the result that no citizen could foretell what was a possible criminal act, since the analogy section might be applied to cover any act"[3]. Art. 23 established the principle of retroactivity of criminal law: "The Criminal code shall apply to all actions not considered by courts before this Code came into legal force". Chapter III of the Code addressed a variety of factors to be considered while determining the punishment: whether the crime was committed with the purpose to restore the rule of bourgeoisie or *intuitu personae*, whether the offense was directed against the Soviet State or against an individual, etc.[4]. Art. 24 part 1 provided that "while determining the measure of punishment, the extent and nature of danger imposed both by the offender himself and the crime committed by him should be taken in-

1 *Ibid*,.805.

2 Art. 27 of the 1922 Criminal Code of the RSFSR. Retrieved from http://www.consultant.ru/cons/cgi/online.cgi?req=doc;base=ESU;n=3006;frame=83#0

3 John N. Hazard, "Reforming Soviet Criminal Law" 29(2) *Journal of Criminal Law and Criminology* (July–August 1938), 167.

4 See the 1922 Criminal Code of the RSFSR.

to consideration". In order to do that, judges were instructed to study the circumstances of the crime and the personality of the offender as it manifested itself in the crime committed by the offender and his intent, "to the extent it is possible to apprehend the offender's personality based on his lifestyle and past"[1], and also to determine "whether this crime committed at this time and place is in breach of the fundamentals of public safety". Measures of social defense included exile from the USSR (for a certain period of time or forever), deprivation of freedom, compulsory labor without imprisonment, conditional sentence, complete or partial confiscation of property, imposition of a fine or a duty to make up losses, deprivation of rights, dismissal from office, and social ostracism.[2] The death penalty was the supreme measure of punishment.

Other measures of social defense included placement in mental health facilities, compulsory treatment, the prohibition on holding specified positions or engaging in specified activities, and the prohibition on residing in certain areas[3].

The longest and most detailed Chapter I of the Special Part of the 1922 Code enumerated the list of crimes against the state, the gravest crimes at that time. Chapter III addressed violations of the rules of separation of the church from the state. It includes such remarkable crimes as "using religious prejudices of people for the purpose of overthrowing the power of workers and peasants or encouraging disobedience of its laws and regulations" (Art. 119); "committing fraudulent actions for the purpose of instilling superstitions in people or profiting from this" (Art. 120); "teaching religious doctrines to minors in public and private educational institutions and schools" (Art. 121); and "performance of religious rites in government agencies and enterprises and placement of any religious images in such places" (Art. 124). Traditionally, the gravest crimes are listed in the Special Part of the Criminal Code according to the extent of public danger: the gravest crimes always come first. In the 1922 Code, crimes against the life, freedom and dignity of the person were envisaged only in Chapter V — after crimes against the state, white-collar crimes, rules of separation of church and state, and economic crimes. By doing this, Soviet lawmakers legitimized a lesser extent of social danger imposed by the crimes against the person as opposed to such wrongdoings as "wasteful utilization of manpower provided in the course of fulfillment of compulsory labor duty committed by the head of a public agency or enterprise" (Art. 127), "issuance of rations and manufactured goods for purposes other than intended committed by the head of a public agency or enterprise" (Art. 131), "moonshining in the absence of appropriate permission, producing of moonshine that is stronger than allowed by law, and illegal storage of moonshine for sale" (Art. 140). It is remarkable that criminal insult and defamation were also criminalized in the first Soviet Criminal Code.

1 Art. 24 of the 1922 Criminal Code of the RSFSR.
2 *Ibid*., Art. 32.
3 *Ibid*., Art. 46.

The 1926 Criminal Code of the RSFSR made social danger itself, and not violation of a specific provision of the Special Part of the Code, the key to judicial sanctioning[1]. The new Code incorporated the basic provisions of the 1922 Criminal Code and raised them to a more advanced level. Under the 1922 Code, a person could be recognized as socially dangerous (1) as a result of his/her criminal activity, (2) "due to systematic abuses in his/her professional activity", or (3) due to his/her connections with the criminal environment[2]. The 1926 Code added one more ground — previous activities of the person in question[3]. The term "punishment" that was used together with the term "measures of social defense" in the 1922 Code was not included in the 1926 Code. Measures of social defense embraced judicial-correctional measures, medical measures, and medical-pedagogical measures. These measures were to be applied not for purposes of punishment, but in order to prevent the commission of new crimes by repeat offenders, to influence other "unbalanced members of the society" and to adjust criminals to "the conditions of coexistence in the workers' state"[4]. The new Code held that the principle of analogy remained one of the key principles of the Soviet criminal law: "If any socially dangerous act is not directly provided for by the present Code, the basis and limits of responsibility for it shall be determined by application of those articles of the Code which provide for crimes most similar to it in nature"[5]. The priority of protecting the new regime was made even clearer compared to the previous Code. "Any act or omission directed against the Soviet system or that violates the legal order established by the worker-peasant power during the period of transition to the communist system" constituted a socially dangerous act (Art. 6). The gravest crimes were those directed against the Socialist State. This led to a very sharp division between political and non-political crimes. Article 46 of the 1926 Code provided that crimes contained in the Code were classified as follows: those directed against the foundations of the Soviet system established in the USSR by the power of workers and peasants, and therefore considered to be the most dangerous, and other crimes[6]. In the new Code, crimes against the state were called counterrevolutionary crimes. A counterrevolutionary crime included any action aimed at overthrowing, undermining or weakening the power of Soviets of Workers and Peasants, the Bolshevik Government, and also actions directed towards providing aid to that part of the international bourgeoisie not recognizing the equality of rights of the Communist property system which is about to

1 Harold J. Berman. *Soviet Criminal Law and Procedure: the RSFSR Codes* (Harvard University Press, 1972), 21.
2 Art. 48–49 of the 1922 Criminal Code of the RSFSR.
3 Art. 7 of the 1926 Criminal Code [*Ugolovny Kodeks*] of the RSFSR. Translated, retrieved from http://istmat.info/files/uploads/49552/ugolovnyy_kodeks_rsfsr_-_1950.pdf
4 Art. 9 of the 1926 Criminal Code of the RSFSR.
5 *Ibid*., Art. 16.
6 Berman, *op. cit.* note 43, 22

replace capitalism, and seeks to overthrow it by means of intervention, blockade, espionage, financing of media, etc.[1]. Types of counterrevolutionary crimes were listed in the infamous article 58, the wording of which was flexible and ambiguous, thus providing a good basis for arbitrary interpretation. The Code established the concept of **"economic counterrevolution"** (Art. 58.7) consisting of an "action against the normal activity of state agencies and enterprises or against their proper functioning" committed for counterrevolutionary purposes (Article 58-7). Punishment for crimes directed against the foundations of the Soviet system was stricter than punishment for all other crimes, and the death penalty was envisaged only for crimes against the state.

Art. 59 of the new Code codified another type of crime against the state: "crimes against the Administrative Order that are especially dangerous to the USSR" or any actions that

> "were not directly aimed at overthrowing Soviet rule and the Worker-Peasant Government, but which result in infringement of the normal operation of administrative bodies or the national economy and involve resistance to authorities and obstruction of their operation, disobedience of law, or other actions resulting in weakening the strength and prestige of the regime".

These crimes included civil mass incitement of civil unrest, attacks by armed bands, theft of firearms from the army, damaging railways, evasion of military service, counterfeiting, forgery of commercial papers, smuggling, violation of the Statute on the Foreign Trade monopoly, violation of foreign exchange regulations, and others[2]. These crimes did not require counterrevolutionary intent or direct intent to overthrow Soviet power. Many of them, nevertheless, were made punishable by death, if committed under especially aggravating circumstances, which included committing a crime "with the purpose of restoring bourgeois rule" or "by a person one way or another belonging currently or in the past to the class of individuals that exploit other people's labor"[3]. Committing a crime for the first time, by a worker or peasant or "though beyond the limits of necessary defense, but with the purpose to defend against infringement of Soviet Power, the revolutionary legal order, or to defend the defender himself, his rights or another person"[4] constituted a mitigating circumstance.

The Bolsheviks proudly declared their break with the Russian legal tradition, yet as Lenin and Stalin faced the challenge of governing, they were forced to contemplate what role the law should play in their newly created socialist society[5]. By the 1930s, it became clear that early revolutionary ideas about the inevitable de-

1 Art. 58-1 of the 1926 Criminal Code of the RSFSR.
2 Berman, *op. cit.* note 43,.24.
3 Art. 47 (b) of the 1926 Criminal Code of the RSFSR.
4 Art. 48(a) of the 1926 Criminal Code of the RSFSR.
5 Pomeranz, *op. cit.* p. 73.

mise of law, state, family, and other basic institutions were unrealistic. But as discussed above, the state kept the criminal law for reasons of expediency. The Procurator General of the USSR Andrei Vyshinskii had been writing since 1930 about the importance of law as the means of defending the socialist state[1]. Pomeranz quotes Vyshinskii's statement that rather than withering away, the law would serve as the bedrock of socialism.[2]

The trend towards criminal repression intensified as Stalin's personal grip on power strengthened. One of the immediate results was the passing of three notorious acts. The Joint Decree of the USSR Central Executive Committee and Sovnarkom of 7 August 1932, "On protection of Property of the State-Run Enterprises, Collective Farms, and Cooperatives and Strengthening of the Public Socialist Property," or the *Law on Three Spikelets,* explicitly emphasized the persistent defensive nature of the Soviet criminal law. The preamble of the act stated that this Decree was the state's response to the repeated complaints of workers and peasants regarding theft of cargos and kolkhoz and cooperative property committed by *antisocial elements*. All types of public property (state, kolkhoz and cooperative property) were declared fundamental to the socialist public order. Persons attempting theft of public property were labeled *enemies of the people*, and the fight against enemies of the people was proclaimed the top priority of the Soviet state. The Law on Three Spikelets envisaged execution by shooting and confiscation of property as a measure of punishment for (1) the theft of kolkhoz or cooperative property and (2) pilferage committed on a railway or water transport. If there were mitigating circumstances, the capital punishment could be replaced by 10 years' imprisonment with confiscation of property. Persons sentenced under this law were not subject to amnesty. The Decree did not establish the minimal amount of stolen property that constituted a crime, and enforcement of these provisions clearly demonstrated that the amount did not matter: a person could face criminal charges for picking several spikelets on a kolkhoz field. Art. III of the Decree highlighted the defensive nature of this act and was intended to protect kolkhozes and their members from "kulaks and other antisocial elements". Those who tried to avoid the kolkhoz slavery were treated as "antisocial kulak-capitalist elements" that committed a crime against the State. Lack of desire to join a kolkhoz was construed as "use or propagandizing the use of violence and threats to kolkhoz members in order to force them out of the kolkhoz and with the purpose of forcibly destroying the kolkhoz" and was punished by 5–10 years in a forced labor camp.

The Joint Decree of the USSR Central Executive Committee and Sovnarkom of 22 August 1932 "On Fighting Blackmarketeering" served as a logical continuation of the Law on Three Spikelets. This act envisaged disproportionately severe pun-

1 Peter H. Solomon, Jr. Soviet Criminal Justice Under Stalin (Cambridge: Cambridge University Press, 1996), p. 157.

2 Pomeranz, *op. cit.*, p. 86.

ishments for activities that could be qualified as black marketeering (given that the principle of analogy was still in force): a person could be sentenced to 10 years of imprisonment for selling cookies on the black market, for example. This Decree provided additional legal grounds for the battle of the Soviet state against its own people as they were sliding into poverty. The early 1930s saw the horrific consequences of collectivization, which caused mass starvation and poverty. Another hidden goal of this Decree was to eliminate memories about the New Economic Policy, which was discontinued in 1927. The early 1930s marked a new phase in the life of the Soviet Union, with no place for the NEP. This new phase brought a new concept of responsibility for activities in breach of the Soviet legislation in force — that of collective responsibility. An offender's family members also had to be convicted and made liable for the offender's wrongdoings.

The Decree of the USSR Central Executive Committee of 8 June 1934 "On amending provisions on crimes against the state (counterrevolutionary crimes and crimes against administrative order) with articles on betrayal of the Motherland" introduced a broad definition of *betrayal of the Motherland*. Persons convicted under this Decree were punished by execution and confiscation of property; if there were mitigating circumstances, the punishment was 10 years of imprisonment with confiscation of property. Betrayal of the Motherland committed by a military serviceman was punishable by the death penalty and confiscation of property. The Decree on betrayal of the Motherland not only symbolized the further increase in severity of criminal sanctions, but also openly encouraged informing on others. If a military serviceman knew that a betrayal of the Motherland had been committed or was imminent and failed to report it, he was subject to 10 years' imprisonment. Responsibility became collective: if family members of a military serviceman who undertook unauthorized travel outside of the Soviet Union contributed to the act of betrayal of the Motherland or knew about it and did not notify the authorities, they were subject to 5 to 10 years of imprisonment with confiscation of property[1]. Provisions of this act were incorporated into the criminal codes of the Republics. The Law "On Family Members of Traitors of the Motherland" followed in March of 1935, and the extended definition of "family member of a traitor of the Motherland" was provided in the 1942 Regulation of the State Defense Committee: "family members of a traitor of the Motherland are his parents, spouse, sons, daughters, brothers and sisters, if they lived together

1 The Resolution of the USSR Central Executive Committee of 8 June 1934 "On amending of provisions on crimes against the state (counterrevolutionary crimes and crimes against administrative order, which are especially dangerous for the USSR with articles on betrayal of the Motherland" [Postanovleniye Tsentralnogo Ispolnitelnogo Komiteta SSSR *O dopolnenii polozheniya o prestupleniyah gosudarstvennykh (kontrrevolutzionnykh y osobo dlya Soyuza SSr opasnikh prestupleniyakh protiv poryadka upravleniya) statyami ob izmene rodine*] Translated, retrieved from http://www.consultant.ru/cons/cgi/online.cgi?req=doc;base=ESU;n=31237#0.

with the traitor of the Motherland or financially depended on him at the moment of committing a crime or mobilization due to the beginning of war". Legitimization of the extended limits of criminal responsibility and transformation of personal responsibility into collective responsibility went together with other changes. In 1935, the age of criminal responsibility was reduced from 14 to 12 years; the Decree of the USSR Central Executive Committee of 2 October 1937 extended the maximum term of imprisonment for the most dangerous crimes (sabotage, espionage, etc.) from 10 to 25 years. All these legislative developments clearly demonstrate a complete fiasco of the initial Marxist statement on the temporary nature of law in general and criminal law in particular. Marxism-Leninism viewed law as a provisional tool that was necessary during the time of the dictatorship of the proletariat for the purposes of class struggle. The Soviet state realized the benefits and pertinence of criminal law and completely gave up the idea that criminal law was a temporary tool. On the contrary, the role of criminal law constantly increased. The elasticity and vagueness of early Soviet criminal law provided a pseudo-legalization for the massacre of hundreds of thousands of innocent people. What is more, these standards became a terrible weapon and the basis of a catastrophe waiting to happen, and they remain relevant and dangerous to this day. The early Soviet criminal law, including the Criminal Codes of 1922 and 1926, formed the basis for a legal tradition of arbitrary interpretation and selective application of the law. These acts contributed significantly to the formation of a specific mentality of Soviet judges and transformed judicial discretion into judicial arbitrariness. And here, too, Ferri's theories played a sinister role in establishing that the main function of justice is to protect society from socially dangerous elements. In the Soviet version of this concept, the basic function of justice was transformed into the prioritization of defense of the state over defense of its citizens. This approach became customary in the Soviet Union, which forged its own brand of socialist law that, for a brief time, would stand beside common law and civil law as one of the world's three major legal traditions[1].

Significant changes took place in the Soviet criminal legislation in 1960, when the new Criminal Code of the RSFSR was adopted. As Professor Harold J. Berman puts it, "the restoration of the traditional vocabulary of criminal law, the limitation of the doctrine of analogy, the careful analysis of crime in terms of subject and object, and the emphasis throughout on strict legality all bear witness to what may be called a Struggle for Law"[2]. Donald D. Barry, George Ginsburgs and Peter B. Maggs state that many of the most important developments in Soviet law that took place in the 1960s and 1970s "could be classified under the heading of legal reform, and this would apply in particular to the impressive codification activity

1 Pomeranz, p. 74.

2 Berman, *op. cit.* note 25, 836.

that has taken place in many branches of law".[1] The 1960 Code provided exact definitions of various crimes, where the objective side of every crime was described in details with the use of such traditional categories as "object of crime" and "subject of crime". The new Code considerably narrowed the limits of judicial discretion in the area of determination of punishment. The principle of retroactivity completely disappeared, and the Code stated that a law criminalizing an act or increasing punishment for the offence could not be retroactive[2]. Aggravating and mitigating circumstances were also modified and became less politicized. These developments were apparently positive, but insufficient; the new Code was much better than the previous one, but still conflicted with democratic standards of criminal law. However, this legal reform had Soviet underpinnings. Similar to the 1926 Criminal Code, the interests of the Soviet state were the top priority: crimes against the state (treason, espionage, sabotage, wrecking, anti-Soviet agitation and propaganda, etc.) were still considered the most dangerous. The 1960 Criminal Code envisaged a number of wrongdoings that were typical for the Soviet regime: violation of rules for currency transactions, failure to report crime against the state, theft of state or social property, pederasty, defamation, insult, private entrepreneurial activity and activity as a commercial middleman, profiteering, etc. Vagrancy was criminalized in May 1961 by the Decree of the Presidium of the USSR Supreme Soviet "On Tightening of Control over individuals avoiding socially useful labor and engaging in antisocial parasitic lifestyle". Articles establishing criminal liability for vagrancy, beggary, sodomy, etc. offered a variety of possibilities for prosecution of dissent. Many of these offenses were decriminalized in 1990s in the course of the reform of Russian criminal law.

1 See *Soviet Law After Stalin* (edited by Donald D. Barry, George Ginsburgs and Peter B. Maggs, Sijthoff& Noordhoff International Publishers B.V., 1978).

2 Art. 6 of the 1960 Criminal Code of the RSFSR. Harold J. Berman. *Soviet Criminal Law and Procedure: the RSFSR Codes* (Harvard University Press, 1972, 127.

CHAPTER 3. SIGNS OF RE-BIRTH OF CERTAIN TRADITIONS OF SOVIET CRIMINAL LAW IN MODERN RUSSIA

Sadly, certain cases as well as the recently passed pieces of the Russian legislation show the signs of old Soviet attitudes in contemporary Russian criminal law and law enforcement. These Soviet notions, including the vague definition of the concept of "betrayal of the Motherland", turned out to be so popular and handy, that they survived their authors and experienced a rebirth in the parliament of the Russian Federation.

Less than 15 years after the tremendous breakthrough in the area of humanization of post-Soviet criminal law, the first signs of retreat came up on the agenda. In 2008, a bill extending the definitions of high treason and espionage was introduced in the State Duma. Shortly after that the bill was returned for further improvement, and then President Dmitriy Medvedev recognized the presence of the risk of arbitrary interpretation of the definitions of "state secret", "high treason", and "espionage". Apparently, at the end of 2012 this risk became considerably lower, and the bill was adopted in November with no significant changes. Prior to November 2012, Article 275 defined high treason as

> "espionage, transfer of a state secret or any provision of assistance to a foreign government, foreign organization or their representatives in their conduct of hostile actions to the detriment of the external security of the Russian Federation, committed by a citizen of the Russian Federation."

As amended, however, Article 275 defines high treason as an act

> "that is committed by a citizen of the Russian Federation, acts of espionage, disclosure to a foreign state, an international or foreign organization, or their representatives of information constituting a state secret that has been entrusted or has become known to that person through service, work, study or in other cases determined by the legislation of the Russian Federation, or any financial, material and technical, consultative or other assistance to a foreign state, an international or foreign organization, or their representatives in activities against the security of the Russian Federation."

The following are the most dangerous pitfalls of the new wording of Article 275 of the Criminal Code of Russia. First, the phrase "hostile actions to the detriment of

the external security of the Russian Federation" is replaced by the ambiguous phrase "activities against the security of the Russian Federation." The omission of the word "hostile" essentially makes this concept extremely ambiguous. Second, it is obvious that by the legislation's design, the new definition covers not only external but also internal security. A clear and detailed definition of both concepts is absent from the Criminal Code. Third, ambiguity of the wording "financial, material and technical, consultative or other assistance to a foreign state, an international or foreign organization, or their representatives in activities against the security of the Russian Federation" makes it applicable to almost any activity. Fourth, international organizations are identified as potential recipients of information constituting state secrets, as well as of the abovementioned types of assistance. Any list of such recipients must necessarily be open-ended and can include any international organization by default. Sixth, the vagueness of this statutory provision makes it impossible for citizens to properly abide by it, a violation of one of the fundamental conditions of the rule of law. This ambiguity creates unlimited possibilities for arbitrary interpretation and selective application. Pursuant to the provisions of Article 275, a criminal case for high treason can be initiated against any citizen of the Russian Federation who provides someone with almost any information or commits almost any action.

In other words, under the new wording of Art. 275, providing almost any information and committing almost any act by any Russian citizen may be qualified as high treason. These flexible provisions suggest parallels with early Soviet criminal law.

Some typically Soviet offences were decriminalized for a short period of time.

Federal Law No 420-FZ of 8 December 2011 amended various Russian laws and invalidated those articles of the Criminal Code that provided criminal liability for slander and insult. The rejoicing at this change did not last long. In July 2012, criminal liability for slander was not only restored, but became more severe. In the new law, the list of slanderous acts that entail criminal liability was expanded to include defamation combined with abuse of office, defaming a person by stating he or she is suffering from a disease dangerous to public health, and accusing a person of having committed a sexual crime. The penalties were also changed: arrest and imprisonment were eliminated. Fines, on the other hand, were increased and are calculated differently: in the previous version, a crime was punishable by a fine stated as a multiple of the legally established minimum monthly wage (which could change from time to time); in the new version, fixed amounts have been set. But the details should not obscure the main point: it became apparent that the government was not ready to abandon criminal punishment for slander since it was such an effective instrument for controlling the media.

The Pussy Riot Case. For organizing a so-called "punk prayer" in Moscow's Christ the Savior Cathedral in February 2012, Pussy Riot members were arrested and later sentenced to two years in prison. Their case reveals a number of disturbingly familiar features in Russia's public and legal environment. Most people might dislike the idea of holding a punk prayer in a place where believers come to worship. However, de-

spite individual tastes and attitudes toward the band's performance, under the law, Pussy Riot members should not have been subjected to such harsh legal penalties or such heavy-handed treatment by law enforcement. The applicable Russian legislation in effect at the time of the violation established the sanction of a fine in the amount of 1,000 rubles in the a case of presenting "offense to the religious feelings of believers and/or desecration of items, signs and emblems of religious reverence"[1] . This exactly fits the violation committed by Pussy Riot in Moscow's Christ the Savior Cathedral, and it has little overlap with "hooliganism," the violation for which the participants were sentenced. In other words, the "punk prayer" was an administrative offense, that is, an unlawful, guilty act that is characterized by a considerably lower degree of public danger than a crime. If their actions had been assessed objectively rather than according to the "best traditions" of the Soviet law, Pussy Riot members would have been fined and that would have been the end of the case[2].

In this particular case, nevertheless, *who* did it and *how* it was done was more important than *what* was done, and the Russian judicial machine reacted in strict accordance with the provisions of the 1922 Criminal Code : "when determining the punitive measure, the degree and the character of the threat the offender poses as well as the degree and the danger of the crime he committed are examined. In pursuing these aims the circumstances of the crime are examined, the identity of the criminal is established because it manifested itself in the crime the offender committed and in his motives, and because it can be established based on his way of living and his past. Also, the extent to which the crime itself violates the principles of public safety at a given time and under the given circumstances is determined."[3] This accurately describes the illegal, one-sided and biased approach to evidence by Judge Marina Syrova, who stated that the behavior of the accused in the courtroom should be considered as yet another proof of their guilt — an interpretation that ensured the required result: the members of Pussy Riot were not found guilty of what they actually did, but, according to the best traditions of early Soviet criminal justice, were sentenced on the basis of their categorization as socially dangerous individuals[4]. It is notable that acts insulting religious feelings were criminalized in June of 2013[5].

Further proof to the fact that the Russian criminal law is on a dangerous track to restoration of certain attitudes of Bolshevist law can be found in the case of

1 Article 5.26 (2) of the Code of Administrative Offenses the RF of 30 December 2001. Translated. Retrieved from http://www.consultant.ru/document/cons_doc_LAW_34661/ca82e094f1dcf553b6a4bfa7b9a3271b38922c98/

2 Mishina E. The Re-birth of Soviet Criminal Law in Post-Soviet Russia. *Russian Law Journal*. 2017;5(1):57–78

3 Article 24 of the 1922 Criminal Code of the RSFSR.

4 Mishina E. The Re-birth of Soviet Criminal Law in Post-Soviet Russia. *Russian Law Journal*. 2017; 5(1): 57–78

5 Art.148 of the 1996 Criminal Code of the Russian Federation. Translated. Retrieved from http://www.consultant.ru/document/cons_doc_LAW_10699/

Ildar Dadin, an oppositioner and civic activist. In the summer of 2014, a new Article 212.1 on "repeated violations of the established rules of organizing or holding public gatherings, meetings, rallies, marches, and pickets," was added to the Russian Criminal Code. In December 2015, Ildar Dadin became the first person prosecuted and convicted under this article, which has been strongly criticized both by members of the Russian Presidential Human Rights Council and by most prominent Russian lawyers as contradictory to the country's fundamental law and the European Convention on Human Rights. Noted Russian lawyer Henri Reznik has pointed out the anti-constitutional nature of this article and emphasized that multiple and repetitive administrative offenses do not constitute a crime, as criminal acts are associated with a higher level of danger to the public.[1] Reznik also noted another blatant violation: when a criminal case against Ildar Dadin was initiated, some court decisions on Dadin's administrative offenses had not yet come into legal force and therefore charges under Article 212.1 were filed against him illegally.

There are several shocking features in Ildar Dadin's case.

First, Article 212.1 itself and Dadin's criminal case initiated under this article will eventually become textbook examples of the restoration of Bolshevik-style criminal law in post-Soviet Russia. Those who suggested introducing criminal liability for repeated violations of the rules of organizing and holding meetings, rallies, and other forms of public gatherings cannot draw justification from the danger such assemblies pose to the public, because there is simply no such danger. Once again following the "best traditions" of the 1922 Criminal Code, the authors of this legislative innovation nonetheless found that such gatherings posed a threat to the current political system. Article 212.1 stipulates a maximum penalty of five years, which qualifies such offenses as medium-gravity crimes.[2] For comparison, the same maximum penalty is provided for the murder of two or more people committed under the influence of extreme emotional disturbance[3] and for incitement to suicide[4]. For further comparison, Article 117 (1) stipulates a maximum penalty of three years for torture without aggravation, thus making torture a minor crime, which is less dangerous for society than repeated violations of the rules of holding meetings and rallies. **Second**, as in the Pussy Riot case, law-enforcement bodies were more interested in Ildar Dadin himself as a "socially dangerous element" than they were in his actions. The situation evolved along the lines of the first Soviet Criminal Code, which instructed judges, when deciding on a sentence, to take into account the level and nature of the threat posed by both

1 Reznik on Ildar Dadin's conviction: it's an insult of law. Novaya gazeta, April 01, 2016). Translated. Retrieved from https://www.novayagazeta.ru/articles/2016/04/01/68036-genri-reznik-8212-o-prigovore-ildaru-dadinu-171-eto-oskorblenie-prava-187

2 Art. 15. of the 1996 Criminal Code of the RF.

3 Article 107 (2) of the 1996 Criminal Code of the RF.

4 Article 110 of the Criminal Code of the RF.

the criminal and his act and to "establish the personality of the criminal, since it revealed itself in the crime he committed as well as in his motives, and since it can be established based on his way of life and past."[1] Judicial authorities determined the punishment according to their "socialist legal conscience": although the prosecutor was asking for only two years of imprisonment, the judge decided such a punishment would be insufficient. As a result, Dadin was sentenced to three years in a penal colony. **Third**, although Article 51 of the Russian Constitution guarantees the right not to give incriminating evidence against one's relatives, Ildar Dadin's father testified against his own son. Even Article 205.6, which joined the Russian Criminal Code in July of 2016, contains an annotation stipulating that a person cannot be held criminally liable for failure to report a crime prepared or committed by his or her spouse or close relative, and in 2015 this article did not even exist. It seems that some sort of social genetic memory dating back to Stalin's 1930s, when legislative innovations encouraged whistleblowing and denunciations, must have kicked in[2]. **Fourth,** the punishment stipulated by Article 212.1 openly violates the principle of proportionality, which is one of the fundamental principles of criminal law. According to Article 43 of the 1996 Criminal Code, punishment is used to restore social justice as well as to correct convicted criminals and to prevent crimes in the future. Actions criminalized by Article 212.1 do not infringe upon social justice. From the point of view of criminal law, being an accumulation of administrative offenses, such actions do not represent any social danger, and thus, they do not entail the task of correcting the convicted individual. The introduction of this article to the Criminal Code was motivated solely by political expediency and the urge to fight dissent. As for punishment, just like in feudal times, it serves as an intimidation tactic to teach others not to dissent[3].

On February 10th, 2017, the Constitutional Court of the Russian Federation (RF) delivered its decision on the constitutionality of Article 212.1. In the official interpretation the Court ruled that the Article was constitutional. The Court established that "*the constitutional legal meaning of the provisions of Article 212.1 of the Criminal Code of the RF discovered in this Decision shall be binding for all representative, executive and judicial bodies of state power and of local self-government, as well as for enterprises, institutions, organizations, officials, citizens and their associations*"[4]. The Court ruled that the federal legislature is eligible (but not obliged) to change Article 212.1 "*following the requirements of the Constitution of the RF and in accordance with the legal positions of the Constitutional Court outlined*

1 Art. 24 of the 1922 Criminal Code of the RSFSR.
2 Mishina E. The Re-birth of Soviet Criminal Law in Post-Soviet Russia. *Russian Law Journal.* 2017; 5(1): 57–78.
3 Mishina E. Op. cit.
4 Decision No 2-P of the Constitutional Court of the RF 10 February, 2017. Translated. Retrieved from https://rg.ru/2017/02/28/sud-dok.html

in this Decision".[1] On February 22nd, 2017, the Presidium of the Supreme Court of the RF repealed Dadin's conviction on narrow grounds, and on February 26th, Dadin was released from the penal colony. While Dadin's release is certainly a very good development, Article 212.1 remains in the Criminal Code of the RF. The second person to be prosecuted under the controversial legislation was the Russian activist Konstantin Kotov. In early September of 2019, Tverskoy District Court sentenced Kotov to four years in a penal colony after finding him guilty of taking part in multiple unsanctioned protests for the duration of 180 days. In this sentence, the court openly violated several legal positions of the Constitutional Court. As established by the Constitutional Court[2], its legal positions (containing the interpretation of constitutional norms or the constitutional meaning of a specific law), which serve as grounds for the conclusions of the Constitutional Court in the operative part, are mandatory for all state bodies and officials. Norms interpreted by the Constitutional Court cannot be applied in any other interpretation that disagrees with the legal meaning established by the Court.

On September 17th, 2019, a group of Russian constitutional law experts published a letter [3]to Valery Zorkin, the Chief Justice of the Constitutional Court. In the letter, they stated that the constitutional legal meaning of Art. 212.1 as discovered by the Court was ignored, and actions and decisions of executive and judicial bodies of state power inclusive of the Kotov's sentence are openly in breach of the Decision No 2-P and other prior decisions of the Constitutional Court. The authors provided a comprehensive list of legal positions of the Constitutional Court that have been ignored or violated by the executive and judicial bodies. This list includes, but is not limited to, the following. First, the Constitutional Court has previously suggested that the public authorities should neutrally respond to the preparation and holding of assemblies, rallies, marches and pickets. Public demonstration rules for protesters (including the preliminary notification requirement) are of significance; however, the observation of these rules should not be *"an end in itself"*. Additionally, compliance with these rules shall not create hidden obstacles for the realization of the right to peacefully assemble, which is protected by the European Convention. Public authorities should be tolerant to peaceful assemblies, even when they can interfere with the routine (i.e., impeding traffic), since otherwise freedom of assembly would be deprived of its meaning. Strong reasons must be provided for imposing restrictions on political or otherwise socially important actions; in the absence of such reasons, these restrictions may have a negative impact on the general respect of freedom of self-expression.

1 *Ibid*.

2 Determination of the Constitutional Court No 88-O 07 October 1997. Translated. Retrieved from http://www.consultant.ru/document/cons_doc_LAW_16539/

3 A lawyers' letter to Valery Zorkin regarding the case of Konstantin Kotov. Translated. Retrieved from https://www.novayagazeta.ru/articles/2019/09/17/82001-konstitutsionnomu-sudu-stoit-obratitsya-v-gosdumu

The Constitutional Court emphasized that efforts of governmental and municipal bodies aiming at the facilitation of legitimate exercise of civic initiatives shall not result in the establishment of excessive control over activities performed by the organizers and participants of public events. This idea of "excessive control" includes unreasonable limitations on the free holding of assemblies, rallies, demonstrations, and pickets. Federal lawmakers must prevent unreasonable state coercion and shall ensure the balance between individual rights and liability and the public interest, which is expressed in the protection of individuals, society, and the state from unlawful infringement. In the Russian legal system, a crime (as opposed to other types of violations) must include the element of "*criminal social danger*", in the absence of which even acts which formally qualify as a criminally punishable activity shall not be considered crimes. The Russian Constitutional Court stated that if a violation of the established organizational order or the holding of a public event was: a) committed by an individual who was held administratively liable under Art. 20.2[1] of the Code of Administrative Offences of the RF; b) at least three times within 180 days; c) possessed a formal nature; d) did not bring up negative consequences or a feasible threat that such consequences would occur, such a violation shall not be treated as representing criminal social danger. Thus, criminal liability for such an act based solely on the multiplicity of violations goes beyond the limits of the constitutionally permitted criminal law restriction of civic rights and freedoms. Holding a demonstration in the absence of prior approval from the government does not necessarily justify punitive measures; a peaceful demonstration shall not be an object of criminal sanctions. A conviction based only on the participation in a public event — which involved no acts of violence — is impossible without the evaluation of its proportionality as provided by the national courts. Measures applied to the participants of peaceful public events due to their formal illegality shall not aim at deterring the general public from the attendance of assemblies and demonstrations, i.e. from open political discourse. Another fundamental legal position provided that the violation of the established organizational order or the holding of a public event committed by an individual who was a) held administratively liable under Art. 20.2[2] of the Code of Administrative Offences of the RF; b) held at least three times within 180 days by itself is not a sufficient basis for prosecution. Criminal liability may occur only if such a violation resulted in the infliction of personal injury, in damage to

1 Article 20.2 "Violation of the established order of organization or holding an assembly, rally, demonstration, march or a picket ". The Code of Administrative Offences of the RF 30 December, 2001. Translated. Retrieved from http://www.consultant.ru/document/cons_doc_LAW_34661/c77bf52af28dfd8f9de192b9faf0999c023256d2/

2 Article 20.2 "Violation of the established order of organization or holding an assembly, rally, demonstration, march or a picket". The Code of Administrative Offences of the RF 30 December, 2001. Translated. Retrieved from http://www.consultant.ru/document/cons_doc_LAW_34661/c77bf52af28dfd8f9de192b9faf0999c023256d2/

the property of individuals, to legal entities, the environment, public order, national security, or other constitutionally protected values, or if there was a feasible threat of such damage. The Constitutional Court pointed out that a person who has committed a crime envisaged by Art. 212.1 of the Criminal Code does not necessarily have to be sentenced to imprisonment if it is his or her first offense of that kind. The court can only apply such a punishment if it comes to the well-grounded conclusion that the correction of the convict is impossible without isolation from the society[1].

Authors of the letter assert that the constitutional legal meaning of Art. 212.1 of the RF Criminal Code (as discovered by the Constitutional Court of the RF), which is binding for all state bodies, organizations, officials and individuals[2], was ignored by the executive and judicial bodies involved in the case. They argue that Kotov's sentence is openly in breach of this decision, as well as of other decisions declared by the Constitutional Court. The Procuracy offered a remarkable explanation by arguing that the decision of the Constitutional Court on the so-called "Dadin's article"[3] was violated due to the presence of criminal social danger in Kotov's case. State Prosecutor Yaroslav Mytz asserted that the participants of an unapproved rally by default jeopardize themselves and other people who happened to be at a place of mass congregation. From the procuracy's point of view, feasible social danger could occur in the connection with the subsequent violation of traffic rules, as well as the blockage of streets and of Moscow's tourist attractions[4]. However, from my point of view, the wording of "*feasible social danger"* looks strikingly similar to the notorious Bolshevik notion of "*revolutionary practicability*".

Konstantin Kotov's sentence was appealed to the Moscow City Court, which upheld the prior verdict on October 14th, 2019. Kotov's defense attorneys asserted that the verdict violates several provisions of the Code of Criminal Procedure and additionally contradicts multiple legal positions of the Constitutional Court of the RF, as well as of the European Court for Human Rights. Maria Eismont, one of Kotov's attorneys, points out that the first instance court interviewed only 5 out of 30 defense witnesses. Additionally, the court failed to examine several elements of evidence provided by the defense. *"The sentence contains only eight lines which include the testimony of our witnesses, whereas the testimony of witnesses for prosecution is described on eight pages. That is the result of a trial that is both illegal and unfair*", — said Eismont[5]. She added that the adversarial principle was violat-

1 A lawyers' letter to Valery Zorkin regarding the case of Konstantin Kotov.
2 P. 2 of the Decision No 2-P of the Constitutional Court of the RF 10 February, 2017 .
3 Decision No 2-P of 10 February 2017)
4 https://www.novayagazeta.ru/news/2019/10/04/155864-prokuratura-ob-yasnila-narushenie-postanovleniya-ks-v-dele-kotova-realnoy-ugrozoy-obschestvu?utm_source=fb&utm_medium=novaya&utm_campaign=spisok-negativnyh-posledstviy--konechno
5 https://www.novayagazeta.ru/news/2019/10/14/156121-kotov

ed in this trial, as the court only agreed to watch the documentary videos suggested by the prosecution but neglected to view the evidence suggested by the defense.

A third conviction under the Dadin's article[1] followed on September 27th, 2019. **Andrey Borovickov**, a coordinator of Alexey Navalny's local office, was found guilty of a repeated violation of the rules for holding a rally and sentenced to 400 hours of community service by the Oktyabrsky district court of Arkhangelsk. Previously Borovickov was fined for his participation in a peaceful anti-Putin rally "He is not our Tzar", as well is in the rally against the retirement age increase. His third administrative offence was the participation in a protest rally against the building of a trash disposal site in Shiyes[2] in April 2019[3].

Law enforcement decisions made in the so-called "Moscow Case" also display the worst attitudes of Soviet criminal law, namely, the disproportional severity of sentences and the obvious accusatory bias on the part of judges. On September 16th, actor Pavel Ustinov was sentenced to three and a half years in prison for allegedly dislocating the shoulder of a police officer during a demonstration that happened on August 3rd. In response to the allegations, Ustinov said that he was not participating in the rally and that he did nothing to resist the police officer. Judge Alexey Krivoruchko from the Tverskoy district court of Moscow refused to consider videos of Ustinov's detention (that seem to support his story and show that the police officer was not injured) as an item of evidence[4]. Such an attitude on the part of a judge brings up historical parallels with the provisions of the 1918 Decree on the People's Court, which established that courts "*are not bound by any formal evidence, and, depending on the circumstances of the case, it is up to the court to allow certain evidence or request such evidence from a third person*"[5]. The case of financial manager Vladislav Sinitza provides us with another example of the disproportional severity of punishment. On September 3rd, 2019, he was sentenced to five years in a standard regime penal colony for a Tweet. In the Tweet, Sinitza expressed his doubts as to whether the kids of force structure officers would get home safely after the brutal suppression of the non-coordinated protest rally of July 27th, 2019. The court aligned with the prosecution and ruled that Sinitza's Tweet contained an incite-

1 Art. 212.1 of the Criminal Code of the RF
2 Shiyes is the name of a small train station on Russia's Northern Railway
3 https://meduza.io/news/2019/09/27/v-rossii-vynesli-tretiy-prigovor-po-dadinskoy-statie-glavu-shtaba-navalnogo-v-arhangelske-osudili-na-400-chasov-obyazatelnyh-rabot
4 https://www.rferl.org/a/moscow-case-ustinovprominent-russians-protest-repression/30171770.html
5 Art. 24 of the Decree on People's Court of 30 November 1918. Translated. Retrieved from http://istmat.info/node/31884

ment for violence against the children of policemen[1] and members of Rosguardiya[2]. As in Kotov's case, the Moscow City Court left Sinitza's sentence unchanged. In his final speech before the court Sinitza noted that, from his point of view, things that are happening in Russia right now resemble a medieval witch hunt. The legislative developments discussed above, together with the cases of Pussy Riot, Ildar Dadin, Konstantin Kotov, Pavel Ustinov and others, clearly demonstrate that many ugly traditions of the Bolshevik criminal law are making their way back. Much like in the early Soviet years, judges are not bound by any formal evidence and can easily ignore the most important proof in order to ensure the necessary conviction. If a judge received an order to convict a particular individual, this individual will be convicted, no matter what the real circumstances of the case are. The mentalities of judges, prosecutors, investigators and other legal actors play a critical role in the real-world context of the courtrooms, where life intersects with law on a daily basis. Today the Russian legal system is operated by law-enforcement bureaucrats, whose minds bear the deformities of the Soviet legal consciousness. The idea of *"feasible social threat"* serves as a good excuse for breaking constitutional law (like the ignorance of the provisions regarding the binding force of Constitutional Court judgments in Konstantin Kotov's case) and, chances are, will become a decent substitute for the notion of "*revolutionary practicability*". Crimes against the state or the established political order are slowly becoming more dangerous than crimes against persons. From the point of view of 21st-century Russian legislators, torture is less dangerous for society than repeated violations of public assembly rules. This represents yet another similarity between the items of this article of the Criminal Code and the early statutes of Soviet criminal legislation, according to which crimes against the state — which, in this case, have been equated with the current political order — posed a bigger public threat than crimes against persons[3]. The internationally established purposes of criminal punishment [4] are to: a) to restore social justice; b) to correct the convict; c) to deter other crimes. The Russian criminal justice system has so far largely focused on the third part, whereas the first two elements are apparently ignored. Disproportionately severe punishments (as in cases of Konstantin Kotov and Vladislav Sinitza) are intended to terrify the "offenders" and to scare away their potential followers.

1 https://www.novayagazeta.ru/articles/2019/10/03/82215-pyat-let-za-tvit-srednevekovoe-nakazanie-lishat-svobody-za-mnenie-nelzya?fbclid=IwAR2qfrg6oKKlpi0W5TgFsgGdOKA0RPXq47mcYTQzEnnMbf_Ecf2opWiWDjc

2 Rosguardiya (Federal Service of the Troops of the National Guard of the Russian Federation) is an internal military force of the Russian Government, which is not a part of the RF Armed Forces. Rosguardia became infamous, inter alia, due to the numerous cases of cruel oppression of protest rallies and violent treatment of peaceful protesters.

3 Mishina E. The Re-birth of Soviet Criminal Law in Post-Soviet Russia. *Russian Law Journal*. 2017; 5(1): 57–78

4 Art. 43 (2) of the Criminal Code of the RF.

The defensive nature of the Soviet criminal law, enshrined in the very first Soviet Criminal Codes of 1922 and 1926, has returned. To put it simply, under this Code the state actively defends itself against its citizens and sometimes exceeds the limits of self-defense to commit acts of oppression against them[1].

Soviet courts. Bolsheviks treated the pre-revolutionary judicial system exactly the same way they treated the imperial legislation: these "survivors of the Tsarist regime" had to be eliminated. The Decree on Courts No. 1 of 22 November 1917 addressed both the old courts and the new Soviet ones. The Decree abolished all pre-revolutionary courts and suspended activities of justices of the peace. Judges were replaced by local courts consisting of a local judge and two public assessors.[2] Local judges had to be elected by direct popular vote or by local Soviets before elections were called. The pre-revolutionary system of court investigators, prosecutorial supervision, and an independent bar association were eliminated together with the old courts. Preliminary investigation of criminal cases was assigned to local judges, and all men and women who enjoyed good reputation and were not deprived of civil rights could seek a career as a prosecutor or a defense attorney. No formal requirements, including possessing a law degree or experience in legal practice, were mandated, so these paths were open for active supporters of the new regime. The Instruction for Revolutionary Tribunals of 19 December 1917 provided for the setting up of "collegia of the legal profession" ("*pravozastupniki*"). Any person who wanted "to assist the administration of revolutionary justice" and had a letter of recommendation from a local Soviet could easily join such a collegium. Both men and women not deprived of political rights could participate in cases in the capacity of prosecutors or defense attorneys[3]. The Instruction established the first formal requirements for potential *pravozastupniks* who wanted to take part in the administration of "revolutionary justice": they had to be loyal to the new regime and to have ancestry not marred by wealth or noble rank. Only such persons were allowed to enjoy political rights at that time. The Decree On People's Courts of the RSFSR of 30 November 1918 introduced a dual system of people's courts and revolutionary tribunals. Preliminary investigation was vested with district and city investigatory commissions[4], and investigation was put under the jurisdiction of the newly established Soviet militia. Article 22 ("While handling all cases, the People's Courts shall apply the decrees of the Workers' and Peasants' Government, and in the event of absence or insufficiency of such decree shall be guided by socialist legal consciousness") prohibited basing judgments on the "legislation of overthrown governments". Provisions

1 Mishina E. Op. cit.

2 Decree on Courts No. 1, *op. cit.*, note 30, 2.

3 Par. 7 (a) of the Instruction of the RSFSR People's Commissariat for Justice No 1 for Revolutionary Tribunals of 19 December 1917. Translated . Retrieved from http://www.law.edu.ru/norm/norm.asp?normID=1321089

4 Art. 28 of the Decree On People's Courts of the RSFSR of 30 November 1918.

of Art. 24 ("People's Courts are not bound by any formal evidence, and depending on the circumstances of the case, it is up to the court to allow certain evidence or request such evidence from a third person, for whom such requests are mandatory") created grounds for unlimited judicial discretion and selective application of law, which later became symbolic of Russia, much like vodka, the matryoshka, or the balalaika.

Under Art. 4 of the Decree on People's Courts, revolutionary tribunals handled cases of counterrevolution, sabotage, discrediting of the Soviet regime, and espionage. A revolutionary tribunal had the power to recognize a case as not having political importance and to transfer it to a people's court[1]. In practice, things worked in the opposite direction. According to Professor Harold Berman, "central and local organizations sprang up to assume the functions of the local courts. These organizations were gradually absorbed by central and local Chekas. Thus, despite the provision for local courts in the First Decree on Courts, in fact from 1917 to 1922 the law was administered by the revolutionary tribunals which were established by the same Decree (and by the Chekas, in so far as the Chekas may be said to have administered law)"[2]. According to Professor Berman, revolutionary tribunals "were supposed to be open, public courts with both prosecution and defense participating in the trial. But especially after the assassination of Uritzky and the attempt on Lenin's life (August 30, 1918) they "abandoned formalities"[3]. Shortly before the adoption of the first Criminal Code of Soviet Russia, judges received explicit instructions on the mode of judicial behavior from the leader of the Bolshevik state : «*the courts should not do away with terror — to promise that would be to deceive ourselves and others — but should give it foundation and legality, clearly, honestly, without embellishments*»[4] .

In the same letter, Vladimir Lenin suggested broader application of the death penalty.

However, though Bolsheviks openly encouraged courts to apply terror and to give it foundation, the formal framework was expected to appear respectable. In order to emphasize the important mission of the administration of people's justice, the newly established Soviet courts were called *people's courts* as opposed to the bourgeois prerevolutionary judicial institutions. The further strengthening of this quality was to be achieved through adjudication of cases by collegia consisting of three people, one a professional judge, and two others being people's assessors representing the people. However, this new design did not serve its pur-

1 Art. 4 of the Decree On People's Courts of the RSFSR of 30 November 1918.
2 Berman, *op. cit.* note 25, 803.
3 *Ibid*, 805.
4 Vladimir Lenin. Additions to the draft introductory act to the Criminal Code of RSFSR and letter to D.Kurskii, People's Commissar of Justice 15 May 1922. [Dopolneniya r proektu vvodnogo zakona k Ugolovnomu Kodeksu RSFSR y pismo D.I.Kurskomu.]. Collected works, vol. 27 (1932), 296.

pose: public assessors gained no respect from the population, and most people did their best to avoid this honorable duty of a Soviet citizen. Shortly, the real role of people's assessors in the Soviet courts became obvious: their main task was to approve everything the judge was doing or saying. A situation where a public assessor would openly disagree with a judge or make his own point was out of the question. No wonder this type of "people's justice" did not increase the prestige of courts, judges, or people's assessors.

In the totalitarian state, where separation of powers was non-existent and instead the principle of unity of power was envisaged on the constitutional level, there was no such thing as an independent judiciary. A beautiful constitutional provision on the independence of judges from the 1936 Constitution was nothing but a window-dressing, provided that institutional independence of courts was out of question. The Procuracy, which was granted extremely broad powers during the Soviet period, enjoyed the power to supervise courts. The procurator was both a participant in the court proceedings and a supervisor of the court's activities[1]: as early as in December of 1933, the USSR Procuracy was vested with the power to supervise the correct and uniform application of law by judicial institutions[2]. In all cases the procurator had the task of ensuring that all judgments, sentences, rulings and orders were lawful and well-founded. In a way, the procuracy, by having the right to participate in the hearings of cases at all levels and then to protest decisions it did not like, was placed above courts[3]. Moreover, even after a criminal or civil case had been decided, the procuracy — at the behest of a party or on its own initiative — could file a protest requesting that the case be reopened[4]. Such a request could be filed years after a legal action had been decided. Thus, no finality of judgments (*res judicata*) existed under Soviet law, creating a major source of instability within the legal system[5]. Courts depended on administrative agencies and local Soviets of People's Deputies. This dependence lay primarily in the realm of financial issues and social benefits: in the Soviet Union, judges were one of the most underpaid branches of the legal profession. Their salaries were meager, so their social benefits, housing, health insurance, etc., held comparatively more importance. On the other hand, being a judge meant stability and a slow but steady career progression. This factor deeply affected gender balance in the judicial profession. Soviet judges were not overworked: the secre-

1 Peter B. Maggs, Olga Schwartz, William Burnham, Law and Legal System of the Russian Federation, (Juris Publishing Inc., Huntington, New York, 2015, Sixth ed.), 188.

2 Art. 4 (b) of the Statute on the Procuracy of the USSR 17 December 1933. Translated. Retrieved from http://istmat.info/node/24231

3 Peter B. Maggs, Olga Schwartz, William Burnham, 188–189.

4 William E.Pomeranz, "Supervisory review and Finality of Judgments under Russian Law", Review of Central and East European Law, 34. No. 1 (2009), 17–18.

5 William E.Pomeranz. Law and the Russian State. Russia's Legal Evolution from Peter the Great to Vladimir Putin. The Bloomsbery History of Modern Russia series. London, Great Britain, 2019, 103.

taries did the research, an indictment was normally a framework for a conviction, and all necessary (and unnecessary) instructions came from the local body of the Communist Party. Consequently, judgeships were very much sought after by divorced women with young children. The Communist party was a real Big Brother for Soviet courts and judges. All judges were either members or candidate members of the CPSU. A non-party person had almost no chance to become a judge and to make a career in the Soviet judicial system. Membership in the Communist party was crucial for becoming a judge: that is how the external channel of influence worked in order to make a judge predictable and easily manipulated. All orders and instructions coming from the Communist party bodies were mandatory and had to be followed. At that time, the "telephone law"[1] or "telephone justice" phenomenon, which has been a reality in Russian life for decades, if not centuries[2], became especially strong. Normally, a court chairperson served as a liaison, who transmitted signals to the judges. In the most urgent and important situations, judges received orders and instructions directly by means of a phone call. Some phone calls could ruin a career of a particular judge: that was a possible scenario in case of an acquittal. Under the Soviet rule, an acquittal was treated almost as an emergency followed by two explanatory notes: one for the chairperson of the court in question and another for the local Communist party officials. If the explanatory notes did not pass muster, the judge had to present his explanations in person. In post-Soviet Russia, the percentage of acquittals is still critically low. Even in these few (less than 1 %) cases of non-guilty verdicts, in more than 50 % of cases acquittals are stricken after appeal of the judgment[3].

The fact that, from the very beginning, Soviet courts were used as a tool for criminal and political repression alongside revolutionary tribunals constitutes another reason for their dependence. Revolutionary tribunals were later eliminated, and their repressive function was transferred to courts, which were gradually becoming an inalienable part of the state repressive apparatus. By the late 1930s, Soviet courts had acquired the reputation of punitive agencies, and the activities of *troikas*, which handled political cases without any participation by the defense,

1 Alena Ledeneva describes "telephone justice" as "the practice of making an informal command, request, or signal in order to influence formal procedures or decision-making. The term emphasizes the prevalence of oral commands over written instructions; refers to the culture of informality and self-censorship; points to the limitations of the judiciary vis-a-vis administrative power; hints at the use of legal institutions for extra-legal purposes; and implies that networking and mediation remain essential instruments of governance". Alena Ledeneva, "Telephone Justice in Russia", 24(4) Post-Soviet Affairs (2008), 326.

2 Kathryn Hendley, "The "Telephone Law" and the 'Rule of Law': a Russian case", 1 Hague Journal on the Rule of Law (2009), 241–262.

3 Ekaterina A. Mishina, Mikhail A. Krasnov, Tamara G. Morshchakova, eds. Otkrytye glaza rossiyskoi Femidy (The Opened Eyes of the Russian Themis) (Moscow, Liberal Mission Foundation, 2007) 15.

contributed to shaping this reputation[1]. The necessity to protect rights, freedoms and legitimate interests of the Soviet people was out of the question. At that time, a deformation of legal consciousness — both the professional deformation of legal practitioners and the deformation of the legal consciousness of ordinary people-reached the point where arrests were perceived as a normality: if someone was arrested, it meant that something was wrong with this person. Confession had already been made the most important evidence, and judges usually preferred confession to other types of proof, given the explicit provision of the 1918 Decree on People's Courts that "courts are not bound by any formal evidence, and depending on the circumstances of the case, it is up to the court to allow certain evidence or request such evidence from a third person, with these requests mandatory for such persons".

The dependence of Soviet judges was of a many-faceted nature. The list of external actors that exercised influence or pressure on the judicial community included, but was not limited to, various administrative agencies, the Ministry of Justice, the Procuracy, Soviets of People's Deputies, and local bodies of the Communist Party. Inside the judicial community, pressure came from court chairpersons, who served as liaisons and enjoyed enormous powers, with case assignment being one of the most important ones.

Dependence on upper courts and especially on the highest court in the system (the Supreme Court of the USSR) was very typical for Soviet times and is still present today in contemporary Russia. This problem is especially important due to a great number of resolutions or instructions issued by the higher courts. These acts are usually intended to instruct the lower courts on how to apply norms of a certain legislative act, and which circumstances must be taken into consideration when handling criminal or civil cases. Another purpose of these acts of the top courts was to maintain the so-called "uniformity of court practice". In reality, maintenance of uniformity of court practice translated into imposition of considerable limitations on judicial discretion.

All these factors contributed to shaping the specific mentality of Soviet judges. The Soviet judicial mentality turned out to be amazingly sustainable: almost three decades after the collapse of the Soviet Union, the Soviet judicial mentality is still persistent. It became slightly different, and acquired several new qualities, but, by and large, preserved its Soviet nature. The first important feature of Soviet judicial mentality is *the specific self-identification* of Soviet judges, who never felt like independent arbitrators vested with the power of administration of justice. On the contrary, they self-identified themselves as governmental officials and acted like governmental officials. They were sure that their main goal was to protect the interests of the Soviet state. *Impact of their previous career* comes next*;*

1 The first troika was created in early 1918 and included F. Dzerzhinsky, V. Alexandrovich and Ya. Peters . See O.B. Mozokhin, A Right for repressions: Extrajudicial powers of the bodies of state security (1918–1953) (Moscow, Zhukovsky, 2006) 23.

most Soviet judges were former prosecutors, law enforcement officers, or secretaries of judges, who themselves had been on the bench since the Soviet period.[1] No wonder these former prosecutors, investigators and other law enforcers applied old familiar behavioral patterns to administration of justice. Defense attorneys almost never had a chance to become judges. They were more autonomous than the representatives of other branches of the legal profession, so the system considered them unreliable and somewhat suspicious. This type of selection of prospective judges actively contributed to shaping another salient feature of the Soviet judicial mentality: *accusatory or prosecutorial bias*. Most Soviet judges felt obliged to issue guilty verdicts. Usually, the text of indictment served as a rough draft of judgment. If a judge took the risk of delivering an acquittal, usually s(he) had to present two explanatory notes: one to the court chairperson and the other to the local organization of the Communist party. *Professional deformation of judges* constitutes another essential feature of the Soviet judicial mentality. After becoming members of the judicial corporation, the new Soviet judges had to promptly adjust to the rules of the game. These rules included unconditional subordination to the chairpersons of their courts, and following the instructions of the upper courts, Communist Party bodies, officials of administrative agencies, and other outside actors. Quite soon, the new Soviet judges started to feel that they also were governmental officials. While making judgments, they were guided not only by the provisions of the legislation in force, but even more by the acts of administrative agencies, not to mention the phenomenon of "telephone justice". There was no need for independent and impartial judges. On the contrary, good Soviet judges had to be obedient and easily manipulated. Apparently, independent decision-makers were not in demand, so it is probably a good thing that Russia does not belong to the common law system, under which judges make law.

In the Soviet Union, a judicial career was one of the least prestigious legal professions and was not sought after. The heavy involvement of the Soviet courts in political repression and witch-hunts also contributed to people's dislike of the courts. After the dissolution of the Soviet Union and the emergence of an independent Russian state, judges were divided into two groups: those who got a law degree under Soviet rule and those of the next generation who never practiced or served under Soviet rule. This division is illustrated by surveys, especially one conducted in 2007–2008 by the INDEM Foundation as part of the project entitled "Judicial Reform in Russia: An Institutional and Societal Analysis of The Transfor-

1 Ekaterina Mishina and Melanie Peyser, From Judicial Independence to Independent Judicial Decision-making: Opportunities for Strengthening Judicial Independence in Russia. The World Rule of Law Movement and Russian legal reform. (Justiseinform, Moscow, 2007), 111.

mation, An Assessment of Results & Future Perspectives."[1] The in-depth interviews conducted with different legal professionals showed that the respondents found considerable differences between the judges who practiced under Soviet rule and those who became judges in post-Soviet times. While making a judgment or passing a sentence, older judges took into consideration the circumstances that affected the parties involved in the process. Judges from the new generation usually made their judgments or passed sentences based only on the letter of the law (even this is an idealization since quite often the new generation of judges base their judgments on secondary legislation and often ignore the incentives of fairness and the circumstances of the offense). Sociological data clearly shows, however, that both the old school judges and the new ones are as unpopular as their predecessors from the Russian Empire and the Soviet Union.

1 See G.Satarov, V.Rimskiy, Yu.Blagoveshchensky. Sociological study of the Russian judiciary (Moscow — Sankt-Petersburg, Norma Publishing House,2010).

PART 2. DIFFERENT REFORM PATTERNS[1]

CHAPTER 1. HISTORY MATTERS: PRIORITY AREAS IN THE REFORM OF THE FORMER SOVIET REPUBLICS

A breakup is always hard, and the breakup with the Soviet past was no exception. This breakup was hard, painful and scary, and sometimes it was unclear how and where to move forward. The painfulness varied depending on a variety of factors, but all the post-Soviet states had to solve a number of similar problems. The first and most serious problem inherited from Soviet times, which post-socialist countries faced after becoming independent, was changing the constitutional system. This aspect of the breakup called for proper legitimization, including choosing a particular constitutional system, and the adoption of a new constitution in each particular case. Constitutional systems envisaged in the fundamental laws of the post-socialist emerging democracies demonstrated that not all these states were equally ready to depart from their authoritarian past. Only Estonia and Latvia opted for the parliamentary republic, while others preferred constitutional systems with stronger presidential powers. Tajikistan, Turkmenistan, Azerbaijan, and Belarus preferred the US-based presidential model. Other former Soviet republics introduced a semi-presidential constitutional system, although later two of them switched to the parliamentary republic. In 2000, Moldova decided to repeal the semi-presidential system due to obvious signs of authoritarianism. The constitutional amendments of 2000 changed the form of government by considerably narrowing the scope of presidential powers. In 2010, the authoritarian regime of Kurmanbek Bakyev was overthrown in Kyrgyzstan, and the new Constitution established a parliamentary republic. The cases of Moldova and Kyrgyzstan suggest the following conclusion: economic hardships do not necessarily involve "the iron fist" and the escalation of authoritarian rule. The Moldavskaya SSR was the poorest republic of the Soviet Union, and today Moldova is the poorest European country. The state of the national economy, living standards and occurrence of natural resources in Kyrgyzstan are far from perfect. Nevertheless, the

1 Certain parts of this Chapter draw on a research paper written by Daniel Scher, University of Michigan, 2012.

two poorest former Soviet republics eventually replaced the semi-presidential model with a parliamentary system, where the risks of authoritarianism are considerably lower. According to Freedom House data, both states soon displayed signs of democratization of their political regimes. Moldova currently has a transitional government or hybrid regime, and Kyrgyzstan has also showed obvious positive trends: in 2009 the Kyrgyz republic had a consolidated authoritarian regime, which transformed into semi-consolidated authoritarianism by 2013[1]. Unfortunately, in 2017 the democracy score of Kyrgyzstan declined, and the country returned to consolidated authoritarianism.

The development of a new legislative framework was another top priority in the times of transition to democracy and a market economy. This task included repealing old Soviet legislation and drafting new laws regulating relations that were nonexistent under Soviet rule and which appeared on the agenda during the transition to a market economy. Amending Soviet legislation was viewed as a temporary half-measure intended to be used before adopting new legislation. Obviously, even after numerous alterations intended to modify Soviet legislation to fit the needs of the transition period, old Soviet laws had to be replaced as soon as possible. Despite the number and quality of amendments, they could not sufficiently transform the Soviet legislation into the legislation necessary for the transition period, when the social system, the national economy, and key priorities were all undergoing fundamental transformation. First, all civil and criminal laws had to be replaced. Soviet criminal legislation was the quintessence of the repressive nature of the Soviet system, and all former member republics clearly understood the impossibility of starting a new life with old Criminal Codes. Democratization of criminal legislation became the key task, including a fundamental change of priorities, the maximum possible elimination of signs of the Soviet past, and decriminalization of a number of offences. The main functions of the Soviet Criminal Codes (protection of the Soviet social and state system, its political and economic system, the socialist legal order, etc.[2]) had to be changed. The 1990s saw a long-awaited humanization and modernization of Russian criminal law. The 1996 Russian Criminal Code brought a fundamental change in the highest priorities of Russian criminal law: the emphasis was put on protection of the individual. Legality, equality before the law, and liability based solely on guilt, justice, and humanism became the basic underlying principles of the new Code[3]. The fact that these principles are stated signals an intention to depart from the principles and practices of the old Soviet Code, which emphasized "protection of the social structure of the USSR, its political and eco-

1 Freedom House. Nations in Transit. 2009, 2013. Retrieved from https://freedomhouse.org/report/nations-transit/nations-transit-2016

2 Art. 1 of the RSFSR Criminal Code of 1960. Harold J. Berman. Soviet Criminal Law and Procedure: the RSFSR Codes (Harvard University Press, 1972), 126.

3 The RF Criminal Code of 1996, art. 3–7.

nomic system … and socialist law and order"[1]. Soviet civil law was also a misfit for the transition period. The administrative-command system was eliminated, and transition to the market system implied the full-fledged transformation of the socialist national economy. Such fundamental changes called for urgent civil law reform, with restoration of the fundamental importance of this area of law and development of new civil legislation to be the top priorities.

The deformation of legal consciousness in all segments of society was another big problem, with the Soviet attitude towards work playing a significant role. People were not motivated, since their salaries rarely depended on how well they worked. The socialist type of economy engendered disrespect for private property. As for attitude towards the law, Russian public opinion always displayed legal nihilism and disrespect for law. A strong dislike for courts and judges was another persisting factor. Unlike many other countries (both common law countries and continental law ones), in Russia — regardless of the regime in place — public opinion demonstrates a negative attitude towards the courts and judges. Before 1917, judges in tsarist Russia were disliked and unpopular, a situation well-described in the books of the great Russian writers Nikolai Gogol, Alexander Ostrovsky, and Fyodor Dostoyevsky. Their unforgettable characters and comments provide a grim picture of public perception of the judicial profession in tsarist Russia. While it is convenient to blame everything on the Communists, to a large extent the political concepts and practices of the Russian Communists reflected the traditional Russian attitudes towards law and state. The Russian state has always had difficulties in instilling respect for the rule of law, either on the part of its citizens or its officials[2]. The Marxist-Leninist perception of law as a temporary institution that would be needed only in the period of the dictatorship of the proletariat before the victory of socialism and creation of a classless society was a sort of logical continuation of the pre-existing attitude. Under Soviet rule, this attitude acquired a new characteristic: in pre-revolutionary Russia, most people simply disrespected judges; after the revolution this disrespect was supplemented by fear.

In his book *Little Country That Could,* Mart Laar, the father of Estonian reforms and former Prime Minister of Estonia, comments on specific features of the transition of a group of post-socialist countries, including Estonia. According to Laar, in these countries socialist governments were supported and maintained mainly through repression, so many people deeply resented the Soviet presence, and the legacies of democracy and the market remained strong. For these countries the transition was a sort of "return to the future", to the point where their normal development had been stopped by forced Sovietization. People in these countries remember how markets and democracies functioned in the past. In some of these countries market instincts were never totally killed. That is the main reason why

1 Peter B. Maggs, Olga Schwartz, William Burnham, Law and Legal System of the Russian Federation,(Juris Publishing Inc., Huntington, New York, 2015, Sixth ed.), 765.

2 *Ibid*, 6.

their transition has been far easier than it has been, for instance, in Russia, where democracy and private property had very weak roots. Laar underlined that collectivization did not take place in Central and Eastern Europe to the same extent as in the Soviet Union; also, Central and East European states retained diplomatic services, armed forces, police, customs and other structures.[1]

An increase in the crime rate was another problem that all post-Soviet states faced after regaining independence. Political instability together with an almost catastrophic state of the national economy inevitably resulted in the escalation of crime. This problem had to be handled by former Soviet militia, and the Soviet-style militia was incompatible with the goals of the transition period. Adaptation of the militia to the new system of values and new circumstances including the transition to democracy and making protection of rights and freedoms of people a key priority was one of the most important and challenging tasks. As a first step, two big problems had to be solved: to create a new mode of militia-public interaction, under which militia focused on protection, rather than enforcement (as opposed to the role of militia in the Soviet republics, where the militia "were not set up to *serve* but to *command* their populations"[2]), and to convince people that the militia had truly changed. Unlike many state security services, which deal with external threats, militia are exclusively focused inwards. Only militia have the power to use force against fellow citizens. Such power must be given to proper people, who are trained in the proper way, subject to proper constraints, and properly sanctioned when necessary. Whether citizens like it or not, they may interact with the militia on an almost daily basis — much more often than with the representatives of other force structures. In emerging democracies trying to depart from their authoritarian past, it is vital for the legitimacy of the state that police-citizen interactions are compatible with the values of a democratic society[3]. In the transitional period, the militia (which is usually renamed and is referred to as "police") acquires a crucial role. First, the activity of the police will impact on the success of nascent democratic institutions. Police can either help or dramatically hinder processes critical to democracy, including voting, speaking in public, publishing, assembling, voicing opposition, and participating freely in the politics of the state.[4] The activity of the police can strongly influence the success of emerging democratic institutions.[5] A duly trained police service can maintain stability

1 Mart Laar, Little Country That Could (Centre for Research into Post-Communist Economies, London, 2002).

2 Niels Uildriks, Police Reform and Human Rights: Opportunities and Impediments in Post-Communist Societies, (Intersentia, 2005), 17.

3 David Bayley, Changing the Guard: Developing Democratic Police Abroad (Oxford University Press, USA, 2005), 18.

4 *Ibid*., 18

5 Niels A. Uildriks, Policing post-communist societies: police-public violence, democratic policing and human rights (Open Society Institute, New York, 2003), 8.

during the turbulent time of transition and "play an important role during these periods of uncertainty that are notorious for the accompanying problems of public and political disorder, crime and violence, and poverty and disorientation of the population." Being the most visible arm of state authority, police can provide a valuable demonstration of the character of the new society. If citizens have repeated interactions with courteous, professional police, they may gain increased confidence in and lend support to their new government.[1]

When reforming a repressive militia force structure in the context of a new democracy, the end-goal is the creation of a *civilian democratic police service*.[2] There are various definitions of what constitutes a civilian democratic police, but two common ideas are that a democratic service is one that is both "downwardly responsive" and accountable.[3] The fundamental difference is the following: a downwardly responsive service is one that responds "down" to the needs of citizens, rather than "up" to the demands of the state.[4] A "downwardly responsive" service must be accountable to elected, civilian authorities, rather than a shadowy security structure. Further, civilian democratic police must also be accountable to the public, through media, civilian groups, NGO's, complaints boards, and the like.[5] That is the only way to transform a repressive police *force*, which protects the state from its citizens, into a police service that works for the people.[6] Like any other reform, the police reform cannot be conducted outside of other reforms of the criminal justice sector, and the success of police reform strongly depends on the efficiency of transformation of other institutions connected to or interacting with the police. Nevertheless, the centrality of police reform cannot be over-emphasized.[7] An undemocratic state can have a civilian democratic police force; but a legitimate democracy cannot exist with a non-responsive, unaccountable, authoritarian police force, which works against the people and not for the people.

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1 Bayley hints at this point when he notes that one cannot have an authoritarian police force in a democratic state. See Bayley, supra note 5, 18.

2 United States Institute of Peace, Criminal justice reform in post-conflict States: A guide for practitioners (USIP, New York, 2011), 81.

3 David Bayley, "The Contemporary Practices of Policing: A Comparative View", in US Dept. of Justice, Civilian Police and Multinational Peacekeeping: A Role for Democratic Policing (National Institute of Justice, 1999), 4.

4 *Ibid*.

5 *Ibid*., 5

6 Annette Robertson, "Criminal Justice Policy Transfer to Post-Soviet States: Two Case Studies of Police Reform in Russia and Ukraine". European Journal on Criminal Policy and Research (2005). 1–28. Robertson, A. Eur J Crim Policy Res (2005) 11: 1. doi:10.1007/s10610-005-2290-5

7 Theodore P. Gerber and Sarah E. Mendelson, "Public Experiences of Police Violence and Corruption in Contemporary Russia: A Case of Predatory Policing?", 42(1) Law & Society Review, (2008), 1–44, 9.

CHAPTER 2. REFORMS IN RUSSIA. CONSTITUTIONAL AMENDMENTS – 2020

Russian Reforms were launched during the period usually referred to as the "wild 1990s". This period was characterized by, among other phenomena, the rampant growth of street crime, political instability, economic hardships, the appearance and vigorous development of organized crime, a deepening of social differentiation, and the flourishing of corruption. For many Russians "the wild 1990s" also meant a decrease in living standards and a considerable loss of safety, but it was also a time of rapid and fundamental changes. It was then that Russia started the comprehensive process of transformation which brought about freedom of the press, freedom of speech, political competition, democratic elections, and other unprecedented things that were unheard of under Soviet rule. Results of the first years of Russian reforms were above all possible expectations. This short period was beautifully described by Leon Aron:

> "Within a few years, this national soul-searching led to the rethinking of some of the most fundamental aspects of my country's existence: one-party dictatorship and state ownership of economy; the country's relations with the outside world; the legitimacy of the Soviet Union's control over east-central Europe and Moscow's control over constituent republics. The onrush of new ideas and ideals engendered the thirst for freedom of speech and press, free elections, human rights, private property, and civil society independent from the state. Judging by public opinion surveys and, more important, the votes cast by millions of Russians in the increasingly free elections between 1989 and 1991, this must have been one of the shortest successful national intellectual and moral reorientations in modern history"[1] .

Russian reforms started in a time of hardships, troubles and sorrows. Obviously, it would have been naive to expect that the transition from Soviet rule to a more democratic regime would be smooth and easy. The dissolution of the Soviet Union was similar to emergency surgery and thus it involved pain, suffering and a variety of complications. However, there was no chance to avoid it and, once done, this surgery demanded a recovery period. This recovery period occurred in the 1990s.

1 Leon Aron, Roads to the Temple (Yale University Press. New Haven and London, 2012), 2–3.

The dissolution of the Soviet Union was legitimized in December of 1991, but *the de facto* collapse of the huge federative state had started much earlier, and in 1991 it simply came to its logical end. Boris Yeltsin found himself in a position where he had to deal with the multilayered Soviet legacy, to prevent chaos both in politics and in economics and to take measures initiating the transition to a market economy and a more democratic political regime. That was an enormous task and a big challenge, especially for a former Soviet apparatchik and Communist official who happened to become the leader of the Russian democratic movement. Given the circumstances and details of Yeltsin's background, there would have been little surprise if the new Russian leader had succumbed to the temptations of dictatorship, as happened in a number of post-Soviet countries. The decline of the national economy in 1991 could have served as a sufficient excuse for introducing elements of authoritarianism. But

> "despite his Communist past Yeltsin believed, recognized and appreciated the principle of the rule of law, the necessity of protection of human rights and freedoms, private property, market economy, and political competition. He made it perfectly clear from the very beginning that his choice was transition to real, and not declarative, democracy"[1].

Usually, Gorbachev and Yeltsin are depicted as contrasting political figures. Georgy Satarov, Yeltsin's former aide in 1994–1997, strongly disagrees, stating that it is hard to imagine two politicians having so much in common, despite obvious differences in their tempers, habits and political style. According to Satarov[2], the most obvious similarities include the following:

1. Both were self-made men.
2. Both were products of the Soviet system turned spontaneous democrats.
3. Both came to power as anti-crisis managers. Gorbachev was elevated by the Communist gerontocracy, which understood and anticipated the unavoidable crisis of the Soviet totalitarian system. Yeltsin came to power when the crisis was already going at full steam and had to be resolved in a situation where many highly respected people hesitated to take responsibility.
4. Both were extremely and genuinely popular at the onset of their political careers and almost completely lost their popularity in the end.
5. Both turned out to be victims of the unintended outcome of their decisions and actions under unprecedentedly complicated circumstances, wherein the joint efforts of even the best experts could not have prevented errors.
6. Both made mistakes and were repeatedly criticized for it. But in many cases both Gorbachev and Yeltsin accepted the entire responsibility for hard and unpopular decisions.

1 Anders Aslund, Russia's Capitalist Revolution: Why Market Reform Succeeded and Democracy Failed (Peterson Institute for International Economics, Washington, DC, 2007).

2 Personal interview with Georgy Satarov, February of 2016.

7. Their shortcomings and mistakes frequently appeared to be a continuation of their good qualities. For instance, both had a propensity for compromise.
8. Both resigned voluntarily and were not afraid of possible consequences of resignation.

When Yeltsin came to power, Russia's problems were not limited to the economic and political crisis; ideologically the country was also in ruins. The Communist party, formerly "the leading and guiding force of the Soviet society and the nucleus of its political system", was harshly kicked off the pedestal by virtue of three presidential decrees:

- No. 79, "On Suspending of Activity of the Communist Party of the RSFSR"[1] of 23 August 1991;
- No. 90, "On Property of the CPSU and the Communist Party of the RSFSR"[2] of 25 August 1991;
- No. 169, "On Activities of the CPSU and the Communist Party of the RSFSR"[3] of 06 November 1991.

The highly politicized issue of the constitutionality of these decrees as well as of the CPSU and the Communist party of the RSFSR quickly reached the Constitutional Court, which handled the politically charged case of the Communist Party of the Soviet Union, even though the Law "On the Constitutional Court" established an outright ban on the consideration of political issues[4]. In order to circumvent this prohibition, in April 1992, the then-Constitution of the RSFSR, which had remained in force since 1978, was amended with article 165.1 of the constitution, establishing, in particular, the right of the Constitutional Court to adjudicate on the constitutionality of political parties and other public associations. The Solomonic ruling of 30 November 1992, was the first of a number of masterpieces of juridical casuistry from the Russian Constitutional Court, and its main goal was to prevent another political crisis. The Court commented on the crucial question of constitutionality of the CPSU and the Communist party of the RSFSR in the following way:

> "Whereas in August–September of 1991 the CPSU factually disintegrated and lost the status of an all-union organization, dissolution of decision-making organizational structures of the CPSU and the CP RSFSR was found in conformity with the Constitution of the RSFSR, and the CP of the RSFSR was never institutionalized as an independent political party, pursuant to Article 165.1 of the Constitution of the RSFSR, Art. 44 para. 5, Art. 62 paras.1 and 2 of the Law "On the Constitutional Court of the RSFSR", ad-

1 Available at http://www.kremlin.ru/acts/bank/134
2 Available at http://kremlin.ru/acts/bank/144
3 Available at http://kremlin.ru/acts/bank/385
4 Art. 1 para.3 of the RSFSR Law "On the Constitutional Court" of 1991. Retrieved from http://pravo.gov.ru/proxy/ips/?docbody=&nd=102012069&rdk=&backlink=1

> judication of the request to verify constitutionality of the CPSU and the CP RSFSR shall be terminated"[1].

According to Donald Barry and Yuri Feofanov, no one anticipated that the Constitutional Court would reach such a decision[2]. However, the Constitutional Court did exactly what it was expected to do: it gave a political answer to a political question. Justice Gadis Gadjiev, who became a member of the Constitutional Court in 1991, mentioned in his interview to *Novaya Gazeta*:

> "It was really hard to come up with this decision, it was a huge compromise. I had voted for this verdict. While making up this decision we based it more on political reasons than on juridical logic. We felt that if we had taken a radical approach and ruled that both the top structures of the Communist Party and the party itself had been illegal, it would result in a split in the society"[3].

According to the Constitutional Court's ruling, the prohibition of the high organizational structure of CPSU and the Russian Communist party was found constitutional. The primary territorial party organizations were found legal and were given the right to carry out activity in conformance with the law[4]. Given the emotions boiling over the future of the Communist party, the top priority on the 1991 agenda was the national economy. The rampant economic crisis cried out for instant deregulation and financial stabilization[5]; five working groups were developing various reform programs, and finally, Yeltsin opted for the program suggested by Yegor Gaidar and his colleagues from the Institute of Economic Policy. Being an experienced apparatchik, Yeltsin considered it impossible to have a 35-year-old nonpolitician confirmed as the head of the Government by the Russian Parliament.[6] Moreover, he decided to take personal responsibility for the painful and unpopular economic reform, under which the liberalization of prices was one of the cornerstones. On 28 October 1991, Yeltsin announced the "shock therapy" program on the opening session of the Fifth Congress of People's Deputies of the RSFSR and requested the power to rule by decree for a one-year period until 1 December 1992. The Congress had no alternative to suggest[7], and vested Yeltsin with emergency powers in the sphere of economics, including the power to combine the positions of presi-

1 The Decision of the Constitutional Court of Russia No 9-P of 30 November 1992. Translated. Retrieved from http://www.lawrussia.ru/texts/legal_383/doc383a242x994.htm

2 Yuri Feofanov and Donald Barry. Politics and Justice in Russia: Major Trials of the Post-Stalin Era, (New York, M.E.Sharpe Inc., 1996).

3 http://www.novayagazeta.ru/politics/47691.html

4 Yuri Feofanov, The establishment of the Constitutional Court in Russia and the Communist party case (The National Council for Soviet and East European Research, Washington D.C., 1993), 16.

5 Aslund, *op. cit.* note 2..

6 Boris Yeltsin. Zapiski prezidenta (Записки Президента) (1994), 125.

7 Kommersant-vlast, No. 042 of 4 November 1991.

dent and prime minister. Over 6–8 November 1991, Gaidar became deputy prime minister, as well as minister of finance and economy.[1] As explained by Yeltsin, Gaidar's role was to galvanize the paralyzed economy and to make it work. That was cruel, but necessary. While other doctors were discussing the therapy options, Gaidar got the patient out of bed[2].

The new approach to economics demanded a new system of courts able to adjudicate economic disputes under new economic circumstances. As Mikhail Krasnov puts it, the state and departmental arbitrazh systems that operated in the Soviet Union were administrative agencies empowered to settle economic disputes between the Soviet socialist enterprises. In fact, they were much more involved in strengthening *planned state discipline*. General courts had no experience in adjudicating economic disputes, so in order to guarantee the rights and legitimate interests of entrepreneurs, a system of independent arbitrazh courts was created[3]. At the same time, this was an obvious sign that the government had started creating the necessary prerequisites for transition to the market economy.

Within a week after the Law "On Arbitrazh Courts" was passed, another judicial agency came into existence. Setting up of the Constitutional Court was unprecedented for Russia, since it was historically the first organ vested with the power to give a legal evaluation of acts of top governmental officials including the President of Russia. The Law on the Constitutional Court was drafted according to European standards. For the first time in Russia, this law envisaged principles of irremovability and immunity of judges, introduced a ban on involvement in politics and having a second job, and stated that judges should be guided only by the Constitution[4].

The Law of the Russian Federation "On Mass Media", of 27 December 1991 possessed crucial importance for Russian reforms since it repealed the Soviet mode of operation of media. This Soviet mode was based on censorship and strict ideological control via the Communist Party of the Soviet Union, leaving no room for freedom of the press. The model typical for countries without democratic political regimes dictated that the responsibility of the media was to transfer the instructions and ideas of the political elite to the people. In accord with this model, the Soviet media operated on the following principles: the activity of the media shall not undermine the existing regime, and media materials shall not critique the dominant political and moral values of the political regime in question. Censorship was justified by the necessity of the realization of the aforementioned principles. Criticism that targeted the government and contradicted the dominant political mainstream could easily result in criminal prosecution. No wonder journalists and employees of media organizations were not independent.

1 Aslund, *op. cit.* note 2, 92.
2 Yeltsin, *op. cit.* note 10, 132.
3 Gorbuz A.K., Krasnov M.A., Mishina E.A., Satarov G.A., Transformation of Russian Judiciary, a Complex Analysis, (Norma Publishing House, Moscow — St. Petersburg, 2010), 46.
4 Gorbuz A.K., Krasnov M.A., Mishina E.A., Satarov G.A., *Ibid*., 47.

The 1991 Law on Mass Media proclaimed the freedom of the press, the prohibition of censorship, and symbolized the beginning of the era of independent journalism in Russia.

Economic reform was the top priority on the Russian domestic agenda in the early 1990s, but political reform was also needed. The new constitution of Russia was meant to be more than beautiful words; it was meant to be the fundamental law by which Russia would actually be governed. In 1993, each of the prominent Russian lawyers involved in the process of drafting the constitution presented their ideas for the best possible form of government for Russia. The idea of a parliamentary republic (the most sustainable and politically stable system) gained almost no support in the very beginning and became impossible for Russia after the political crisis of September–October 1993. Therefore, the choice had to be made between the presidential and the semi-presidential systems.

Two constitutional drafts (one developed by Sergey Shakhray's working group and the other by August Mishin and Yury Skouratov under the auspices of the Reform Foundation) were based on the American experience: a presidential system where the President is both the Head of State and the Chief Executive. According to Boris Yeltsin's former assistants, the President liked the draft by Mishin and Skouratov. However, very soon, the advocates of the semi-presidential system changed Yeltsin's mind by making the point that in the presidential system, the president cannot dissolve the lower chamber of the Parliament. As a result, the decision was made not to deprive the Russian President of this powerful bargaining chip, of the ability to dissolve the Parliament, and the choice was made in favor of the semi-presidential system, with the Constitution of the Fifth Republic in France as the model.

Fundamentals of the constitutional system of Russia embrace such universally recognized democratic principles as the rule of law, separation of powers, and supremacy of rights and freedoms of the person and the citizen. For the first time, the Russian Constitution included a separate chapter on the judiciary.

> "The 1993 Constitution of Russia proclaimed the independence of the Russian judiciary (arts. 10, 118, etc.), basic principles of organization and operation of courts including judicial independence, administration of justice only by courts, prohibition of extraordinary courts, adversarial procedure and publicity of court proceedings, financing of courts from the federal budget, fundamentals of legal status of judges — independence, irremovability, inviolability (art. 118–123) and established the RF Constitutional Court, the RF Supreme Court, the Higher Arbitrazh Court, federal and other courts (art. 125–128)"[1].

1 Elena B. Abrosimova, Sudebnaya vlast v Rossiyskoy Federazii: systema y printsipy (Judicial power in the Russian federation: system and principles). Moscow, Institute of Law and Public Policy (2002) 68–69.

The transition to the market economy cried out for tremendous changes in the **legal environment**. Reform was needed in all areas of the law. The reinstitution of the fundamental importance of civil law and the abolition of outdated Communist concepts became the major goals of the civil law reform that began with the enactment of special statutes on property and entrepreneurial activity[1]. Aleksandr Makovskii and Evgenii Sukhanov (prominent Russian legal scholars and civil law experts) noted[2] that

> "to a certain extent the preparation of the 1991 Fundamentals was similar to the restoration of old paintings. Numerous norms and institutions lost in the thirties and sixties, norms indispensable to the functioning of a market economy, needed to be restored"[3].

Although the 1991 Fundamentals reintroduced many traditional concepts of market-economy civil law, they had only outlined the contours of the civil law reform. 1994–2006 saw the adoption of four Parts of the new Civil Code that attempted to be fully compatible with market economy principles[4].

The process of democratic transition was impossible without fundamental transformation in the area of **criminal law,** so in 1996 the new Criminal Code of Russia was adopted. Humanization and democratization were the top priorities in the drafting process, which involved the maximum possible elimination of the Soviet legacy, including decriminalization of a number of crimes. The structure of the Special Part of the 1996 Criminal Code displayed a tremendous change of priorities: crimes against a person were made the gravest crimes (whereas in the Soviet Criminal Codes the gravest ones were crimes against the State). The elimination of the principle of analogy, incorporation of article 128 establishing criminal liability for "illegal hospitalization in a psychiatric clinic", and decriminalization of such Soviet-era crimes as anti-Soviet agitation and propaganda, sodomy, vagrancy, illegal currency transactions, speculation, etc., also represent a big achievement in the area of democratization of the Criminal Code of Russia.

The Concept of Judicial Reform in Russia of 24 October 1991 was a fundamental document symbolizing the start of considerable modifications in the judiciary, especially targeting the transformation of Soviet courts into an independent branch of power. The mission of the reformers was to create conditions for imple-

1 William Burnham, P. Maggs, G. Danilenko. Law and Legal System of the Russian Federation. (Huntington N.Y., Juris Publishing Inc., 2009). 307.

2 *Ibid*., 307.

3 A. Makovskii, E. Sukhanov, Osnovy grazhdanskogo zakonodatelstva i predprinimatelskaya deyatelnost (Fundamentals of Civil legislation and Entrepreneurial Activities) in Osnovy grazhdanskogo Zakonodatelstva SSSR i soiuznykh respublik (Fundamentals of Civil legislation of the USSR and Union Republics, Moscow, 1991), 5, 6.

4 Burnham, Maggs, Danilenko, *op. cit.* note 17, 307.

mentation of the principle of decisional independence, which had been envisaged on a constitutional level since 1936[1], but had no chance to be enforced under the totalitarian regime. Judicial independence is a central component of any democracy and is crucial to the separation of powers, the rule of law, and human rights[2]. The institutional independence of courts and the individual independence of judges during the process of reviewing the facts of the case, conducting legal analysis, and making a decision in a case are deeply interconnected. As a practical matter, it is nearly impossible to separate the conditions that threaten the institutional independence of the judiciary and the independence of individual judges in their official capacity[3]. According to Judge Birtles, judicial independence is composed of two foundations. Only together do the two guarantee the independence of the judiciary. These two foundations are the independence of the individual judge and the independence of the judicial branch[4]. As Elena Abrosimova puts it, both drafters of international acts and Russian lawmakers highlight the togetherness of the institutional independence of courts and the decisional independence of judges[5].

The main tasks of Russian judicial reform included, at the first place, adaptation of courts and judges to the new social and economic reality, modernization of the existing Soviet judicial system and transformation of the Soviet courts into an influential branch of power, one independent from the legislature and the executive branch. Protection and observance of the human and constitutional rights of individuals in all proceedings was another important task together with the incorporation of democratic principles of organization and operation of law enforcement agencies into Russian legislation. The Concept highlighted the importance of securing of the proper level of material support for courts, judicial authorities, prosecutors, police, and investigative agencies, as well as proper material support and social services for the employees of courts and law enforcement agencies. Securing of the reliability and increased availability of information on the operation of courts and law enforcement agencies was mentioned as another priority on the agenda of judicial reform.

The aforementioned tasks needed to be completed while taking into account the strong influence of the Soviet past. Russian lawyers have only very recently begun to recognize the tremendous importance of path dependence (the de-

1 Art. 112 of the 1936 Constitution of the USSR. Retrieved from http://constitution.garant.ru/history/ussr-rsfsr/1936/red_1936/3958676/

2 Judge William Birtles. "The Independence of the Judiciary", in The World Rule of Law Movement and Russian legal reform. (Moscow, Justitsinform, 2007) 101–106, 101…

3 Ekaterina Mishina, Melanie Peyser. "From Institutional Independence to Independent Judicial Decision-making: Opportunities for Strengthening Judicial Independence in Russia", in The World Rule of Law Movement and Russian Legal Reform. (Moscow, Justitsinform, 2007), 106–133, 109.

4 Birtles, *op. cit*. note 22, 102.

5 Abrosimova, *op. cit*. note 16, 54.

pendence of institutions on their previous decisions), a phenomenon that was first studied by physicists and mathematicians and then by economists. Path dependence is now a common term in both economics and law. Path dependence can mean just that: where we are today is a result of what has happened in the past, i.e., "history matters". Factors from the Soviet past that still affect Russian courts today due to path dependence can be divided into three groups. External Factors (group No 1) include, at the first place, the fact that under Soviet rule courts did not constitute an independent branch of power. This is not surprising, since the principle of the separation of powers was not compatible with the totalitarian regime that existed in the USSR. Soviet state power was based on the principle of "democratic centralism" that implied total control. Strong dependence upon the Communist Party constituted another external factor. For judges-to-be, membership in the Communist Party of the Soviet Union (CPSU) was a condition *sine qua non*. Directives of the CPSU bodies were fully mandatory for judges and had to be executed immediately. Dependence upon administrative agencies was factor No 3, which primarily related to financial and social issues. In the USSR, judges were one of the most poorly paid positions in the legal profession, so material support, social services, and social benefits for judges had great importance. Also, in certain periods under Soviet rule (especially under Joseph Stalin), the courts were nothing but an element of an enormous repressive machine used for the destruction of life and altering the destinies of millions of people. The courts, both *de jure* and *de facto*, were a part of a unified law enforcement system, which ensured that judges depended upon the CPSU bodies, administrative agencies, the USSR Ministry of Justice (to which the courts were subordinated), and the prosecutors. Internal Factors (group No 2) embraced dependence upon chairpersons of the courts, who played and still play the main role in exercising influence on judges, since court chairpersons enjoy a remarkably wide scope of powers. Factor No 2 was the existing system of the administration of courts and the judicial community (i.e. Judicial Councils, Qualification Commissions and Self-Governing Bodies), which was used to exercise influence on the content of judgments and the procedures for decision-making. Dependence upon higher courts, especially the highest (supreme) courts constituted the internal factor No 3. Soviet judicial mentality constitutes the third group and includes, as was described above, specific self-identification of judges, accusatory (prosecutorial) bias, impact of previous career and professional deformation, wherein judges identify themselves as governmental officials and not as independent arbitrators; while adjudicating a case, they are oftentimes guided by the acts of the executive branch instead of federal laws.

Although a highly important and well-drafted document, the Concept of Judicial Reform has serious deficiencies. The necessity of fundamental transformation of the role of court chairpersons was not even mentioned, and this issue turned

out to be one of the time bombs of the Russian judicial reform.[1] Whereas many provisions of the Concept addressing the new status of judges were replicated in the 1992 Law on the Status of Judges in the Russian Federation, the powers of court chairpersons were altered in a non-reformatory way, with the Law on the Status of Judges actually further extending the powers of court chairpersons in relation to judges[2]. The fact that the necessity to reform the role of court chairpersons was ignored by the authors of the Concept had a far-reaching negative impact on the Russian judicial reform.

Several years ago, Professor Mikhail A. Krasnov, a prominent contemporary Russian legal scholar, produced important research which he called an "audit of Russian judicial reform"[3]. In this work, he stated that in the very beginning, Russian judicial reform was substantive, and was generally done in accordance with the provisions of the basic founding document, the 1991 Concept of Judicial Reform. In 1993 a new impetus came from the adoption of the Russian Constitution, which outlined the separation of powers and an independent judiciary. Despite this bright start, it is impossible to say that the establishment of an independent judiciary was high on the political agenda, and quite soon the movement for reform became sluggish. In the mid-1990s, the relative unimportance of judicial reform became even more obvious. A new burst of attention to the judiciary came in the beginning of the 2000s. But, as Krasnov puts it, judicial reform would have been better off without this attention, since coupled with the increased financial support for the courts and the improvement of their material circumstances, the attention effectively established a strict dependence of the judiciary upon the political powers that be.

In assessing the results of the Russian judicial reform, we must stress a number of its considerable achievements, at the first place, outlining the principle of the separation of powers in the Russian Constitution (whereby the courts obtained the status of an independent branch of state power) and the adoption of a considerable number of new laws and procedural codes regulating the status of courts, judges, and the implementation of different types of judicial proceedings. Other main achievements include the establishment of the bodies of the judicial community, setting up the federal Constitutional Court and the constitutional (charter) courts of the subjects of the Russian Federation, and the establishment of justices of the peace. Hendley notes that "what marks the JP courts as unique is their relative independence", which is rooted in the lack of political importance of the case they handle and their odd place in the institutional structure"[4]. The re-

1 Gorbuz A.K., Krasnov M.A., Mishina E.A., Satarov G.A., *op. cit.* note 14, 58.
2 *Ibid*., 56, 59.
3 See Mikhail Krasnov. Sudebnaya reforma: Ot Konzepzii 1991 goda do segodnyashnego dnya (Popytka Inventarizatsii). Doklad (Judicial reform: from the 1991 Concept until today (an Attempt at an Audit) (Report)). Moscow, 2001.
4 Hendley, *op. cit.* (2017), 176.

vival of jury trials, which had existed in Russia before 1917, also comes as a highly important development. Salaries of judges were increased to the point where Russian judges are well-paid. Considerable progress in the enforcement of judgments must be also noted. Slowly but steadily, Russian courts started to depart from the Soviet tradition of total secrecy of activities of all governmental agencies and became more transparent[1].

One of the main failures of Russian judicial reform is the fact that Russian judiciary has not become independent *de facto*; it still depends strongly upon the President and the executive branch. Many recent examples of improper law enforcement leading to the perversion of the initial intent of lawmakers constitute another huge failure; in many cases, the inadequate application of Russian legislation has brought unexpected and negative results. The Constitutional Court of Russia, which initially operated as an independent body, is under strong political pressure today. Efforts to improve the infrastructure and financing of the courts have been matched by attempts to limit institutional independence and power through changes to the makeup of judicial qualification collegia and even the power of the Constitutional Court of statutory review[2]. Though the draft law on administrative courts was passed in the first reading in November of 2000, Russia still lacks a separate system of administrative justice[3]. Within the last several years, the status of Justices of the Constitutional Court was modified several times in violation of one of the fundamental principles that ensure independence of the judiciary. Elimination of the bicameral structure of the Constitutional Court had a bad impact on its operation. Certain decisions made in relation to the Constitutional Court clearly demonstrated that the status of Justices could be arbitrarily changed. The main problem is that judges are constantly reminded that regardless of their wishes, their status can be changed at any moment[4]. The operation of jury trials in Russia faces numerous problems. People do not want to be jurors, and jurors experience strong external pressure and feel unsafe. The matters subject to jury trials have become more and more narrow. Despite almost 30 years of judicial reform, many judges still possess accusatory bias and lack decisional independence. There is still no proper system of training for incoming judges that would be enough to meet the standards and requirements of democracy and market economy.

1 Abrosimova , *op. cit*. note (2002) 166.

2 See Solomon, Peter H. Jr. "Threats of Judicial Counterreform in Putin's Russia," 13 (3) Demokratizatsiya. (Summer 2005), 325–345.

3 http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=PRJ&n=7085#044429023590582994

4 For further details see an interview with Tamara Morschakova, a retired Deputy Chief Justice of the Russian Constitutional Court, at http://www.imrussia.org/ru/rule-of-law/151-tamara-morschakova-recent-changes-in-russian-legislation-resulted-in-a-considerable-decrease-of-the-legal-status-of-the-constitutional-court

Moreover, certain experts (including former insiders of the judicial community) think that there are obvious signs of judicial counter-reform in Russia. Prime examples include further politicization of the judiciary with Russian courts being transformed into political tools. Hendley argues that "this does not always require arm twisting. More pliable judges are assigned the politically tricky cases"[1]. Further limitation of the scope of jury trials also sends a warning message. The lifetime term of judges was changed to appointment until 70 years of age, unless otherwise established by a federal constitutional law[2]. A further increase in the power and role of court chairpersons, "who act as the enforcers of the political will", is another sad sign of judicial counter-reform.

In October 2013, a draft of the constitutional amendment titled "On the Russian Federation Supreme Court and Prosecutor General's Office" was submitted to the State Duma. This is how the explanatory note to the bill outlines its main goal: "intending improvement of the court system of Russia and strengthening its unity, to form a single supreme judicial body for handling civil, criminal, and administrative cases, as well as resolving economic disputes and other cases. The Supreme Court of Russia can become one [unitary]"[3]. The bill proposed abolishing the Higher Arbitrazh Court and transferring its functions to the Supreme Court. That is how the lawmakers planned to ensure "the uniformity of approaches in the administration of justice in relation to individuals and legal entities, eliminate the possibility of denial of access to judicial protection, and maintain uniformity of judicial practice"[4].

The bill was enthusiastically approved and passed all required stages of the legislative process. The proposed constitutional amendments received the approval of more than two-thirds of the subjects of the Russian Federation, and the law entered into effect on 6 February 2014. On 5 February 2014, the new federal constitutional law on the Supreme Court of the Russian Federation also entered into effect.

What happened after that is usually termed by the media the "unification" or "merger" of the Higher Arbitrazh Court and the Supreme Court. This definition seems to be a misfit: pursuant to the Civil Code of Russia, merger means unification of two or more legal entities into one new legal entity, provided that the independent existence of these legal entities is terminated. The course of events signals that the notions of "unified" and "created on the basis of the former Higher Arbitrazh Court and the Supreme Court of the Russian Federation" are used in-

1 Hendley. Op. cit. (2017), 176.

2 Art. 11 of the 1992 RF Law "On the status of judges in the Russian Federation". Available at http://www.consultant.ru/document/cons_doc_LAW_648/17cbf059db6b40e61557bf28e28a88a797625d8d/

3 The text of the explanatory note can be found here http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgent&RN=352924-6&02

4 *Ibid*.

correctly. Even the text of the law clearly reveals this error: "The Higher Arbitrazh Court of the Russian Federation is being abolished and the judicial matters falling within its competence are being transferred to the jurisdiction of the Supreme Court of the Russian Federation." There is not a word about the unification of the two supreme courts. On the contrary, the law states directly and unequivocally that one of the courts is to be abolished and the matters under its authority are to be transferred to the other one. In a nutshell, it is not a *unification,* but an *acquisition*. Thus, Russia's current Supreme Court is not a new court, but simply a new version of the old Supreme Court that swallowed the Higher Arbitrazh Court and established a strict admission filter for its former judges seeking to hold judicial positions in the Supreme Court. In some ways, this event suggests parallels with the maneuver that is usually referred to as a *hostile takeover.*

When Russia started its transition to the market economy and reintroduced private property, that process necessitated the regulation of numerous new areas. Disputes arising from legal relations in these new areas were to be handled by judges of the newly created arbitrazh courts. These judges had the same Soviet legal background as did their peers from the system of general courts, and Soviet legal education did not offer courses on banking law, corporate law, telecommunications law and other areas of law that appeared in Russia at the onset of reforms in the early 1990s. Consequently, arbitrazh court judges faced the necessity to undertake professional training in order to fill the gaps, and by doing so, a new generation of highly professional arbitrazh court judges able to solve the most complicated conflicts of law came into existence.

The quality of arbitrazh court decisions is apparently higher than the quality of judgments delivered by numerous judges from the courts of general jurisdiction, and this fact is obvious both for members of the legal profession and for non-lawyers[1]. The political nature of arbitrazh courts is considerably less pronounced than that of courts of general jurisdiction, and they recur to punitive actions less often. The way how arbitrazh courts respond to changes is also different. Professor K. Hendley points out that "courts of general jurisdiction remain stubbornly resistant to modernizing further. The arbitrazh courts have begun experimenting with electronic filing and sending notices via electronic mail"[2].

Chances are high that the acquisition of the Higher Arbitrazh Court by the Supreme Court will have a negative impact on the judges of arbitrazh courts. The aforementioned desire to ensure *"uniformity of approaches in administration of justice"* does not necessarily mean raising the judges of general courts to the professional level of arbitrazh court judges; it may work in the opposite direction. If

1 This assumption was confirmed by the results of the World Bank project on "Efficiency of Interaction between Courts and Mass Media" under the Judicial Reform Support Project (Contract No. JRSP/2/A.4.1 of 25 November 2010), project report, 77–80.

2 Hendley K. Everyday Law in Russia (Cornell University Press — Ithaca and London, 2017), 158.

worst comes to worst, it will be another confirmation of the statement that Russia does not need highly professional and well-educated judges.

Transformation of the Russian judicial workforce into a highly self-protective and closed entity became one of the most visible results of the Russian judicial reform. This entity is constantly trying to perpetuate or replicate itself, and vigorously opposes changes. Judges who take the risk of acknowledging the shortcomings of the Russian judiciary or who dare to resist the pressure are either removed from the bench or face numerous problems.

Russian media have more than once announced the inevitably approaching but always allegedly successful completion of these reforms. In 2004, the Chairman of Russia's Supreme Arbitration Court, Veniamin Yakovlev, said that "the judicial reform is essentially completed and does not need any important structural adjustments." I share the same view as some of my colleagues, who believe that Russian judicial reform was partially completed. According to Elena Abrosimova, the Russian judicial system was fundamentally transformed. However, if we compare the basic features of the Soviet and Russian court systems, it becomes obvious that the Russian judiciary is still based on the principle of strict centralism, which makes Russian courts controllable and easily manipulated. There is still a way to go to the final stage of transformation of the Russian judiciary, when citizens of Russia will be granted access to fair, legitimate, and law-abiding courts[1].

The picture of Russian reforms would be incomplete without mentioning police reform. Police reform was launched in Russia much later than in other post-Soviet states. President Dmitri Medvedev announced his plans for reforming the Russian police, then known as the militia, in December 2009. The bill on police reform was presented as a part of Medvedev's corruption-fighting campaign and was designed to bring Russia's troubled law enforcement system closer to international standards by increasing professionalism and respect for rights among officers, diminishing the rate of corruption, and raising public confidence in the police force[2]. The adoption of this law was preceded by heated public debates. The prospect of police reform attracted so much interest that Medvedev posted the draft of the law online for public commentary; of 33,000 comments posted, 20,000 contained concrete suggestions for changes to the text. Similarly, at the Duma, 560 amendments to the law were proposed before it was passed in an accelerated approval process in February 2011[3]. On 1 March 2011, Federal Law FZ-3 of 7 February 2011 "On the Police" took effect. After more than five years of enforcement of this law, there are sufficient grounds to state that the Law on the Po-

1 Abrosimova, *op. cit.* note 16 169.

2 Policing reforms: Democratizing Russian Law Enforcement and the Federal Law "On the Police". 14 December 2011, 1. The text of the report may be found at http://imrussia.org/media/pdf/Research/Sasha_de_Vogel__Reforming_Police.pdf.

3 Sasha de Vogel. Reforming the Police. 16 October 2012. http://imrussia.org/en/analysis/law/316-reforming-the-police.

lice failed to become the basis of transformation of the post-Soviet militia into an efficient police service. The Russian experience tells us that the letter of the law does little to ensure change — what matters is whether the law will be enforced. In Russia, people are often more afraid of the police than of criminals. It will take many years for Russians, who are used to "police lawlessness", to develop trust in the authorities. To undertake the long-awaited fundamental transformation of the Russian militia on the basis of this law is unrealistic due to the ambiguity of its provisions, which implies a high risk of arbitrary interpretations, and the lack of a strict accountability scheme. A great deal of commentators corrections and amendments, which could have made the text of the law much better, were not taken into consideration in the process of preparation of the final version of the bill. The result was frustrating: the quality of wording of the Law on the Police is far from perfect. This law is less of a basis for reform than it is proof of a lack of interest in carrying out real police reform. Measures suggested in the law are mainly cosmetic and provide no guarantee of protection from the lawlessness of the Russian Police.

Analyzing the evolution of the *rule of law* under Putin, Hendley notes a shift from *pravovoe gosudarstvo* to *gospodstvo zakona (*supremacy of written law) and argues the literal translation of this phrase reveals its qualitative difference from the Gorbachev-era term[1]. Under Gorbachev, "*gospodstvo zakona"* was presented as a necessary but not sufficient condition for "*pravovoe gosudarstvo" […]*. For Putin, however, the goal is "*gospodstvo zakona". […]* Belying its literal meaning, it has come to be understood as giving officials a wide berth to decide when and to whom to apply the rules. It is more consistent with rule by law than rule of law.

Major changes during the 1990s–2000s affected the specific features of Russian corruption[2]. Corruption has been an essential part of Russia's life for centuries, regardless of the form of government. In Russian imperial times, the taking of bribes was so natural that no one ever even thought of fighting against it. In this regard, the main question that arose was not whether bribe-taking was right, but rather *what* to take to the official in question — did he accept money, gifts, or something else? During that historical period, the rule of thumb for bribe-takers was "take according to your rank." As usually happens, drastic societal transformation was accompanied both by growth of corruption and by changes in the nature of corruption. The first change was the transition from "imperial-totalitarian" corruption to market-style corruption.

Soviet-style corruption was totalitarian in nature and had two fundamental characteristics: the first was a shortage of all possible goods and the centralized distribution of existing resources; the second was an informal agreement between the central authorities and the regional elites — the latter demonstrated

1 Hendley (2017), 229.

2 This section draws on findings and research conducted by the Russian foundation Information Science for Democracy (INDEM).

their loyalty to the former, who reciprocated by turning a blind eye to the corruption and abuses of the regional authorities. The main areas of corruption under Soviet rule included health care, secondary and higher education, the traffic militia, obtainment of driver's licenses, and others.

The Great Bourgeois Russian Revolution of the 1990s[1] for some time eliminated the prerequisites of Soviet corruption due to the weakening of state authority in general and the exhaustion of resources. The imperial model was replaced by market-style corruption. Since the mid-1990s, the disorderly trade in illegitimate administrative services has been joined by the purchase of favorable governmental decisions and court judgments by large business structures. Amazingly, health care and higher education remained the most corrupted areas.

Recent research conducted by INDEM[2] has made it possible to identify the fundamental characteristics of present-day Russian corruption and the objective trends of its continuing intensification. The most striking features and, at the same time, the causes of its growth are the bureaucracy's effectively total impunity, absence of any external control over its activities, and the specific character of Russia's transition to a market economy and to a different political regime. The list also includes historical precedents, primarily the use of corruption as a means of ensuring the loyalty of the bureaucracy, the Soviet tradition of a total lack of respect for private property, the inclusion of judges in the system of state punitive agencies, and the weakness of civil society. Shortcomings in Russian legislation in general and the enforcement of laws, with the main problem being their selective application, resulting in the establishment of a "shadow", and a quasi judicial system that exists in parallel with the official judicial system, constitute another essential feature of post-Soviet corruption. The immense scale of Russian corruption and its headlong rate of growth together with the Russian society's remarkable tolerance for corruption also play a crucial role. In the citizens' view, corruption has long been a distinctly unpleasant, yet an entirely natural phenomenon. Additionally, many believe that corrupt arrangements offer the best chance of rapid and effective interaction with the authorities, as a result curtailing any motivation among most of the country's population to seek the support of anticorruption measures. Corruption in law enforcement agencies has reached the stage at which it presents a threat to national security. The corruption of officials whose direct responsibilities include blocking the free movement of terrorists and any cargo they are transporting has facilitated the perpetration of a series of terrorist attacks on Russian territory. The INDEM findings unequivocally demonstrate that corruption creates a threat to the safety of the country's population — and this is not just a matter of the corruption of our police (formerly militia), due to which

1 This term was coined by A. Salmin.

2 See Rossiyskaya Korruptsiya: Uroven, Struktura, Dinamika: Opyt sotsiologicheskogo analiza (Russian Corruption: Level, Structure, Dynamics: a sociological study). Georgy Satarov. Ed. (Moscow, Liberal Mission Foundation, 2013).

most Russians are more afraid of a policeman than of a criminal. Venality in organizations expected to comply with established safety standards in areas such as construction, fire safety, and child welfare has been responsible for a series of tragedies in which people lost their lives. Without the presence of corruption, these tragedies could have been avoided, averting the loss of human life. Moreover, Russian corruption has developed into an immense institutional trap. A huge number of officials share the average citizen's belief that the costs of attempting to counter corruption substantially exceed the losses inflicted by its existence. It is totally obvious that hard-hitting measures intended to limit corruption would inevitably entail a sharp increase in the effectiveness of the law enforcement agencies and the courts. Yet this would by no means be to everyone's liking and, furthermore, would make the results of the administration of justice and law enforcement activities less predictable.

According to INDEM's findings, critical factors impeding fighting corruption in Russia include the endemic nature of Russian corruption and the specific features of the political regime, where the autonomy of the branches and levels of power of governmental and non-governmental institutions have been destroyed or greatly undermined. Political corruption and corruption at the top governmental level have become immune to any anti-corruption efforts. These factors embrace degradation and a low level of efficiency in the law-enforcement system, a lack of separation of government and business, uncertainty of property rights, inadequate protection of property by the state. The underdeveloped rule of law and conformism of the judiciary in cases where the executive branch's interests are involved also impede anti-corruption efforts. Another critical factor is the absence of a single center responsible for carrying out anti-corruption policy, hence the dispersion of responsibility, which creates a system wherein no accountability and responsibility at all. An overall lack of transparency of the authorities, including in the development of anti-corruption policy at the federal level, also affects the process. In addition, little coordination exists between the authorities and the expert community. A low level of professionalism and expertise among government officials whose scope of responsibilities includes the development and implementation of anti-corruption policy, has become a real problem. An escalation in the restriction of activities and independence of non-governmental actors (NGOS, mass media, and business) by the "vertical of power" also handicaps and even nullifies anti-corruption efforts.

A second change in the structure and nature of Russian corruption took place at the turn of the millennium. The disorderly and growing market for corruption became more organized and underwent a sort of "crystallization", as organized corruption networks took shape. For example, corrupt networks became able to fabricate a criminal case and then order for it to be dismissed for a bribe. The political turnover that happened at that time went together with the rampant centralization of power, restrictions on activities of opposition groups and independ-

ent media, distortion of federalism, and imposition of control over the legislative process and judicial activities when the interests of the political leadership were involved. Institutions of external control over the bureaucracy were eliminated in the course of three years. With no supervision and external control, the federal government acted as a monopoly, which resulted in the large-scale growth of corruption, especially in business-government relations. Things got visibly worse in the mid-2000s. Systematic measurements of Russian corruption performed with the help of four indexes (Corruption Perceptions Index (Transparency International); Corruption (Freedom House, "Nations in Transit"); Corruption (Heritage Foundation, "Index of Economic Freedom"); and Control of Corruption (World Bank, "World Governance Indicators")) revealed similar trends between 2000 and 2009: decreasing levels of corruption by 2004–2005, and subsequent growth of corruption. That happened in the beginning of the second presidential term of Vladimir Putin, when Russia dropped from 90th to 126th place according to the Corruption Perceptions Index. Over the last five years the average amount of a bribe grew from 9,000 rubles (approx. $300 US) in 2008 to 236,000 rubles (approx. $7,800 US) in 2011 (according to the data of the Ministry of Interior's Department for Combating Economic Crimes). The INDEM experts highlight the following features of Russian business corruption:

1. One tenth of all corruption deals target the legislative and judicial branches. All other bribes go to the administrative agencies. The leaders are fire-safety services, health and safety and epidemiological inspections, tax, customs, licensing, and law enforcement agencies.
2. There is also an interesting shift in the main focus of bribery: whereas previously officials took bribes to shut their eyes to legal infractions, they now take them simply to perform their duties.

In recent years, corruption in Russia has become a business. In the 1990s, businessmen had to pay different criminal groups *in order to get protection*. Nowadays, this "protective" function is performed by officials.

The Russian anti-corruption legislative environment appears extremely impressive. The Presidential Decree "On Fighting Corruption in the system of public service" of 4 April 1992 pioneered the process. A number of anti-corruption measures were envisaged in the Federal law "On Fundamentals of Public Service of the Russian Federation" of 31 July 1995, and then strengthened by provisions of the Federal Law "On Public Civil Service of the Russian Federation" of 27 July 2004. The 1997 Concept of National Security noted that serious mistakes committed in the initial stage of introducing reforms had facilitated the growth of corruption. In the Strategy of National Security adopted in 2009, the development of a framework of anti-corruption legislation was mentioned as one of the priorities. Strategic considerations were reflected in the 31 July 2008 National Plan for Countering Corruption, and the initial version of that document also considered measures for the prevention of corruption. These measures include the establishment of spe-

cial requirements for judicial office and positions in the state civil service, the introduction of public and parliamentary oversight of the observance of anticorruption legislation, the expert anti-corruption appraisal of normative legal acts, the introduction of a formal obligation for state and municipal employees to report instances of corruption and other similar violations of law of which they become aware while performing their official duties, and the introduction of anticorruption standards (a unified system of prohibitions, limitations, obligations and authorizations intended to prevent corruption).

The next important stage was Federal Law No. 273 "On Countering Corruption" (from 25 December 2008), which defined the key concepts in this sphere and envisaged a series of anti-corruption measures. Although this is a framework law that includes a number of referenced legal norms and declarative provisions, it has helped to fill a substantial legislative lacuna and represents the first time that the struggle against corruption is enshrined in Russian federal law. The defects of this law include, in the first place, an excessively narrow legislative definition of corruption and, in addition, the fact that a number of corrupt actions that are recognized as such in most foreign countries (for instance, corruption in the area of lobbying) are not offenses punishable under law according to the Russian legislation.

In 2009, expert anti-corruption evaluations took the central place on the agenda. From then on, a key role in this sphere was assigned to two departments — the Prosecutor's Office and the Ministry of Justice, pompously referred to as "the federal agency of the executive authority in the sphere of justice." It is now the responsibility of prosecutors to conduct an expert anti-corruption evaluation of normative legislative acts with reference to the rights, freedoms and obligations of the individual and the citizen, state and municipal property and state and municipal posts, as well as to a broad spectrum of areas of legislative regulation, including, for instance, taxation and budgetary legislation, and also legislation on licensing. The Ministry of Justice has been assigned the function of conducting expert anti-corruption evaluations of drafts of legislative acts, presidential decrees, and ordinances of the federal government. The law provides for the possibility of independent expert anti-corruption evaluations by institutions of civil society and citizens at their own cost and expense; such independent experts are subject to accreditation by the Ministry of Justice, and their conclusions are recommendatory in nature.

Presidential Decree No. 460 from 14 April 2010 approved a new version of the National Strategy for Countering Corruption and set forth a revised National Plan for Countering Corruption. Another National Plan for Countering Corruption for 2012–2013 followed on 13 March 2012.

On 1 January 2013, Federal Law No. 230 "On Verifying the Correspondence of the Expenditure of Individuals Occupying State Posts and Other Individuals to Their Levels of Income" and a number of related amendments to the current leg-

islation came into force. The new law establishes the legal and organizational foundations for verifying "the correspondence of the expenditure of an individual occupying a state post (or other individual), the expenditure of his wife (or her husband) and their underage children to the total income of the given individual and his wife (or her husband) for the three years immediately preceding the conclusion of a transaction" (Art. 1). The law also extends to individuals occupying state posts at the regional level, members of the Board of Directors of the Central Bank, individuals occupying posts in the Central Bank, a number of state corporations, the Pension Fund, the Social Insurance Fund, and other individuals specified in Article 2 of the law, and likewise to their spouses and underage children. In addition, the list includes the President, members of the federal government and both houses of the Federal Assembly, judges, members of regional legislatures, their spouses and underage children. The decision to undertake verification is taken on the basis of information received in writing from a wide range of sources, beginning with the law enforcement agencies and ending with the governing bodies of political parties and the national mass media (Art. 4).

The authority to undertake the verification of expenditure is held by a large number of agencies and their officers. Failure to provide information requested for purposes of implementing such verification of the correspondence of expenditure to income is an offense, and those guilty of such an offense are liable to be dismissed from the post that they hold. And if, in the course of verifying the expenditure of an individual specified in Article 2, evidence of a crime, or of an offense, administrative or other, is uncovered, the information obtained as a result of the verification process is forwarded to *the appropriate place*, i.e., to the Prosecutor's Office. The next step is the forwarding to a court, by a prosecutor of the appropriate level, of an application for the forfeiture to the state of any parcels of land and other real estate, means of vehicular transport, securities, etc., concerning which no information has been provided to demonstrate that they were acquired with legal income.

It is apparent that the availability of a comprehensive legislative framework cannot ensure the complete success of anticorruption efforts. According to Freedom House data (2015), Russia earns almost critically poor ratings. Russian civil society scores slightly higher compared to electoral process, independent media, judicial independence, national and local democratic governance, corruption, and the democracy score, but the trend is negative (from 5.50 in 2013 to 6.00 in 2015). Electoral process, corruption, and national democratic governance ratings are catastrophic — 6.75, where 7.00 is the lowest. [1] The Corruption Perceptions Index of Transparency International displays certain progress: in 2015 Russia scored 119[2] as opposed to 143 in 2011 and 127 in 2013.

1 https://freedomhouse.org/report/nations-transit/2015/russia
2 https://www.transparency.org/cpi2015#results-table

PUTIN'S CONSTITUTIONAL AMENDMENTS – 2020

On January 15, 2020, in his State of the Union address, Russian President Vladimir Putin presented his proposals for comprehensive changes to the Russian Constitution. In so doing, Putin exercised his constitutional obligation to determine the guidelines for domestic and international policy established by Art. 80 (3) of the Constitution. By virtue of this constitutional provision and legal positions of the Constitutional Court of Russia[1], these guidelines are compulsory for all bodies of state power. The President offered a comprehensive program of changes to be made in the Russian Constitution and emphasized the following important topics:

1. "Russia is and will remain Russia only as a sovereign state"[2].
2. "Social obligations of the state must be fulfilled no matter what. We need a new constitutional norm establishing the minimum monthly wage cannot be lower than the subsistence minimum. Principles of adequate pension coverage shall be also entrenched in the Constitution".
3. Individuals holding offices "that are crucially important for ensuring the safety and sovereignty of the state" cannot have a foreign citizenship or a residence permit from another country[3].
4. "A constitutional provision establishing that the same person cannot hold the office of the President of the Russian Federation for more than two terms is being debated in the society. I do not think that it is a pivotal question. However, I agree with it".
5. «It's important to enshrine principles of the unified system of public authority in the Constitution, to organize efficient cooperation between the state and the municipal organs. Herewith, powers and real possibilities of local self-government (the level of power that is closest to the people) must and shall be extended and strengthened".
6. "To entrust the State Duma with not just coordination, but approval of the candidate for the position of the Chairman of the Government of the RF, and also with approval of all Deputy Chairpersons and federal ministers… This will increase the role and importance of the national Parliament, the role and importance of the State Duma…and will ensure more efficient and substantial cooperation between the legislature and the executive branch"[4].

1 In p. 2 of the motivation part of the Decision No 9-P of November 29th, 2006, the Constitutional Court ruled that obligatory nature of guidelines of domestic and international policy for all public authorities follows from the Constitution.

2 President Putin's State of the Union speech of January 15th, 2020, is available here http://kremlin.ru/events/president/news/62582

3 Op. cit.

4 President Putin's State of the Union address of January 15th, 2020, http://kremlin.ru/events/president/news/62582

7. "The Basic Law shall establish and protect judicial independence, as well as the principle that judges shall be governed solely by the Constitution and federal laws"[1].

Putin also emphasized the key tasks of further constitutional development:

1. To create a strong, reliable, invulnerable and stable system that will guarantee Russia's independence and sovereignty;
2. To create a system that will ensure the rotation of those vested with power or occupying high-ranking positions in other areas[2].

Wasting no time, on January 20th President Putin submitted the draft of the constitutional amendments to the State Duma. In the course of several weeks, the initial draft underwent significant alterations, was approved by both houses of the Russian parliament in early March and was signed into law by President Putin on March 14, 2020. In mid-March, the Constitutional Court of Russia examined the issue of constitutionality of the presidential amendments and found them to be in conformity with the Russian Constitution. On July 04, 2020, constitutional amendments[3] entered into force after the electorate's approval in the course of the "all-Russian voting".

This chapter aims to analyze how the presidential program of constitutional changes presented in his State of the Union address was embodied in the final text of the constitutional amendments. Another goal of the chapter is to see whether these unprecedented constitutional changes were actually needed, and how they affect the constitutional system of Russia and the lives of Russian citizens.

The necessity to ensure and protect national sovereignty on the constitutional level became the focal point of Russian propaganda in March–June of 2020. State-owned media were actively promoting the idea that Russia's sovereignty is in danger. Remarkably, the initial version of the 1993 Constitution addressed both the issue of sovereignty and the issue of preserving the state unity. The Preamble talks about "*preserving the historically established state unity*" and "*renewing the sovereign statehood of Russia*". Art. 3 (1) states that *"the multinational people of the Russian Federation shall be the bearers of its sovereignty and the sole source of power in the Russian Federation"*. Art. 4 proclaims that "*the sovereignty of the Russian Federation shall extend to its entire territory"* and that Russia *"shall ensure the integrity and inviolability of its territory"*[4]. Nevertheless, the 2020 constitutional amendments include new p. 2.1 of Art. 67, which establishes that "t*he Russian Federation shall ensure the defense of its sovereignty and territorial integrity. Actions […] aimed*

1 Op. cit.
2 Op. cit.
3 Article 1 of the Law of the Russian Federation on the amendment to the Russian Constitution. Available at http://www.consultant.ru/document/cons_doc_LAW_346019/3d0cac60971a511280cbba229d9b6329c07731f7/
4 P.1, p. 3 of Art. 4 of the 1993 Constitution of Russia.

at the alienation of the part of the territory of the Russian Federation and also calls for such actions shall not be allowed". This constitutional provision provides an eloquent example of redundant law-making. There was absolutely no need for this new provision, especially because public calls for violation of the territorial integrity of Russia were criminalized in 2014 (the year of annexation of Crimea)[1]. Besides, no attempts to infringe upon Russia's sovereignty or violate Russia's territorial integrity have been detected so far.

The so-called "socio-economic amendments" were also actively advertised by the national propaganda. The people were assured that these amendments would greatly contribute to their well-being and strengthen the obligations of the state. New p. 5 of Art.75 envisages the state's guarantee of the minimum wage no lower than the subsistence minimum. New p. 6 of Art. 75 establishes the general principles of universal pension coverage ("principles of universality, fairness and solidarity of generations"[2]). As stated in the same provision, "the Russian Federation forms the system of pension coverage, […] supports its efficient operation, and performs a cost-of-living adjustment at least annually in accordance with the federal law"[3]. From the viewpoint of state obligations, these amendments do not change anything. The 2001 Labor Code of Russia already established the minimum wage cannot be lower than the subsistence minimum[4]. Art. 7 of the 1993 Constitution of Russia initially proclaimed that Russia a social state that *"shall protect the work and health of its people, establish a guaranteed minimum monthly wage, provide state support for the family, motherhood, fatherhood and childhood and disabled and elderly citizens, develop a system of social services and establish government pensions, benefits and other social security guarantees".*

Contrary to propaganda claims, the "social-economic amendments" actually introduce a new constitutional obligation of Russian citizens: adult children are obliged to take care of their parents[5]. Notably, the 1995 Family Code of Russia already establishes that "adult children, who are able to work, must financially support their disabled parents, who need help, and take care of them"[6]. The amendments extend the scope of obligations of adult children; by doing this, the state partially relinquishes its responsibility to take care of the elderly and transfers it onto their children.

A number of 2020 constitutional amendments prohibits government officials of various ranks from having foreign citizenship or a right to permanent residence in a foreign state. This ban applies to state and municipal officers, highest officers of subjects of the RF, heads of federal bodies of state power, members of the Fed-

1 Art. 280.1 of the 1996 Criminal Code of the Russian Federation.
2 Art. 75 (6) of the Constitution of the RF (as amended in 2020).
3 Op. cit.
4 Art. 133 of the 2001 Labor Code of the RF.
5 P. 1 (g-1) of Art. 72 of the Constitution of the RF (as amended in 2020).
6 Art. 87 (1) of the 1995 Family Code of the RF.

eration Council and the State Duma, judges, prosecutors, federal ministers and other heads of federal bodies of executive power, Chairman of the Government and his Deputies, and also to the President of the Russian Federation. It's hard to fathom how this ban will contribute to the protection of safety and sovereignty of Russia[1], not to mention that it is in breach of Chapter 2 of the 1993 Constitution, which establishes the rights and freedoms of the individual and Citizen. Art. 62 provides that *"citizens of the Russian Federation may have foreign citizenship (dual citizenship) in conformity with federal law or an international treaty of the Russian Federation"*[2]. In the same article, "*a citizen of the Russian Federation who has foreign citizenship shall not suffer any diminution of his rights or freedoms and shall not be released from duties arising from Russian citizenship, unless otherwise specified by federal law or an international treaty of the Russian Federation"3.* This ban also violates provisions of Art. 32 establishing that Citizens of the Russian Federation shall have the right to vote, to be elected to bodies of state power and bodies of local self-government and have equal access to state service. Clearly, these amendments are an attempt to underhandedly modify Art. 32 and Art. 62 of Chapter 2, which, together with Chapters 1 and 9, cannot be revised by the Federal Assembly[4]. These amendments come in a sharp contrast with what the President said in his State of the Union address on January 15th, 2020: " The amendments that we are about to discuss shall not affect the fundamentals of the Constitution and, thus, they can be approved by the Parliament according to the existing procedure and existing laws through adoption of appropriate constitutional laws"[5].

New p. 3-1 of Art. 81 gained notoriety as "Tereshkova[6]'s amendment": " *The provision of Part 3 of Article 81 of the Constitution of the Russian Federation limiting the number of terms in the course of which one and the same person may occupy the office of President of the Russian Federation shall be applied to a person that occupied and/or is occupying the office of President of the Russian Federation without counting the number of terms in the course of which he occupied and/or occupies this position at the time of entry into force of the amendment to the Constitution of the Russian Federation introducing the corresponding limitation and shall not exclude for him the possibility of occupying the position of President of the Russian Federation in the course of the terms allowed by this provisions".* As mentioned above, in the State of the Union address

1 As Putin pointed out in his State of the Union address, "Individuals holding offices "that are crucially important for ensuring safety and sovereignty of the state" cannot have a foreign citizenship or a residence permit from another country"

2 P. 1 Art. 62 of the 1993 Constitution of the RF.

3 P. 2 Art. 62 of the 1993 Constitution of the RF.

4 P. 1 Art. 135 of the 1993 Constitution of the RF.

5 President Putin's State of the Union speech of January 15th, 2020

6 Valentina Tereshkova is a member of the State Duma, a member of the "United Russia" political party and a former Soviet astronaut

Putin said that he agrees with the constitutional provision establishing that the same person cannot hold the office of the President for more than two terms. Draft amendments submitted by the President to the State Duma said nothing about "nullifying" his past presidential terms. Similarly, no new provisions on "nullifying" Putin's presidential terms were added in the course of preparation of the draft for the second reading. The second reading took place on March 10th; on that day MP Tereshkova suggested either to remove the restriction of the number of presidential terms in the Constitution, or to establish the possibility for the incumbent president to be re-elected to this position, already in accordance with the updated Constitution. Putin supported Tereshkova's amendment of "nullifying" his past presidential terms and pointed out that "*In general, this option would be possible, but on one condition: if the Russian Constitutional Court says that it does not contradict the Constitution*"[1]. Both houses of the Russian Parliament approved the amendments, including Tereshkova's one, on March 11th. On March 16th, the Constitutional Court ruled that the amendments are in conformity with the Constitution[2].

Not only did the 2020 amendments nullify the presidential terms of Vladimir Putin and Dmitriy Medvedev[3] — they further strengthened the presidential power. Under amended p. (a) of Art. 83, the President can remove the Chairman of the Government from office at his sole discretion; no confirmation of the Duma or consultations with the Federation Council are needed. The new version of p. (b) of Art. 83 establishes that the President "shall conduct the general leadership of the Government of the Russian Federation". The amended p. 1 of Art.110 provides that the executive power in the RF shall be exercised by the Government of the RF under the general leadership of the President. New p. (e.1) of Art. 83 states that the President shall "*appoint to office after consultation with the Federation Council and remove from office heads of Federal bodies of executive power (including Federal ministers), in charge of matters of defense, state security, internal affairs, justice, foreign affairs, prevention of emergency situations and overcoming the results of natural disasters, and public safety*". In other words, the President has been vested with the power to appoint an impressive number of key ministers after non-binding consultations with the upper house of the Parliament and to dismiss these ministers at his sole discretion. These constitutional amendments bring the letter of the Constitution in line with reality. In the initial version of the Constitution, which introduced a semi-presidential constitutional system, the President was outside of the system of separation of powers. However, during the last two decades the President has been gaining even more power in the area of the executive branch, and, finally, he has been placed on the top of it via the 2020 constitu-

1 https://en.hromadske.ua/posts/russian-duma-approves-motion-enabling-putin-to-remain-in-power-until-2036

2 Opinion of the Constitutional Court of the RF No 1–3 of March 16th, 2020

3 Dmitriy Medvedev served as President of Russia in 2008–2012. In 2012, he served as Head of the Government (prime minister) of Russia

tional amendments. Now the President is both the head of the state and the head of the executive branch. In other words, Russia has been transformed into a presidential republic, where the president retains the power to dissolve the lower house of the parliament. Also, the President will take a more active part in formation of the Federation Council, as he can now appoint as many as 30 members of the upper house[1]. A president who has ended his term in office or resigned before the term has ended will become a lifetime member of the upper house of the federal legislature[2].

Under the revised version of p. (f-1) of Art. 83, the President of the Russian Federation shall "*appoint to office after consultation with the Federation Council and dismiss from the office the Procurator General of the RF and Deputy Procurator General of the RF; procurators of subjects of the RF, and procurators of military and other specialized procuracies equated to procurators of subjects of the RF, appoint to office and dismiss from office other procurators for whom such an appointment and dismissal from office is established by a Federal law*"[3]. Like in the case of various high-ranking officials from the executive branch, the President will be eligible to appoint the candidates of his choice after non-binding consultations with the upper house and to terminate their powers at his sole discretion. This amendment brings the letter of the Constitution in line with the country's historic traditions and confirms that the Procuracy is still "the eyes of the Tsar". Indeed, the Russian procuracy has never quite outgrown its origins as "the eyes of the Tsar" in ensuring that the will of the sovereign be carried out.

The "increase of the role and importance of the national Parliament, the role and importance of the State Duma", which was announced in the State of the Union speech, did not materialize. Most changes were either decorative or pointless. The amended p. 2 of Art. 95 states that "the Federation Council shall consist of the senators of the Russian Federation". Provided that the official name of the upper house of the federal legislature remains the same, there was absolutely no point in introducing this new definition: in the absence of the Senate, the name "senators" sounds grotesque. Apparently, the key goal of this amendment was to flatter the vanity of the members of the upper house. The new p. 5 of Article 95 looks like a generous promise for those who are especially active in supporting Putin's regime: *"Citizens having rendered outstanding services to the country in the area of state and public life may be appointed as representatives of the Russian Federation in the Federation Council exercising the powers of senators for life".* New Article 103-1 provides another example of redundant legislation: "*The Federation Council and the State Duma shall have the right to exercise parliamentary supervision, including the sending of parliamentary questions to the heads of state bodies and bodies of local administration on issues included in the competence of these bodies and officials.*

1 P. (c) of Art. 95 of the Constitution of the RF (as amended in 2020).
2 P. (b) of Art. 95 of the Constitution of the RF (as amended in 2020).
3 P. (f-1) of Art. 83 of the Constitution of the RF (as amended in 2020).

The manner of conducting parliamentary supervision shall be defined by federal laws and the rules of the houses of the Federal Assembly". The right of both houses to exercise parliamentary supervision by sending parliamentary questions (as well as in many other forms) was already established by federal law in 2013[1]. Elevating this right to the constitutional level will not affect the quality and efficiency of parliamentary supervision. However, it does look flattering to the members of both houses of the Russian Parliament.

The amended Art. 83, 102, and 129 establish that the Federation Council conduct consultations with the President before he appoints to office the heads of federal bodies of executive power (including Federal ministers) and procurators listed in these articles of the Constitution. These consultations possess no binding nature, and the President has the final say in these appointments. These new constitutional provisions are nothing but window-dressing: they do not increase the role or importance of the Federation Council. However, now members of the upper house have constitutional grounds to claim that they play a role in these appointments.

The analysis of amended articles 11 and 112 immediately reminds one of a statement from the State of the Union address. The President said that the Federal Legislature is ready to bear a larger responsibility for both the formation of the Government and for government policy. The President also suggested to entrust the State Duma not just to *coordinate*, but to *approve* the candidates for the positions of the Chairman of the Government, Deputy Chairpersons and federal ministers. He emphasized this as a way of increasing the role and importance of the Parliament and its lower house[2].

As follows from the amended text of the Constitution, the Duma's consent, which was envisaged in the initial version of the Constitution, was replaced by approval. The revised provisions of art. 111 provide that *"The Chairman of the Government of the Russian Federation shall be* appointed *by the President of the Russian Federation after the approval of his candidacy by the State Duma".* The amended art. 112 establishes that "t*he Chairman of the Government of the Russian Federation shall submit to the State Duma for* approval *candidacies for Deputy Chairmen of the Government of the Russian Federation and Federal ministers, with the exception of the Federal ministers indicated in Paragraph "e-1" of Article 83 of the Constitution of the Russian Federation".* The new p. 3 of Art. 112 looks very flattering for the lower house: *"The President of the Russian Federation shall have no right to refuse to appoint to office Deputy Chairmen of the Government of the Russian Federation and the Federal ministers whose candidacies have been approved by the State Duma".* The sad reality is that these candidacies must be submitted by the Chairman of the Government who can be removed from office at the President's sole discretion (not to mention that the President now heads the executive branch). It is hard to

1 Federal Law of the RF "On the Parliamentary Supervision" No 77-FZ of May 7th, 2013.

2 President Putin's State of the Union speech of January 15th, 2020,

see the Chairman of the Government taking the risk of submitting the candidacies that the President could possibly object to.

More than two decades ago, the Constitutional Court additionally strengthened the role of the President in selecting the Chairman of the Russian Government. In 1998, the Constitutional Court clearly ruled that the President is entitled to submit the same candidate three times[1]. If the Duma refuses the candidacies three times, it can be dissolved. In this context, the new version of p. 4 of Art. 111 looks remarkable. The main part remains untouched : "*After the State Duma has rejected candidates for the office of the Chairman of the Government of the Russian Federation three times, the President of the Russian Federation shall appoint a Chairman of the Government of the Russian Federation*". Still, the legal consequences will be different. Under the initial version of this constitutional provision, the President had to dissolve the State Duma and call for new elections. The former edition of the Article enshrined the constitutional responsibility of the President to dissolve the lower house and to call new elections. In the amended version of the Constitution, this constitutional responsibility transforms into discretion*: "In this case the President of the Russian Federation shall have the right to dissolve the State Duma and call new elections".* In the initial version of the Constitution, everything was clear and simple: to reject candidacies three times means the dissolution of the Duma and new elections. In the amended Constitution, everything depends upon the President. Such level of presidential discretion does not look like an increase of the role and importance of the Russian Parliament.

The amended Art. 112 establishes another ground for dissolution of the State Duma. After the State Duma has refused candidacies presented for Deputy Chairpersons of the Government of the RF, or Federal ministries, three times, the President shall have the power to appoint Deputy Chairpersons of the Government and federal ministers from among the candidacies presented by the Chairman of the Government. "*If after refusal three times by the State Duma of candidates […] more than one third of the offices of members of the Government (with the exception of the offices of federal ministers indicated in Part e-1 of Article 83) remain vacant, the President of the Russian Federation shall have the right to dissolve the State Duma and order new elections*"[2]. In this case the President appoints Deputy Chairpersons of the Government and the Federal Ministers (save for those appointed by the President after consultation with the Federation Council) on proposal of the Chairman of the Government.

Apparently, the 2020 constitutional amendments did not strengthen the Russian Parliament, especially in the area of formation of the Government. If the Duma refuses to cooperate, it will be dissolved, and the President will appoint the candidates of his choice.

1 Decision of the Constitutional Court of the RF No 28-P of December 11th, 1998.

2 P. 4 of Art. 112 of the Constitution of the RF (as amended in 2020).

The amended Art. 132 provides that "*Bodies of local self-government and bodies of state authority are included in a unified system of public authority in the Russian Federation and conduct interaction for the most effective solution of tasks in the interests of the population living on the respective territory*"[1]. Incorporation of local self-government into the unified system of public authority will not result in the extension or strengthening of the capacity of local self-government (as was announced by President Putin in his State of the Union speech). It means just the opposite: the liquidation of local self-government's independence and a pivot towards the restoration of the Soviet power system, not to mention the sharp decrease of the quality of handling local problems. This new constitutional norm eliminates the independence of local self-government and, thus, makes it pointless and de facto eliminates it. What's even worse, this amendment openly contradicts the Constitution. First, it violates Art. 12, which is a part of the unchangeable Chapter 1. Art. 12 constitutes one of the fundamentals of the Russian constitutional system: *"Local self-government shall be recognized and guaranteed in the Russian Federation. Local self-government shall operate independently within the limits of its authority. The bodies of local self-government shall not be part of the system of the bodies of state power".* Second, this amendment constitutes an attempt to indirectly modify Chapter 1 of the Constitution, which is strictly and explicitly prohibited by Art. 16 (2*) : "No other provisions of this Constitution shall contravene the fundamentals of the constitutional system of the Russian Federation".*

The 2020 constitutional amendments will have a great impact on the Russian judiciary. Under the amended article 83 of the Constitution, the President will have the power to submit to the Federation Council, the upper house of the federal legislature, requests to terminate powers of judges of various ranks, among them the Chairman, Deputy Chairman and Justices of the Constitutional Court, the Chairman, Deputy Chairpersons and Justices of the Supreme Court, Chairpersons, Deputy Chairpersons and judges of courts of cassation and courts of appeal of Russia. Such termination shall be performed by the Federation Council in accordance with the federal constitutional law in case a judge committed an act which discredits the honor and dignity of a judge, as well in other cases, which (1) signal that a judge in question cannot perform his or her functions and (2) are stipulated in a federal constitutional law. This new power of the Russian President is highly questionable since it is in breach of the fundamental principles of the status of judges. The independence from other branches of power constitutes the basis of the status of judges. The President's new right to initiate termination of powers of a judge annuls their irremovability and thus ends the puny remnants of the Russian judges' decisional independence. The Russian President has a final say in almost all judicial appointments; now he is empowered to initiate termination of powers of judges, so the latter will totally depend upon his discretion. Russian case law clearly demonstrates that a la-

1 P. of Art. 132 of the Constitution of the RF (as amended in 2020).

bel of "*an act, which discredits the honor and dignity of a judge*" can be easily put on a judge's refusal to obey illegitimate requests of a court chairperson, criticism of the Russian judiciary, a refusal to unconditionally follow the internal unwritten rules of the Russian judicial community and other attempts of a judge to serve as an independent arbitrator (and not as a governmental official who obediently complies with the instructions of his superiors). The ambiguous wording "*an act, which discredits the honor and dignity of a judge"* will allow to remove a judge from the office in the absence of sufficient grounds. Russian legal practitioners concur with the representatives of the academia in their criticism of this amendment; they consistently make a point that only the representatives of the judicial community can bring up the issue of termination of the powers of a judge. Similarly, the Venice Commission expressed its concern and pointed out that "under the new constitutional amendments it will be the Executive, i.e. the President who will have the power to initiate a procedure for their dismissal by the Council of the Federation. The right to initiate a removal process vested in the executive arm of government is not necessarily problematic in itself, provided that the process of removal is a judicial one. However, the introduction of such power in this context, notably on account of the lack of regulation of the removal process in the Constitution, appears to increase the possibility of influence of the Executive over the Constitutional Court".[1]

The new version of art. 107 (3) establishes the power of the Constitutional Court to exercise a preventive constitutional review by request of the President, if within 14 days after receiving the federal law the President rejects it, and both houses of the Russian Parliament shall review it in the order established by the Constitution and approve this federal law in its earlier adopted version by no less than two thirds of the general number of the Federation Council and the State Duma. The fact that the right to initiate preventive constitutional control is now granted only to the President raises serious concerns, since the President obtains a constitutionally entrenched power to block the laws that he dislikes with the help of the Constitutional Court. As a result, the Parliament will be de facto stripped of the possibility to overcome the presidential veto. The federal laws referred by the President to the Constitutional Court in the course of preliminary constitutional review will be examined by the judges, whose powers can be easily terminated under the President's initiative in the absence of any consultations, coordination or recommendations of the bodies of judicial community. It is highly unlikely that justices of the Constitutional Court will take the risk to rule that the law, which the President does not want to sign, is constitutional.

Amended Art. 79 establishes that "decisions of interstate bodies adopted on the basis of provisions of international treaties of the RF in the interpretation contradicting the Constitution of Russia shall not be executed in the Russian Federation". New p. 5.1 (b) of Art. 125 raises to the constitutional level the competence of the Consti-

1 Venice Commission. Opinion No 981\2020 of June 18, 2020, p. 60.

tutional Court to *resolve matters concerning the possibility of enforcing* such decisions. The same constitutional provision empowers the Constitutional Court to decide on the possibility to enforce judgments of foreign or international (interstate) courts, as well as foreign or international arbitrations, which impose obligations on Russia, if such judgments contradict the fundamentals of public legal order of the RF. The Constitutional Court was vested with the right to rule on enforcing judgments of the European Court or Human Rights in 2015[1]. In 2020, this prerogative has been considerably extended and entrenched at the constitutional level. Compliance with the fundamentals of public legal order of Russia as a criterion of enforceability is highly problematic for the following reasons: (1) the notion of "public legal order" does not belong to the area of Russian constitutional law, (2) its ambiguity constitutes grounds for arbitrary interpretation, and (3) this vague criterion will make avoiding the international obligations of Russia both legal and constitutional.

The amended p. 1 of Art. 125 reduces the number of Justices of the Constitutional Court from 19 to 11. This new provision is totally disruptive and ungrounded; the explanatory note to the draft of the constitutional amendments offers no explanation for this downsizing, which will inevitably have a negative impact on the court's efficiency. Another development that restricts individual rights is envisaged in the amended p 4 (a) of Art. 125. Under the original wording of this constitutional provision, an individual, who had a case pending in court and believed that legal norm(s) to be applied in this case will violate his/her constitutional rights and freedoms, was entitled to refer the matter to the Constitutional Court. Now, before lodging a complaint to the Constitutional Court, an individual has to exhaust all national measures of legal remedies.

Changes introduced by the constitutional amendments will have a strong negative impact on Russian citizens, since they significantly reduce the possibilities to seek protection of constitutional rights and freedoms in the Constitutional Court. Now people may have to spend years exhausting the national legal remedies before becoming eligible to refer the matter to the national body of constitutional review. No wonder that few people will be able to reach the final goal. Reducing the number of Justices of the Constitutional Court will affect their workload, the efficiency of the Court and the quality of decisions and determinations. Together with the constitutionally entrenched possibility to avoid enforcing the ECtHR judgments, the future of proper protection of constitutional rights and freedoms of Russian people is in jeopardy.

The Russian judiciary will not benefit from the 2020 constitutional amendments. Neither will the Russian citizens seeking protection of their violated rights and freedoms in Russian national courts or in Strasbourg.

Sadly, the numerous amendments to the current Constitution depict the obvious re-Sovietization trend and ruin the best features of the initial version of Rus-

1 Chapter XIII.1 of the 1994 Federal Constitutional Law "On the Constitutional Court of the RF"

sia's Basic Law. The 1993 Constitution signified a drastic shift from the Communist dictatorship to a democratic government. As a new basic law for the «democratic federal legal state,» the Constitution became an important step toward the establishment of a *Rechtsstaat* in Russia[1]. The 1993 Constitution both provided spacious room for international legal standards in the domestic legal setting and clarified the status of international law in the Russian domestic legal system[2]. It also represented a bold political commitment to the international community and its fundamental values expressed in the principles and norms of international law[3]. The 2020 amendments symbolize the end of Russia's commitment to the international community and its fundamental values. Instead, these amendments pave the way for avoiding international obligations of the Russian Federation. Moreover, the new Constitutional provisions signal the partial return of the Soviet isolationist "doctrine of transformation", which protected the state from the direct penetration of international law.

Some amendments are of an openly discriminatory nature and symbolize the victory of the "Russian historic and cultural traditions" over Western values. For example, the revised p. 1 (g-1) of Art. 72 envisages the *"protection of the institution of marriage as the union of a man and a woman".* It goes without saying that this constitutional provision is oppressive and insulting for the members of the Russian LGBT community. The wording " *the Russian language as the language of the nation-forming people, included in the multinational union of peoples of the Russian Federation with equal rights"*[4] may offend people who reside in the RF, but are not ethnically Russian.

The latest attempts to rewrite history have been elevated to the constitutional level. The Victory in the Great Patriotic War became one of the favorite tools in Putin's propaganda. Unflattering historic facts such as the occupation of the Baltic states and the forceful incorporation of Estonia, Latvia and Lithuania into the Soviet Union are vigorously denied by the current regime. Unsurprisingly, new p. 3 of Art. 67.1 reads like a political statement: "*The Russian Federation honors the memory of the defenders of the Fatherland and ensures the protection of historic truth. Belittling the significance of the achievement of the people in protecting the Fatherland shall not be allowed".* Notably, the achievements of the veterans were already protected by the 1996 Criminal Code of Russia. In 2014, however, the 1996 Criminal Code was amended, and the new article 354.1 "Rehabilitation of Nazism" criminalized the act of publicly committing dissemination of knowingly false information about the USSR's activities at the time of World War II.

The constitutional system initially established by the 1993 Constitution stipulated a significant disbalance of power. According to Professor V.Nersesyantz, the

1 Gennady M.Danilenko. The New Russian Constitution and International Law. The American Journal of International Law, vol. 88, No 3 (July 1994), p. 451.
2 Op. cit., p. 464.
3 Op. cit., p. 470.
4 P. 1 of Art. 68 of the Constitution of the RF (as amended in 2020).

system of separation and interaction of powers possesses an asymmetric and disbalanced nature. The President initially was the most powerful figure that enjoyed the dominant role; the other state branches looked weak in comparison to the chief executive[1]. The 2020 amendments further deepen this disbalance of power and strengthen the role of the President, and the other branches of government are virtually deprived of the opportunity to influence him. The State Duma may charge the president with high treason or another serious crime, but the offense must be confirmed by: (1) the conclusion of the Supreme Court on the presence of all criminal elements in the President's activities ; (2) the conclusion of the Constitutional Court[2] on the compliance with the established procedure for the pressing of charges. The chances of the charge making it through such a complicated procedure are next to zero. First, the decision of the Duma to press charges should be upheld by two-thirds of the votes of the total number of deputies in the Duma. In the history of Russia there have been three attempts of impeachment (two in 1993 under the 1978 Constitution of the RSFSR and one in 1999), and the required number of votes has never been collected. Secondly, if one is to take into account the President's new authority to initiate the termination of the powers of Supreme and Constitutional Court judges, as well as of chairpersons and their deputies, the judges of the Russian Federation's high courts will think ten times before giving unfavorable conclusions — for they can pay for this with their posts[3].

During the almost 27 years of functioning after its adoption in 1993, the Russian Constitution never saw such fundamental and, at the same time, unnecessary and disruptive changes. The adoption of the 2020 amendments is the worst thing that could happen to the 1993 Constitution of the Russian Federation.

1 Problems of general theory of State and Law. Ed. by Prof. V. Nersesyanz. Moscow, Norma publishers, 1999, p. 689.

2 Art. 93 of the Constitution of the RF (as amended in 2020).

3 https://khodorkovsky.com/everything-about-the-plebiscite-vote-is-a-scam/

CHAPTER 3. THE BALTICS

Estonia, Latvia and Lithuania are often referred to as the "Baltic states", but there are scarcely sufficient grounds to unite them in one group in such a way. Considering language, religion and historical experiences, there is no common "Baltic" determinator (except, of course, the Baltic Sea): whereas Estonian is a Finno-Ugric language, Latvian and Lithuanian belong to the family of Baltic languages together with the former Prussian language. As far as religion and historical experiences are concerned, Estonia and Latvia have the common experience of being under the reign of powerful neighbors, such as Denmark, the Teutonic order, Sweden, and Russia, while Lithuania was once a strong independent state[1]. With the creation of the union with Poland at the end of the 14th century, Lithuania came under the influence of the Catholic Church and the cultural sphere of Europe. This union ended with the partition of Poland after which Lithuania became a part of Russia. The Lithuanian population is mainly Catholic whereas Estonia and Latvia have important Protestant communities along with the Russian Orthodox community[2].

For almost two hundred years, most of the territories of Estonia, Latvia and Lithuania were provinces of the Russian Empire, which constitutes another similarity among the three states. The Baltic provinces enjoyed a high level of autonomy: they preserved local laws and local languages and had their own local representative bodies named Landtags, whereas Russia had no Parliament until 1905. When the Russian Empire collapsed, the newly established Baltic States focused on drafting their Constitutions. For Estonia and Latvia, it was a new experience, whereas the constitutional history of Lithuania is much longer. The Constitution of the dualistic state of the Polish-Lithuanian Commonwealth was adopted on 3 May 1791. As the first written European constitution, this Constitution not only envisaged, but also substantiated the necessity of the principle of separation of powers:

> *"All authority in human society takes its origin in the will of the people. Therefore, that the integrity of the states, civil liberty, and social order remain always in equilibrium, the government of the Polish nation ought to, and by the will of this law forever shall, comprise three authorities, to wit: a legislative authority in the assembled es-*

1 Caroline Taube. Baltic Diversity: Comparing Constitutions, Jurisprudencija, (2002), t.30 (22), p. 43.

2 Caroline Taube. Constitutionalism in Estonia, Latvia & Lithuania: A Study in Comparative Constitutional Law. 2001.

tates, a supreme executive authority in a King and Guardianship, and a judicial authority in jurisdictions to that end instituted or to be instituted"[1].

Lithuania had six constitutions between the World Wars: the first constitutions of 1918, 1919, and 1920 were of a provisional nature and were followed by the constitutions of 1922, 1928, and 1938. Estonia had three constitutions — those of 1920, 1934, and 1938. Latvia had one Constitution, adopted in 1922. Initially, Estonia, Latvia, and Lithuania established the parliamentary republic as their form of government, but political instability and a declining economy paved the way for political crisis and the subsequent escalation of authoritarianism in all three countries. Failure of parliamentary democracy in Estonia and Lithuania resulted in constitutional reforms and new constitutions that granted extensive powers to the executive. In Latvia, many constitutional provisions were suspended after the coup headed by Karlis Ulmanis.

Another similarity among the so-called Baltics is that, unlike other former Soviet republics, Estonia, Latvia and Lithuania did experience a period of statehood and state-building in the interwar period. But, unlike Poland, Hungary, Bulgaria, and other former Soviet satellite states, they did not keep their independent status after the end of World War II, but instead shared the fate of being incorporated into the Soviet Union. Both factors contribute to the unique constitutional situations in these states.[2]

Forceful incorporation into the Soviet Union constitutes another similarity. On 23 August 1939, the Soviet Union and Germany signed the infamous non-aggression pact which became known as the Molotov-Ribbentrop Pact. According to the pact, the Soviet Union and Germany committed themselves to the following:

- Both High Contracting Parties obligate themselves to desist from any act of violence, any aggressive action, and any attack on each other, individually or jointly with other powers (Art. 1);
- Should one of the High Contracting Parties become the object of belligerent action by a third power, the other High Contracting Party shall in no manner lend its support to this third power (Art. 2);
- The Governments of the two High Contracting Parties shall in the future maintain continual contact with one another for the purpose of consultation in order to exchange information on problems affecting their common interests (Art. 3);
- Neither of the two High Contracting Parties shall participate in any grouping of powers whatsoever that is directly or indirectly aimed at the other party (Art. 4);

1 Article V, The Constitution of the Polish-Lithuanian Commonwealth of 3 May 1791.
2 Taube (2002).

- Should disputes or conflicts arise between the High Contracting Parties over problems of one kind or another, both parties shall settle these disputes or conflicts exclusively through friendly exchange of opinion or, if necessary, through the establishment of arbitration commissions (Art. 5).

The wording of the pact is rather neutral, and no wonder: the signing of the pact itself was not concealed, but the signing of the additional protocol, as well as its contents, were kept a closely guarded secret. Below is the text:

"On the occasion of the signature of the Nonaggression Pact between the German Reich and the Union of Soviet Socialist Republics the undersigned plenipotentiaries of each of the two parties discussed in strictly confidential conversations the question of the boundary of their respective spheres of influence in Eastern Europe. These conversations led to the following conclusions. In the event of a *territorial and political rearrangement* in the areas belonging to the Baltic States (Finland, Estonia, Latvia, Lithuania), the northern boundary of Lithuania shall represent the boundary of the spheres of influence of Germany and the U.S.S.R. In this connection the interest of Lithuania in the Vilnius area is recognized by each party. In the event of a *territorial and political rearrangement* of the areas belonging to the Polish state the spheres of influence of Germany and the U.S.S.R. shall be bounded approximately by the line of the rivers Narew, Vistula, and San. The question of whether the interests of both parties make desirable the maintenance of an independent Polish state and how such a state should be bounded can only be definitely determined in the course of *further political developments*. In any event both Governments will resolve this question by means of a friendly agreement. With regard to Southeastern Europe, attention is called by the Soviet side to its interest in Bessarabia. The German side declares its complete political disinterest in the areas. This protocol shall be treated by both parties as strictly secret."

The aforementioned "further political developments" immediately followed the signing of both documents by Molotov and Ribbentrop on August 23, 1939. What happened on 1 September 1939 has long been well-known by the Soviet/Russian people: Germany invaded Poland. This day is considered the official beginning of World War II. What happened on September 17 of the same year is far less known to the Soviet/Russian people: the Polish territory was invaded by units of the Red Army. On the same day, Vaclav Grzybowski, the Polish ambassador to the Soviet Union, was handed a note by the People's Commissar for Foreign Affairs, Vyacheslav Molotov. This document is important enough to quote the text in full:

> "Mr. Ambassador!
>
> The Polish-German war has revealed the internal insolvency of the Polish state. Within ten days of military operations Poland has lost all of its industrial areas and cultural centers. Warsaw

as the capital of Poland does not exist anymore. The Polish government has collapsed and shows no signs of life. This means that the Polish state and its government ceased to exist. Therefore, the treaties concluded between the USSR and Poland have been terminated. Left to its own devices and without leadership, Poland has become a convenient field for all sorts of accidents and surprises that could pose a threat to the Soviet Union. Therefore, the Soviet Government, hitherto neutral, can no longer remain neutral towards these facts.

The Soviet government cannot also be indifferent to the fact that consanguineous Ukrainians and Belarusians living in Poland are left to fend for themselves, left defenseless.

In view of this situation, the Soviet Government instructed the High Command of the Red Army to order the troops to cross the border and take under their protection the lives and property of the population of Western Ukraine and Western Belarus.

At the same time the Soviet Government intends to take all the measures necessary to rescue the Polish people from this ill-fated war, into which it was drawn by its reckless government, and to enable it to live a peaceful life.

Please accept, Your Excellency, the assurances of highest consideration.

The People's Commissar for Foreign Affairs V. Molotov"

It is not surprising that in the Soviet Union they preferred to gloss over this detail. And even less surprising is the fact that the Great Patriotic War was elevated to the most important and sacred war for the Soviet people. That war was different from the Second World War not only in name. The dates were different as well: 22 June 1941 to 9 May 1945. The fact that, prior to 22 June 1941, the Soviet Union actually participated in World War II was hushed up. And there was indeed something to hide: the invasion of Poland was followed soon after by the Winter War with Finland, which was preceded by a series of failed negotiations.

On 5 October 1939 the Soviet government proposed that the Government of Finland send a delegation to Moscow for "an exchange of views on political issues." This proposal caused concern not only in Finland, but throughout the world, as demonstrated by the letter U.S. President Franklin Roosevelt sent to the chairman of the Presidium of the Supreme Soviet of the USSR, Mikhail Kalinin, on 11 October 1939. In it, President Roosevelt expressed "the earnest hope that the Soviet Union will make no demands on Finland which are inconsistent with the maintenance and development of amicable and peaceful rela-

tions between the two countries and the independence of each." The importance of negotiations with Finland to the Soviet Union is evidenced by the fact that Stalin personally participated in the first two rounds. In the first round, the Soviet Union offered to sign a mutual assistance pact, similar to those signed with Estonia, Latvia, and Lithuania in early fall of 1939. Finland rejected the proposal. Gradually the negotiations, including those on the possibility of deployment of Soviet military bases on the Hanko Peninsula, came to a stalemate. Finnish Foreign Minister Vaino Tanner said his country could not grant a foreign country permission to deploy its military bases on Finnish territory. In a statement dated November 11, the Soviet news agency TASS said Finland had refused to accept the minimum requirements of the USSR and increased the number of its troops stationed not far from Leningrad from two to seven divisions. On November 26 and 27 the two governments exchanged notes in connection with the Mainila incident, and on November 28 the Soviet Union denounced the Tartu Peace Treaty of 1920 and the 1932 Non-Aggression Pact with Finland. This is how the Winter War started.

On 14 December 1939 the Soviet Union was expelled from the League of Nations for its aggression against Finland[1]. On 12 March 1940 the Winter War ended. Political rearrangement was avoided, but territorial rearrangement was significant: Finland lost about forty thousand square kilometers of its land to the Soviet Union.

Estonia, Latvia, and Lithuania were a bit more pliable than Finland: in September and October 1939 all three states signed pacts with the Soviet Union on mutual assistance. Under these pacts, the Soviet Union obtained the right to deploy troops on the territories of these countries, as well as set up naval and air bases. In mid-June 1940 all three countries were presented with an ultimatum by reason of their alleged failure to comply with the conditions of the mutual assistance pacts. Pro-Soviet puppet governments were established in Estonia, Latvia, and Lithuania. Territorial and political rearrangement was just the beginning for these countries: they were forcefully incorporated into the Soviet Union. Long-prepared mass repression commenced.

On 11 October 1939, the day after the third mutual assistance pact with the Baltic States had been made, Minister of Internal Affairs Lavrentiy Beria signed the secret NKVD (People's Commissariat of Internal Affairs) order № 001223 "On deportation of anti-Soviet elements from Lithuania, Latvia, and Estonia." On 16 May 1941 the Central Committee of the Communist Party and the Council of People's Commissars of the USSR adopted a resolution "On measures to purge the Lithuanian, Latvian, and Estonian SSR of anti-Soviet, criminal, and socially dangerous elements." The document listed the categories of persons who had to "be arrested

1 League of Nations Expulsion of the U.S.S.R. 14 December 1939 [League of Nations, Official Journal 1939, p. 506 (Council Resolution); p. 540 (Assembly Resolution.)

with confiscation of property and sent to camps for a term of five to eight years, and after serving their sentence in the camps to be exiled in settlements in remote areas of the Soviet Union for 20 years." These included "former policemen, gendarmes, landowners, factory owners, former high level government officials of the state apparatus of Lithuania, Latvia, and Estonia," as well as their family members. Paragraph 9 of the resolution read, "The arrest and deportation operation in Lithuania, Latvia, and Estonia [is] to be concluded in three days."

On June 17, 1941, People's Commissar of State Security Vsevolod Merkulov submitted a memorandum to Stalin, in which he reported on the work done:

I. In Lithuania: <…> total of 15,851 people subject to repression.
   In Latvia: <…> total of 15,171 people subject to repression.
   In Estonia: <…> total of 9,156 people subject to repression.
II. Total of three republics: arrested — 14,467 people; evicted — 25,711 people; total subject to repression — 40,178 people.

During the first Soviet occupation of the previously independent Baltic States, 131,500 people were deported.

According to Caroline Taube, the Soviet takeover constituted an act of aggression as well as a breach of the peace treaties of 1920 by which independence was guaranteed to Estonia, Latvia and Lithuania. As an act of aggression it can be further divided into three crimes of international law — aggression and threats of violence (the events of June 1940), occupation (the political takeover in June–July, which came in the form of speedy Soviet-style elections followed by the falsification of results and forming of puppet governments), and annexation (August 1940).[1] No wonder the annexation of Estonia, Latvia and Lithuania was not generally recognized by the international community: "the occupation of these formally independent and neutral States by the Soviet Union occurred in 1940 following the Molotov/Ribbentrop Pact…The Soviet annexias of the three Baltic States has still not been officially recognized by most European States and the USA, Canada, the United Kingdom, Australia and the Vatican still adhere to the concept of the Baltic States".[2]

The first Soviet occupation lasted until July 1941, when German troops invaded first Estonia and Latvia, and then Lithuania. Initially, the population welcomed the Germans as liberators. However, quite soon it became clear that the change of occupiers did not mean a change in the nature of their presence: mass deportations, repressions and shootings continued.

The second Soviet occupation started at the end of 1944, when as a result of the Baltic Offensive, Estonia, Latvia and Lithuania again were forced into the Soviet Union. Despite the fact that Stalin's Constitution envisaged a right to secede, none of the Baltic republics ever tried to do so: this norm was apparently non-en-

1 Caroline Taube. Constitutionalism in Estonia, Latvia & Lithuania: A Study in Comparative Constitutional Law. Skrifter Fran Juridiska Fakulteten Uppsala. 2001.

2 Resolution of the European Parliament on the situation in Estonia, Latvia and Lithuania of 13 January 1983.

forceable, as were many other provisions of the 1936 Constitution of the USSR.

Gorbachev's reforms had a tremendous impact on the Baltic Republics, where most people did not accept the forced Sovietization. Building on the wave of increasing escalation of the independence movement, Declarations on Sovereignty were passed in Estonia (in November of 1988), Lithuania (in May of 1989) and Latvia (in July of 1989). All three documents emphasized the issues of state and constitutional continuity: "The Lithuanian people… created their state in the XIIIth century and were defending their freedom and independence for centuries. In 1918, the Lithuanian people reinstated their statehood, which was recognized by many foreign countries and acknowledged by the 1920 treaty with Soviet Russia"[1]. The Declaration of Independence of Estonia followed on 2 February 1990; the Act on reinstatement of an independent Lithuanian State on 11 March 1990; and the Declaration on reinstatement of independence of Latvia on 4 May 1990. Formally Estonia left the Soviet Union on August 20, 1991, and on September 6, 1991, the USSR officially recognized the independence of Latvia and Lithuania.

According to Taube, after restoration of the independence of Estonia, Latvia and Lithuania and the founding of the new constitutional order, the legislation emanating from the USSR was not invalidated in a single stroke. Such a measure would have created a legal vacuum and chaos. Obviously, the Soviet legislation was fundamentally reformed or replaced step by step. This procedure included three main stages. First, it implied essential changes in criminal law and criminal procedure as a means of urgently abolishing the repressive impact of the Communist regime. But this was much easier to say than to do. Estonia acted first by passing an amended variation of the Criminal Code of the ESSR. Shortly after that Lithuania also passed important amendments to the Lithuanian SSR Criminal Code. In Latvia the first significant criminal law reform was completed in 1999, when the new Criminal Law took effect and replaced the old Latvian SSR Criminal Code. Criminal procedure codes were adopted first in Lithuania (2002), the next year in Estonia, and in 2005 in Latvia. Secondly, reforms paving the way for establishing a market economy based on private ownership were initiated. A systematization and codification of the legal reforms rapidly undertaken made up the third and final stage with new civil codes, codes of criminal, civil and administrative procedure, etc.[2]

REFORMS IN ESTONIA

Within two and a half decades since the restoration of independence, Estonia has proven itself a very successful reformer. The Little Country That Could got its epithet from Mart Laar, the former Prime Minister (1992–1994 and 1999–2002)

1 Preamble to the Declaration of the Supreme Soviet of Lithuanian Soviet Socialist Republic on the State Sovereignty of Lithuania of 26 May 1989.

2 Caroline Taube (2001)

and Minister of Defense in Estonia. Laar is considered to be the father of the economic reforms that served as the catalysts to the country's rapid development over the course of the past 20 years. Laar's reforms were acknowledged as the most successful and comprehensive in the region and are used as a model for other countries with a transitional economy. After gaining its independence, Estonia needed to deal with the consequences of almost 50 years of Soviet totalitarian rule while taking measures for the rapid and efficient integration into the European economic arena. Estonian reforms were aimed at lustration, the economy, and the law enforcement and judicial systems. The specific features of the Estonian economic reform of the transition period include hybrid privatization, the institution of a flat income tax, and the alteration of banking legislation[1].

On 1 January 2011 Estonia, which had for a long time enjoyed the reputation of being the most radical market reformer in Europe[2], adopted the euro and became the 17th member of the EU to give up its national currency. Estonia was also the first former Soviet republic to enter the Eurozone, in addition to being the first post-Communist country to leave the ruble zone in June of 1992, and started growing economically by 1994. In 1993, Estonia became a member of the Council of Europe; in 1999, it joined the WTO; and in 2004, became a member of NATO and the EU. Estonia was the first of the former Soviet republics to introduce its national currency and to make it convertible. Estonia's entering the Eurozone became a symbol of success of the market reforms that took place after its secession from the Soviet Union.

In 1992, the Estonian government, which consisted of young and talented academics, started the liberalization of prices for both the national and the international trade. This measure allowed the country to promptly overcome the deficit of goods and services that was typical for socialism and to transform Estonia into the country[3] with the most free trade and the lowest level of corruption among all CIS countries. For a number of years Estonia, Latvia, and Lithuania all had governments that changed every year. However, this fact had no impact on political stability in the region, since all the coalition governments shared the same top priority — development of the market economy. These market reforms created the foundation for sustainable economic growth. Estonia became much more attractive from the viewpoint of foreign investors, so the level of direct foreign investments went from $265 million in 1994 to $581 million in 1998. According to Heritage Foundation's Economic Freedom Score, in 2016 Estonia scored 77.2 (up 0.4 point) with a global ranking at number nine and a regional ranking of three.

1 Mart Laar. The Estonian Economic Miracle. (2007). Available at http://www.heritage.org/research/reports/2007/08/the-estonian-economic-miracle

2 Mart Laar, Little Country That Could (London: Centre for Research into Post-Communist Economies, 2002).

3 http://www.forbes.ru/ekonomika-column/vlast/61068-bystrye-reformy-estonskii-retsept

The 2009 financial crisis hit Estonia hard. However, the right-centrist government did not favor the idea of devaluation of the national currency and stayed on the track of budgetary conservatism. Estonia undertook no major borrowing on the financial markets, while at the same time the government managed to bring inflation under control and even to somewhat decrease the rate of inflation. Amazingly, the economic crisis in Estonia was perceived differently inside and outside of the country. The world at large considered Estonia to be in deep financial crisis and speculated whether it would be forced to devalue or accept an IMF program, but neither the people nor the government recognized any crisis[1]. They focused on fulfilling all Maastricht criteria in order to join the EU in January 2011[2]. After undertaking the necessary anti-crisis measures and radical downsizing of the state expenditures, Estonia finally complied with the Maastricht criteria. The political choice of the Estonian political leadership made the consequences of the world financial crisis more severe for the population and, at the same time, paved the way to entering the Eurozone. According to Forbes, Estonia did a lot to break up with the Soviet past and become a market-based democracy; however, the readiness of the West to cooperate with the Estonian leadership should not be underestimated.[3]

Estonian reformers perceived the reforms as a multidimensional task and understood rather well that, without good laws, the market economy will not actually work. As Mart Laar put it, the rule of law demands good laws, and the demand for those laws and institutions brings them to life. The countries which had just gotten free from Communist rule had to start pretty much from scratch. And they did not have the time to develop their own legislation thoroughly as had been the case in the West, because the developing market economy required good laws immediately[4].

In order to ensure compliance with the European standards, it was decided that one of the EU states should be taken as an example, and that the Estonian legal system should be built up around the legislation and traditions of this country. The decision was to follow Germany: the Estonian legal system had belonged to the German sphere of legal systems since the Hanseatic period, and large Estonian urban centers at the time — Tallinn, Tartu, Parnu and Narva — were all members of the Hanseatic league[5]. Choosing Germany as a model enabled Estonia to use a large proportion of the legislation which was created before 1940, and which was one of the most modern in the world. According to Kerikmae, the Es-

1 Anders Aslund, The Last shall be the First: the East European Financial crisis (Washington, DC, Peterson Institute of International Economics, 2010), 41.

2 *Ibid*.,41.

3 http://www.forbes.ru/ekonomika-column/vlast/61068-bystrye-reformy-estonskii-retsept

4 Laar, *op. cit*., note 2.

5 See Estonia, Latvia and Lithuania. Country Studies, ed.by Walter Iwaskiw (Federal Research Division, Library of Congress, Washington, DC, 1996).

tonian legal system has historically been based on constitutional values and the principles of continuity (*restitutio ad integrum)*[1]. This constitutional continuity was repeatedly highlighted in a number of acts adopted in Estonia at the time of regaining independence. The Law of the Estonian SSR on Estonian symbols of 8 May 1990 re-enacted several articles of the 1938 Constitution, including Article 1 (Estonia is an independent republic, where the supreme power is held by the people); Article 2 (the territory of the Estonian State is an indivisible whole); and Article 4 (in Estonia, only those laws which have been put into force by her own institutions shall have effect)[2]. September of 1991 saw the establishment of the Constituent Assembly, which was tasked with drafting the new Estonian Constitution. Some of the drafts considered by the Assembly proposed the introduction of a strong presidential system, while others favored a parliamentary democracy[3]. Another option was the reinstatement of the last interwar Constitution of 1938, which was rejected in the end because its authoritarian character seemed to be out of touch with a modern democratic society[4]. Eventually, the choice was made in favor of a parliamentary constitutional system. However, constitutional continuity with certain provisions of the 1938 Constitution was stressed in the preamble to the 1992 Constitution, which clearly states that this Constitution was adopted

> "with unwavering faith and a steadfast will to strengthen and develop the state which is established on the inextinguishable right of the people of Estonia to national self-determination and which was proclaimed on 24 February 1918, which is founded on liberty, justice and law, which shall protect internal and external peace, and is a pledge to the present and future generations for their social progress and welfare, which shall guarantee the preservation of the Estonian nation, language and culture through the ages, the people of Estonia, on the basis of § 1 of the Constitution which entered into force in 1938, and by a referendum held on 28 June 1992, adopted the following Constitution"[5].

In the fall of 1992, the Estonian parliament (*Riigikogu*) adopted a resolution on consistency of legislative drafting. According to this resolution, legislation must be drafted based on the laws which were in force before the Soviet occupation, that is, in 1940. Before World War II, the Estonian legal system belonged to the

1 Tanel Kerikmae. Estonia in the European Legal System: protection of the rule of law through constitutional dialogue. Dissertation. Tallinn (2009),15.

2 For further details see The Law of the Estonian SSR on Estonian symbols of 8 May 1990 (Закон Эстонской ССР от 08.05.1990 «О символике Эстонии»).

3 Dr. Rainer Grote. The 1992 Constitution of the Republic of the Estonia : introductory note. Edited by Max Plank Institute Oxford University Press, 2007, 6.

4 *Ibid*, 6.

5 Constitution of the Republic of Estonia of 28 June 1992.

Central European legal family, and was most influenced by Czarist Russian and Germanic law[1]. The Estonian leadership always perceived reforms as a multidimensional task, so judicial reform was an integral part of the process of restoration of independence and democracy. The reform aimed at the reinstatement of a modern and efficient judiciary based on the Western European model and building in compliance with fundamental democratic principles.

The first truly Estonian national judiciary was developed after the turmoil of the First World War. Estonians did not follow the Bolshevik experience[2]: courts that were established under pre-revolutionary Russian rule continued to operate in order to prevent a judicial vacuum. In 1919, the National Court became Estonia's highest court of law. Rural community courts lost their status as lower social class courts and were limited to matters concerning social welfare. The 1938 Courts Act marked the completion of a national judiciary. By that time, Estonia also had its own basic criminal and civil codes, as well as procedural legislation.

The forceful incorporation of Estonia into the Soviet Union meant the end of sovereignty and the demolition of the national judicial system. The National Court was eliminated, and the Appellate Court and circuit courts were replaced by a Soviet-style Supreme Court and people's courts. All interwar legislation was repealed, and on 1 January 1941 Soviet legislation came into force on the territory of occupied Estonia.

The Declaration of Sovereignty was signed on 16 November 1988. According to the declaration, the sovereignty of «the Estonian SSR» meant that the highest authority within its territory was the state's own legislative, governmental, and judicial institutions. On 16 May 1990, Estonia undertook the duty to provide all citizens of the Estonian Republic with the social, economic and cultural rights and political freedoms "arising from the universally recognized norms… political rights and freedoms of the citizens of the Estonian Republic shall be determined in a separate act in accordance with the universally recognized principles of international law"[3]. Administration of justice had to be exercised by the independent courts separated from the USSR judicial branch[4]. The year 1991 saw the adoption of the Laws of the Estonian Republic "On the Advocacy in Estonia", "On Courts", "On the Status of Judges", and "On the Court of Arbitration of the Chamber of Commerce of Estonia". Amendments to the Law "On the Police" followed the same year. The Prosecutor's Office was transferred out from under

1 Priidu Parna. "Legal reform in Estonia", 33(2) International Journal of Legal Information / the Official Journal of Association of Law Libraries, (2005), 219–223, at 220.

2 All pre-revolutionary courts in Russia were abolished by the Decree on Courts No. 1 of 22 November 1917.

3 Article 8 of the Law of the Estonian SSR «Об Основах Временного Порядка Управления Эстонией» ("On the Fundamentals of the Provisional Order of Governance in Estonia"), 16 May 1990.

4 *Ibid*., Art. 5.

parliamentary control and given the status of a governmental authority, and penal institutions were placed under the authority of the Ministry of Justice. The Law "On Determination of number of courts of the Estonian Republic, their composition and number of lay judges in county and city courts" was passed in 1993. A new version of the Criminal Code was adopted in 1992. Penal law reform has been most influenced by German and French law, as well as by Italian law in regard to procedure.[1] New Law "On Courts" of 2002 invalidated the 1991 Law "On Courts", the 1991 Law "On the Status of a Judge", and the 1993 Law "On Determination of number of courts of the Estonian Republic, their composition and number of lay judges in county and city courts". This Law introduced changes into the Criminal Code, the Criminal Procedural Code, the Law "On Self-Government" and a number of other laws, and made certain alterations in the national judicial system.

The Constitution, which was adopted by popular referendum on 28 June 1992, established the rule of law and judicial power as basic ideas and determined the role of the courts and their position in the general system of government. The Estonian court system is governed by Chapter 13 of the Constitution and the 2002 Law on Courts. Important guarantees of the independence of the judiciary are specified in para. 147. As a rule, judges shall be appointed for life, which means that they do not have to bow to political pressure in order to secure a renewal of their term[2].

Justice in the Republic of Estonia is administered by courts of law which solely exercise judicial power. The Estonian court system comprises: 1) County and City Courts and Administrative Courts; 2) Circuit Courts; and 3) the Supreme Court. Circuit Courts are second-level courts and hear appeals from first-instance courts. There is no separate administrative court structure of administrative courts of appeal and a supreme administrative court; rather, the administrative courts are integrated into the hierarchy of the ordinary courts[3].

The Supreme Court is the court of last resort in Estonia. It handles judgments as an appellate instance and may also, in cases specified by law, change a lower court decision or correct miscarriages of justice. The work of the Supreme Court is carried out by the Civil Chamber, the Criminal Chamber, the Administrative Law Chamber, the Constitutional Review Chamber, and by the General Assembly of the Supreme Court, which comprises all members of the court.

As a part of judicial reform, a new, previously non-existent function of constitutional review was added to the judiciary. A specific constitutional provision[4] explicitly prohibits the courts to apply any law or other legislation which is in conflict with the Constitution. In practical terms this means that Estonia — quite un-

1 Parna, *op. cit.* note 14, 221–222.
2 Grote, *op. cit.*, note 11, 16.
3 *Ibid.*,16.
4 Article 152 of the 1992 Constitution of the Estonian Republic

usually for a Continental European legal system — follows the model of decentralized constitutional jurisdiction in which the assessment of the conformity of ordinary legislation with the Constitution is part of the normal functions of the ordinary courts. Constitutional review of legislation is not only a right, but also a duty of the ordinary courts[1]. Some legal scholars state that the fact that Estonia does not have a separate body in charge of constitutional review is a strong positive feature. According to Kerikmae, the modern approach in multilevel governance is to secure the equilibrium and balance between the national and supranational interest through having constitutional dialogue. In general, states with Supreme Courts (Ireland, Greece, Denmark and Finland) have been innovative in keeping this dialogue, while the member states with Constitutional Courts have avoided it as a rule[2]. Kerikmae believes that the Estonian judicial system with its Supreme Court should become interested and able to participate in the constitutional dialogue.

Cases considered by the Constitutional Review Chamber include the verification of constitutionality of laws which have been passed by the *Riigikogu* and come into effect, constitutionality and legality of *Riigikogu* decisions, constitutionality of laws which the President of the Republic has not signed and which thus have not yet taken effect, constitutionality of laws promulgated by the President of the Republic, constitutionality of international treaties of the Republic of Estonia which have not yet come into force, constitutionality and and the legality of legislative decisions enforced by central executive and local government authorities[3].

Request for the constitutional review of laws, other legal acts, and international treaties may be submitted directly to the Supreme Court by the President, the Chancellor of Justice, and the lower courts. The Supreme Court has the power to either reject the appeal or to agree to review the case fully or in part, and to declare a law to be invalid wholly or in part. The power to nullify a legal act rests solely with the Supreme Court; other courts may declare an act unconstitutional and refuse to apply it.

The establishment of the office of Chancellor of Justice constitutes another achievement of the Estonian judicial reform. The Chancellor of Justice is a unique institution in the Estonian legal system, which does not have an exact equivalent in either the Latvian or the Lithuanian system. According to Grote, it combines certain features of the Swedish Chancellor of Justice with those of the Russian Prosecutor General in its original form. The office of the Chancellor of Justice already existed under the 1938 Constitution, when it was attached to the President of the Republic and was given the task of reviewing the constitutionality of acts

1 Grote, *op. cit.*, note 11, 16.
2 Kerikmae, *op. cit.* note 9, 23.
3 For further details see Constitutional Review Court Procedure Act of 2002 of the Republic of Estonia.

of state and other public bodies and reporting to the President and the bicameral Parliament[1]. In the 1992 Constitution, the powers of the Chancellor of Justice are established in Chapter XII: the Chancellor of Justice is an independent official who shall review the legislation of the legislative and executive powers and of local governments for conformity with the Constitution and the laws. The Chancellor of Justice shall analyze proposals made to him or her concerning the amendment of laws, the passage of new laws, and the activities of state agencies, and, if necessary, shall present a report to the Riigikogu. In certain cases prescribed by the Constitution, the Chancellor of Justice shall make a proposal to the Riigikogu that criminal charges be brought against a member of the Riigikogu, the President of the Republic, a member of the Government of the Republic, the Auditor General, the Chief Justice of the Supreme Court, or a justice of the Supreme Court. Another important duty of the Chancellor of Justice is to present an annual report to the Riigikogu on the conformity of the legislation passed by the legislative and executive powers and by local governments with the Constitution and the laws[2].

By the end of 1994, Estonia had two administrative courts (in Tallinn and Tartu), 21 city and county courts, three circuit courts (in Tallinn, Tartu and Jõhvi), and the Supreme Court, which held its first session in May of 1993 in Tartu. The Estonian government quickly realized the importance of establishing a system for the judges' professional development. As early as 1995, the Estonian Law Center Foundation became very active in this realm, and for 14 years the system for improving judges' qualifications was run by a civil society institution. In 2009, this function was transferred to the Training Council, which is comprised of two judges of a court of the first instance, two judges of a circuit court, two justices of the Supreme Court, and one representative each from the Prosecutor's Office, the Minister of Justice and the University of Tartu[3]. Under the 2002 Law on Courts, support services shall be provided to the Training Council by the Supreme Court.

In Russia, this issue came up on the agenda three years later, and the newly created Russian Academy of Justice was put in charge of the process. The RAJ was co-founded by the Supreme Court and the Highest Court of Arbitration of Russia and, initially, it was nothing but an institution where judges simply seemed to replicate themselves in accord with a safe, approved image for the profession. This is in sharp contrast to Estonia, where for 14 years the system for improving judges' qualifications was run by a civil society institution. In Russia, the potential of civil society institutions in this area was employed rarely and warily.

As a part of Estonia's judicial reform process, all former judges who served in a law-related job under Soviet rule, as well as all other applicants, were required to apply for the position of judge and to take a qualification exam. This practice could be very effective in Russia, where many judges still possess a Soviet mental-

1 Grote, op.cit, note 11, 17.

2 Par..143, Chapter XII of the Constitution of the Republic of Estonia of 1992.

3 § 44 (1) of the 2002 Law on Courts.

ity and demonstrate accusatory bias. Truth be told, such judges would never pass the qualification exams, where the main objective is to determine whether a former Soviet judge could practice law in a transformed political and economic landscape.

Article 3 of the Estonian Law on the Status of a Judge envisaged that applicants must be persons of high moral character who can make good judges. All applicants were also required to have completed the University of Tartu Law Program, or to have equivalent qualifications. Interestingly, Russian judges are not required to possess high moral character, although an exception was made for the justices of the Constitutional Court. Article 8 of the Federal constitutional law "On the Constitutional Court of the Russian Federation" establishes the requirement of a good reputation for the members of the Constitutional Court. It seems that Russian lawmakers don't think that judges need high moral character — it would just make their jobs harder.

Police reform was launched shortly before the official reestablishment of Estonia's independence and included three reform efforts: reinstatement of the interwar police; bringing the system of law enforcement bodies into compliance with the EU requirements; and unification of the agencies vested with law-enforcement duties into one department. Initially the Estonian police was established on 12 November 1918 and included external, criminal, and political units. In 1940, the Estonian police was eliminated and replaced by the centralized Soviet militia controlled by the Army. Such a typically Soviet system was introduced in many countries of the Soviet bloc[1]. Militia units were subordinated to the Ministry of the Interior; their main characteristics included the military-like organization, the Communist mentality of militia officers, and a particular understanding of their functions. The Soviet militia was considered to have emergency powers, so citizens had no access to information on the militia's activities, since that could have decreased its efficiency. Assisting people was not a priority task for the Estonian law enforcement agencies in Soviet times[2].

At first, the Estonian police reforms seemed merely cosmetic: the district offices were renamed, but their internal structure remained the same[3]. Some researchers believed that in the early 1990s, the main objective for reform would have been changing police priorities, which in Soviet times were aimed at pro-

1 S.K. Ivkovic,and M.Haberfeld, "Transformation from militia to police in Croatia and Poland Policing", 23(2) International Journal of Police Strategies and Management (2000), 194–217.

2 Bill Hebenton and Jon Spencer. Assessing International Assistance in Law Enforcement: Themes, findings and recommendations from a case-study of the Republic of Estonia. Helsinki: European Institute for Crime Prevention and Control, affiliated with the United Nations (2001).

3 http://www.myestonia.ru/publ/reforma_pravookhranitelnykh_organov_po_ehstonski/14-1-0-280.

tecting the state rather than the people. In the beginning of the reform period, the police continued to chiefly perform its putative functions. At the same time, just as the former rank system was being changed, the police also lost many of the guarantees and benefits that the "militia" had had, including housing and health insurance[1]. The Police Force Act was adopted on 20 September 1990 and came into effect on 1 March 1991. According to Saar, this law was more of an attempt to reform the Soviet "militia", and soon it became obvious that the aforementioned act was a hindrance to the development of the new police system[2]. The Police Force Act remained in effect until 14 May 1998, when it was replaced by the Police Service Act. The passing of this Act was a very important step in the development of the Estonian police, since it laid the basis for stabilizing the personnel of the police force. The Act specified how personnel are to be recruited, their working conditions, benefits, ranks, and the regulations concerned with leaving the police force. The passing of this Act meant that the police now had a concrete career structure, which gave a young person willing to become a police officer opportunities and guarantees for long service and career progression[3]. The 1998 Act also established requirements for the appointment of police officers[4]. Art. 9 specified a list of categories of persons who shall not be employed in the police service. In 1998, Articles 15 and 17 (establishing the order of transfer of police officers without their consent and guarantees) were contested before the Constitutional Review Chamber of the Supreme Court of Estonia as possibly violating the freedom of movement. The Chamber ruled that freedom of choice of residence may be restricted under Chapter 10 of the Constitution for the reasons of national defense, and this can apply only to members of the armed forces, not to the police service[5]. Thus, the Chamber concluded that this section of the law was in conflict with Art. 34 of the Constitution[6].

In creating their new law enforcement agency, the Estonians followed the Finnish model of a non-militarized police that is a part of the Ministry of Internal Affairs. The major difference was that the new police force would treat people in a radically new way — with respect. Estonia began by reducing the number of po-

1 Juri Saar. Criminal Justice System and Process of Democratization in Estonia. Final Report. Tallinn : NATO Democratic Institutions Research Fellowship (1999), 27.

2 *Ibid*. 27.

3 *Ibid*. 27.

4 Art. 13 of the 1998 Police Service Act of the Republic of Estonia. Retrieved from https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwii_t-Z3prTAhUCwYMKHa6oBMUQFggcMAA&url=http%3A%2F%2Fwww.track.unodc.org%2FLegalLibrary%2FLegalResources%2FEstonia%2FLaws%2FEstonia%2520Police%2520Service%2520Act%2520%25201998(%2520As%2520Amended%25202004).pdf&usg=AFQjCNHjz7DObQYlGUMHqbWunUS9iKyViQ&sig2=QLVdbwuEzoBl0pF1Nb3xYg&cad=rja

5 W.Sadurski. Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe. Springer; 2005 edition (February 21, 2005), 207.

6 Sadurski, *Ibid*.

licemen, and by 2009, the number per capita was comparable with Scandinavian countries. Despite the abolishment of the Soviet system, it took a long time for the public's trust in the police to be restored. Many did not believe that a true transformation was possible.

By the end of the first reform effort, the Estonian police was a two-branched demilitarized service within the Ministry of Internal Affairs. The first branch, the State Police Department, was responsible for public order and internal security, the prevention of crime, traffic safety, criminal investigation, and preliminary investigation[1]. The second branch, the Security Police Department, was responsible for the preservation of constitutional and territorial integrity, the protection of state secrets, counterintelligence, and combating terrorism and corruption[2].

After the Soviet militia was eliminated and the national Estonian police was reinstated in the late 1990s, people's attitude towards the police, which initially scored low in public opinion, started to change. According to the Estonian Economic Research Institute, the percentage of people who report experiencing crimes, of which they or those close to them have been victims, has grown from 38% in 1993 to 54% in 1998. According to Saar, it was an essential indicator of the public`s opinion on police efficiency[3].

On 1 May 2004 Estonia officially joined the European Union. The guidelines of Estonia's policy in the EU were envisaged in the strategic framework document "The Policy of the Estonian Government in the EU in 2004–2006"[4], where the safety of people was established as one of five fundamental goals. The next stage of Estonian police reform came as a part of the process of its integration into the European Union. First, the number of the district police departments was reduced to four. The reformers thought that a Scandinavian-style system of territorial police departments whose jurisdiction does not overlap with administrative regions would ensure lower levels of corruption than in any centralized police system. Upon dealing with quantity, the Estonians turned to quality, focusing on increasing police efficiency. In 2005, they launched the *ePolice* project. The main task of the project was providing policemen with better remote communications capabilities. The system provided for the hardware, information technologies, and communication solutions necessary for instant coordination. All of these measures have proved very effective indeed and the system remains in place.

Today, the Estonian police force is up to European standards in every sense, including its mission: to provide a public service. The main evaluation criteria of the work of the Estonian police is the level of public trust. For this reason, the police force maintains the utmost degree of transparency. Its website (www.politsei.ee)

1 For further details, see "State Police Department Statute" of 1 August 1997.
2 For further details, see "The Security Police Department Statute" of 3 August 1998.
3 For more details see Juri Saar. Op. cit.
4 http://www.riigikantselei.ee/failid/The_Government_s_European_Policy_for_2004_2006_FINAL.pdf

contains all of the information on its institutional structure and operations. The site also allows users to make electronic inquiries and follow the proceedings of criminal and administrative cases online. The Estonian police force is considered to be among the best in Europe. The level of people's trust in police has displayed gradual growth: 17% in 1993, 70% in 2007, and 80% in 2009[1]. According to the results of the survey conducted by independent research company Turu-uuringute AS, in early 2011, 84% of respondents said they trusted the police.

On 1 January 2010 the Police Board, Central Criminal Police, Public Order Police, Border Guard Board, and Citizenship and Migration Board (CMB) were merged and in their place the Police and Border Guard Board started operation. According to the official website of the Police and Border Guard Board, "by its principles, the police are a servicing organization and we consider it our main duty to do our best so that law-abiding people would feel as safe as possible in Estonia"[2]. Trustworthiness, openness, cooperation, human-centeredness, safety, professionalism, integrity and humanity are the core values that the Estonian police uphold in their daily work[3]. The level of people's trust remains the main criteria of evaluation for the police, and the Police and Border Guard Board demonstrates a high level of transparency.

Today Estonia is the only success story of setting up a post-Soviet national state which has completed its post-Communist transition and, despite the remaining problems with the Russian-speaking minority, has fully broken up with its Soviet past. All in all, Estonia is a unique case[4]. Both in general and in such separate areas as the national economy, police reform, and judicial reform, Estonia is the most successful reformer among all the former Soviet republics.

1 E. Prokudina, The police system in Estonia, "Administrative law and Procedure", No 6 (24–25) (2009) (Prokudina E.V., Organizatsiya polizeyskoy systemy Estonii. Administrativnoye pravo y process. 2009, No. 6).

2 http://www.politsei.ee/ru/organisatsioon/

3 *Ibid*.

4 Andrey Ryabov, "Post-Soviet States: the deficit of development, political and economical plurality", Kennan Institute Bulletin in Russia, 23 (2013) 7, 17. (Andrey Ryabov. Postsovetskiye gosudarstva: deficit razvitiya na fone politiko-economicheskogo mnogoobraziya. Vestnik Instituta Kennana v Rossii, 2013, No 23.)

REFORMS IN LATVIA[1]

Unlike Estonia and Lithuania, Latvia took the approach of restoration of the pre-Soviet constitutional system, where the constitutional transition was realized through the reinstatement of Satversme (the Latvian Constitution of 1922). Similarly, Latvian judicial reform was an evolutionary process, under which the new system was created on the basis of the pre-war Latvian experience. The best members of the national judiciary proved to be very active in the realm of judicial reform, and this enthusiastic involvement was one of the unique features of the Latvian judicial reform. In the beginning of the 1990s, judicial reform was developed and then implemented both by individual Supreme Court judges and by the Supreme Court as a judicial body. The working group of the Juridical Commission of the Latvian Parliament was another driving force of the judicial reform. This working group was set up in the early 1990s and included members of the Latvian Parliament, representatives of the Ministry of Justice and the General Procuracy, and law professors from the Latvian University. The Latvian Union of Lawyers also took an active part in the development and promotion of judicial reform. During its work on the basics of judicial reform, the working group also paid a lot of attention to the foreign solutions in this area. In order to combine best practices from both continental and common law systems, members of the working group studied the experience of the USA, Germany, France, Great Britain, Russia, Lithuania, and Estonia. But the experience and best practices of these countries were not used as guidelines for the Latvian judicial reform. Eventually the members of the working group focused on Latvia's own pre-Soviet experience of creating a national judicial system in 1920–1940. The reformers faced two key tasks: to repeal the Soviet judicial system and to facilitate the maximum possible restoration of the pre-Soviet Latvian judicial system. Such an approach towards judicial reform was strongly motivated by the country's public consciousness, wherein nostalgia for Latvia's democratic past in general was one of the key factors.

Judicial reform went together with the reforms in the other areas of law enforcement. In 1991–1992 the reforms of police, the bar association, the investigatory service, and the system of bailiffs (marshals' service) were initiated. The driving force of these reforms was also the Latvian Parliament, where appropriate specialized working groups had been created.

Latvian judicial reform was strongly affected by political and economic factors. At the onset of the judicial reform, Latvia was facing sharp political confrontation.

1 This section represents the shortened, translated and updated version of the country report written by Professor Andrey Wilks, Director of the Institute of Law of the Riga Stradins University. The report was developed as a part of the international component of the Ford Foundation-sponsored project "Judicial reform in modern Russia — institutional-societal analysis of Transformation: Assessment of Results and Future Perspectives" through INDEM Foundation.

The development of the Latvian national economy made Latvia's transition period extremely complicated — especially after the breakout of the last financial crisis. For more than 7 years (in 2000–2007) Latvia was a real success story; its gross domestic product was increasing by 7% every year[1]. Latvia was one of the three post-Soviet countries (together with Hungary and Romania) that were most affected by the crisis[2]. Unlike the other two Baltic states, Lithuania and Estonia, which also experienced serious financial complications but managed to come up with their own anti-crisis programs, Latvia, together with Hungary and Romania, could cope with the crisis only with the help of a stabilization loan from the International Monetary Fund, which was later co-financed to a considerable extent by the European Union[3]. In the case of Latvia, the crisis resulted in a certain political instability and mass demonstrations, which greatly impressed the political leadership of the country[4].

In order to prevent the Communist party from influencing the courts, on 14 February 1990 the Plenary Session of the Supreme Court stated that the post of a judge was incompatible with membership in any political party or organization. On 23 April 1990 the Plenary Session of the Supreme Court recommended that the Supreme Council of the Latvian SSR, then exercising legislative power, declare illegal all decisions of judicial and extrajudicial institutions, which under the laws of the occupying state had subjected the inhabitants of Latvia to repression, and to rehabilitate such persons. On 11 March 1991 the Plenary Session of the Supreme Court passed the Resolution «On the Independence of the Judiciary of the Republic of Latvia,» which for the first time incorporated the fundamental principles of independence of the judiciary and judicial proceedings which met the requirements of international legal standards. The main purpose of legalization of these fundamental principles was to facilitate the judicial reform and the development of democratic processes in independent Latvia.

After the restoration of national independence, a politically important question arose, namely, whether to allow judges who had studied and worked during the Soviet period to continue their work. This question was especially sensitive for the Supreme Court judges. The final decision envisaged the separate assessment of individual performance and loyalty. Several judges had to resign, but many remained in office.

On 15 December 1992 the Saeima (Parliament) passed the Law on the Judicial Power, which formed the legal basis of national judicial reform. No effort was made to conceptualize or outline the judicial reform in any sort of separate document. For the first time, the principle of separation of powers was established on

1 Anders Aslund, The Last Shall be the First: the East European Financial Crisis (Peterson Institute of International Economics, 2010).
2 *Ibid*.
3 *Ibid*.
4 *Ibid*..

the legislative level[1]. Article 1 of the Law on the Judicial Power provided that together with the legislative and the executive branch, the Republic of Latvia should have an independent judicial branch[2]. The Law established a three-tier court system and introduced five district courts. Initially, the Supreme Court embraced the Senate (the cassation[3] instance for all cases and the first instance for constitutional review), and four Chambers — the Chamber for Civil cases, the Chamber for Criminal Cases, the Chamber for Economic Cases, and the Chamber for Constitutional Review[4]. The latter never came into existence, but 1997 saw the creation of the Constitutional Court of Latvia[5]. The power to initiate the review procedure before the Constitutional Court belongs to a number of elected or appointed officials including the President, the *Saeima,* not less than twenty deputies of the *Saeima*, the Cabinet, the Prosecutor General, the Ombudsman, etc.[6] With the reform of the Constitutional Court Act in 2000, this right was extended to persons whose fundamental rights established by the Constitution have been violated.[7]

Despite the absence of a conceptualized document establishing the goals and methods of judicial reform, the initiators of the reform did a great deal ***to promote the idea of the necessity of judicial reform*** and to attract the attention of the general public. This was done by the means of comprehensive public discussion and publication of the results of workshops and roundtables dedicated to

1 Art.1 of the Latvian Law on the Judicial Power of 15 December 1992. Translated. Retrieved from http://worldconstitutions.ru/?p=891

2 Gorbuz A.K., Krasnov M.A., Mishina E.A., Satarov G.A.,The Transformation of the Russian Judiciary. An Attempt at a Comprehensive Analysis (Sankt-Peterburg, Norma, 2010), 249. (Transformatsiya rossiyskoy sudebnoy vlasti. Opyt kompleksnogo analiza. SPb.: Norma, 2010).

3 Cassational review existed in the Soviet Union. After the break-up of the USSR it was introduced in a number of post-Soviet states. The classic textbook on Law and Legal System of the RF by Maggs, Schwartz and Burnham explains that in contrast to its classic understanding in civil law systems, Russian cassation involved not only review for legal error, but also a rather searching factual review. While not a trial de novo, review under this standard was a quite thorough review of the factual issues in the case. In 2010 Russia passed new laws that brought the nature of cassation review closer to its classic understanding. Cassation review is possible only with regard to the judgments which have come into legal effect and only "serious" breaches of substantive or procedural law can be subject to review on cassation, no question of fact will be heard (Maggs, Schwartz and Burnham . Law and Legal System of the Russian Federation. Juris Publishing, 2015, 88–89).

4 Art. 45, 47 of the Latvian Law on the Judicial Power of 15 December 1992.

5 The Constitutional Court of Latvia was established under the Constitutional Court Act of 14 June 1997. Retrieved from http://www.satv.tiesa.gov.lv/en/2016/02/04/constitutional-court-law/

6 Article 17(1) of the Constitutional Court Act.

7 Dr. Rainer Grote, An Introductory Note to the Constitution of Latvia of 1922 (Max Planck Institute for Comparative Public Law and International law, Heidelberg, Oceana, 2007), 10.

the judicial reform in the central mass media. Along with publication in the mass media, basic documents covering various aspects of judicial reform were also published in special publications of the Latvian Parliament and the Council of Ministers. As the fundamental act of the reform, the Law on Judicial Power was published in a special paperback edition and then sent to all libraries, schools, institutions of higher education, and administrative agencies. In fact, from the viewpoint of the general public, judicial reform was a low priority. Despite the efforts of the reformers to promote the idea of the necessity of judicial reform, such issues as the restitution of property of former political prisoners and other victims of political repression, privatization, land reform, setting up a national banking system, and privatization of state-run enterprises all held greater interest for the general public than judicial reform.

In 1993 the National Council for Prevention of Crime, headed by the Prime Minister of Latvia, was established. The focal point of the Council's activity was to train the new generation of lawyers and to change educational programs. Changes in educational programs were made promptly at two key educational institutions — the Latvian University and the Police Academy.

In 1994 the first serious threat to the institutional independence of the Latvian courts surfaced. In that year the Cabinet of Ministers approved new regulations on the Ministry of Justice, with the list of duties of the Ministry including the power to supervise the Supreme Court. On 31 October 1994 the Plenary Session of the Supreme Court ruled that the provisions of these regulations of the Ministry establishing the power to supervise the Supreme Court were in breach of the law and not binding on the Supreme Court. The Plenary Session found that vesting a government department with the power to supervise the Supreme Court openly violated the principle of separation of powers and the principle of judicial independence. The Plenary Session also stated that these provisions constituted an usurpation of the power to supervise the national court of last resort[1].

Latvia was not very active in the area of monitoring the achievements and failures of judicial reform. National experts explain this by the fact of absence of a research institute or a think tank that could be charged with this important mission. According to another version, monitoring was not seen as an efficient instrument of evaluation of the results of judicial reform. Instead, the national judicial reform and its progress were discussed on a regular basis in the Juridical Committee and the Committee for Defense and Interior Affairs of the Latvian Parliament and at the meetings of the National Council for Prevention of Crime. Latvian experts believe that the institutional reform of judicial bodies was a success. The biggest problems of judicial reform were related to the drafting of new procedural legislation, namely the Code of Criminal Procedure, the Code of Civil Proceedings and the Code of Administrative Procedure. It took more than 15 years to draft a new

1 For details see http://at.gov.lv/ru/o-verkhovnom-sude/istoriya/vosstanovlenie-demokratii

Code of Criminal Procedure, and most Latvian experts are unhappy with the quality of this act. Several experts commented that these 15 years were spent in vain.

Latvian experts highlight the following achievements of the Latvian judicial reform. First, the Latvian judicial system has been brought into compliance with Western European Standards, *i.e.*, the European Convention of Human Rights and the Copenhagen criteria. Setting up five new circuit courts and creating the appeal and cassation instances of the Supreme Court of Latvia constitute another positive development. Restoration of the pre-Soviet regulation on the use of real estate, including land use, also played a very important role. The Civil law of 1937 was reinstated in 1992, the Law on Land Records in 1993. A new system of administrative justice was set up, whereas the system of criminal justice underwent significant changes. A real breakthrough took place in the area of legal protection of human rights. National experts also note active research in the area of European Union law and the successful handling of many new types of difficult cases related to areas of regulation that did not exist under Soviet rule due to the nature of the Soviet legal system. Latvian judges study and take into consideration the judgments of the European Court for Human Rights. Courts actively employ high-tech technologies, judges' salaries have been considerably increased, and the Courts became more accessible for the general public.

Persons who take a more critical view of the Latvian judicial reforms, including some Latvian experts, make the following points. According to Latvian experts, the biggest problem was the absence of a real driving force for reform inside the judicial system. The system was very resistant to changes. This point may also explain why such serious problems as the development of procedural legislation, retraining of judges, a highly professional and developed system of selection of candidates for judgeships, the increase of salaries, material and technical support of courts, and some other issues either were not addressed at all for years or were solved only to a minimal extent and without any visible success. All changes related to the Latvian judiciary were nothing but a response to certain unfavorable consequences. Only when Latvian courts found themselves buried under a constantly increasing caseload, were the issues of constructing new court buildings and increasing the number of judges given high priority and brought up on the political agenda. Only when the prestige of the judicial profession went down to a catastrophically low level and talk about corruption in the judiciary was increasing day by day did the political elite of Latvia start looking for ways to solve these crucially important problems.

National experts also addressed a number of ongoing problems. As of 2008, the competition among the candidates for judgeships was still very low. The candidates were poorly motivated and judicial careers not very much sought after. Given the level of caseloads in the courts, the number of judges was still insufficient. Despite certain progress in this area, there was still an insufficient number of court buildings. Court proceedings were too long, and delays remained a big

issue — especially at the stage of preliminary investigation. The level of execution of judgments was still very low. On average the execution of a judgment in a civil case took from two to five years.

The existing system of judge retraining was poorly organized and under-financed. Similarly, national experts were not happy with the quality of judgments; usually judgments were not well-reasoned, and sometimes judges lacked sufficient knowledge of legal writing. Court personnel and especially law clerks for judges were overworked and underpaid. The level of trust in the judiciary was still extremely low. The general public thought that judges were corrupt and unprofessional.

As of 2008[1], judicial reform in Latvia had not been completely successful. The efficiency of the court system was still low, especially in civil proceedings, where handling a case can take up to two years. Change was also needed in the enforcement of judgements.

Latvian experts make the point that ***the general attitude of people towards the judiciary results from the lack of trust in and the low prestige of the judicial profession***. The extremely low level of legal consciousness and insufficient qualifications of many judges also play a negative role. Another important reason is that in comparison with other branches of the legal profession, especially lawyers from the private sector, judges are underpaid. Many experts highlighted that Latvia did not have a chance to shape a good national system of legal education. Two decades of independence (1918–1940) proved to be enough to elaborate on and then adopt a good and sustainable legislative framework. However, it was unrealistic to be able to cultivate traditions of legal education in the span of 20 years. The University of Riga was set up only in 1919. Under Soviet rule, this University was rated as a medium-level one. After the restoration of independence, the level of legal education in Latvia needed to be raised considerably. Now Latvia was a sovereign state whose main goal was the prompt and successful transition to democracy and a market economy. Another important task was to liquidate the traces of the Soviet legacy. Both the system of legal education and the judicial system had to be reorganized and Westernized.

Latvian police reform got off to an early start. On 5 June 1991 the Latvian Supreme Soviet adopted the Law on the Police, which envisaged such key tasks of police as the protection of the life, health, rights, freedoms, and property of citizens and protection of the interests of society and the state from criminal violations and other wrongful acts. The organizational structure of the Latvian Police included the State Police, the Security Police, and the local government police.[2] The new law established that police activities should be based on compliance with law, humanism, human rights, social justice and unity of command, and

1 The year when the data was collected by Latvian experts for the INDEM project.

2 Chapter IV of the Law on the Police of 5 June 1991 of the Latvian Republic (1991). Translated. Retrieved from http://www.pravo.lv/likumi/49_zop.html

should rely on the assistance of the people[1]. Police officers were not allowed to be members of political parties. Main duties of the police included the protection of rights and legitimate interests of people regardless of their citizenship, social, property, or other status, racial and ethnic identity, gender, age, education, language, religion, or political or other views[2]. The 2003 Professional Ethics and Conduct Code of the State Police Personnel requires the police officers to be decent, tolerant and to respect and defend the dignity of a human being[3]. Police officers are expected to combat any signs of corruption in the Police and keep higher-ranking officials or any other authoritative body informed regarding any case of corruption in the Police[4].

The operations of the police are under the control of the Cabinet, the Minister for the Interior, and local government institutions within the scope of their competence[5]. Comparing the policing model of today's Latvia with the Soviet model reveals a certain presence of the old patterns. National experts state that the system of the State Police is strictly centralized and bureaucratic, like the Soviet militia[6]. The Law on the Police was repeatedly amended; however, certain signs of the Soviet legacy are still visible. Nevertheless, this Law served as a sufficient basis for the successful transformation of the Latvian police. The analysis of the Law on Police shows some shortcomings, but it is modern enough for policing according to the principles of the rule of law and democracy[7]. Seeking EU membership and subsequently joining the EU also had a positive impact on police reform in Latvia.

International experts offer varied assessments of Latvian judicial reform. According to Freedom House, Latvia displays a stable and decent level of judicial independence, which remained unchanged for almost a decade and saw further improvement in 2017 and 2018. A new system of judges' performance evaluation was introduced in 2013. Nevertheless, a survey from 2016 found that the percentage of Latvians rating the independence of their courts as good or very good is below the EU average: 42 percent versus 52 percent. This was largely a result of lengthy court cases and several high-profile instances of judicial corruption.[8] Ac-

1 Article 4 of the Law on the Police, op cit. note 14.

2 For a detailed list of main and additional duties of the Latvian police see Articles 10 and 11, *op. cit*. note 14

3 Art.4 of the Professional Ethics and Conduct Code of the State Police Personnel of 5 December 2003. Retrieved from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fCR%2f31%2fRESP%2f1&Lang=en

4 Art. 14 of the Professional Ethics and Conduct Code of the State Police Personnel (2003).

5 Art. 38 of the Law on the Police (1991)

6 E. Melnis, A.Garonskis, A. Matvejevs.,"Development of the Policing in Latvia", Jurisprudencija 1 2006 (79), 76. Retrieved from https://www.mruni.eu/upload/iblock/9c9/8_melnis_garonskis_matvejevs.pdf

7 *Ibid*.

8 For further details see Nations in Transit 2018 report, Freedom House. Available at https https://freedomhouse.org/report/nations-transit/2018/latvia

cording to the 2019 OECD Economic Surveys[1], less than 40% of Latvians display trust in the national judiciary.

REFORMS IN LITHUANIA

In Lithuania, national judicial reform was influenced by political and economic factors. The citizenship issue was solved earlier and more successfully compared to the similar experience of Latvia and Estonia. In November of 1989, the Supreme Soviet of the Lithuanian Soviet Socialist Republic adopted its own citizenship law, which prescribed that the following persons shall be "citizens of the Lithuanian SSR":

(1) persons who held citizenship of the Republic of Lithuania, children and grandchildren of such persons, as well as other persons who were permanent residents on the territory of the Lithuanian SSR prior to 15 July 1940, and their children and grandchildren who now are or have been permanent residents on the territory of the Lithuanian SSR;

(2) persons who had a permanent place of residence in the Lithuanian SSR, provided that they were born in the territory of the Lithuanian SSR, or that at least one of their parents or grandparents was born on said territory, and provided that they are not citizens of another state;

(3) other persons who, up to and including the date of entry into force of this law, had been permanent residents in the territory of the Republic and had here a permanent job or other permanent legal source of support; such persons shall freely choose their citizenship within two years following the entry into force of this law; and

(4) persons who had acquired citizenship of the Lithuanian SSR under this law.[2]

The so-called "zero option" envisaged in para. (3) of Article 1 did not apply to members of the USSR armed forces and security service, who were not considered either residing lawfully or having legal permanent employment in the Lithuanian SSR. There were no other requirements apart from permanent residence and a permanent place of employment or another constant legal source of support — no attention was paid to ethnic origin, language or religion[3]. It is estimated that about 90% of the permanent residents chose Lithuanian citizenship[4].

According to Mole, having passed a "zero-option" law on citizenship as early as 1989, Lithuania's understanding of the state's makeup, unlike that of Estonia and

1 OECD Economic Surveys: Latvia, 2019, OECD Publishing, Paris. Available at https://read.oecd-ilibrary.org/economics/oecd-economic-surveys-latvia-2019_f8c2f493-en#page4

2 Article 1 of the LitSSR Law on Citizenship of 3 November 1989. Retrieved from http://www.jefremov.net/not-poems/enclosure4.htm

3 Caroline Taube, Constitutionalism in Estonia, Latvia & Lithuania. A Study in Comparative Constitutional Law. (Uppsala, 2001).

4 *Ibid*..

Latvia, was more territorially defined than ethnically or historically defined[1]. On the expiry of the two-year period, in 1991 a new Law on Citizenship replaced the 1989 Law. Those who had obtained citizenship according to the 1989 Law were included in the body of citizens as defined by the Law of 1991, whereas permanent residents (mostly USSR citizens) had to apply for citizenship according to the naturalization procedure[2]. So while the national identity discourse in Lithuania was just as anti-Soviet as in Estonia and Latvia, it was less anti-Russian. Interethnic politics in Lithuania were therefore less antagonistic and became even less so after the elections of October 1992[3]. The ethno-demographic structure also played its role. During the period of Soviet rule the number of Russians in Lithuania grew insignificantly: from 8.52% in 1959 to 9.35% in 1989 (as opposed to Estonia and Latvia, with 20.07% and 26.58% Russian populations in 1959, and 30.33% and 33.96% in 1989, respectively[4]). The population structure, where Lithuanians made up almost 80% of the population, ensured a relatively high level of political stability given that in all three Baltic states a change of governments happened on an almost annual basis in the early post-Soviet years. Unlike Estonia, which had similar center-right coalition governments excluding both socialists and the Russian minority[5], Lithuania had a strong post-communist Social democratic party and its politics were neither oligarchic nor ethnic, as ethnic Lithuanians comprised an overwhelming majority[6].

Complex economic reform was launched in 1991 and served as another important factor. At that time, the key tasks of the Lithuanian Government included control over prices, privatization, and land and banking reforms. The Law on Privatization followed in the same year. Land reform was the weakest and the hardest part of the national privatization program, since rampant privatization scared and confused people. Other negative factors included insufficient regulation, growth of corruption, and the involvement of organized criminal groups. However, the tough road of Lithuanian economic reform eventually led to success, and economic growth returned in the second quarter of 2010[7].

In the span of ten years after the restoration of independence Lithuania undertook remarkably early and active anticorruption efforts. A variety of laws with regard to anticorruption measures were enacted during that time: the Criminal Code (2000); the Law on Prevention of Money Laundering (1997); the Law on the

1 R.Mole. The Baltic States from the Soviet Union to the European Union: Identity, Discourse and Power in post-Communist Transition of Estonia, Latvia and Lithuania. (2012,84).
2 Taube, *op. cit.* note 2..
3 Mole, *op. cit.* note 4..
4 Results of the All-Union Census of the USSR, 1970, 1979, 1989. (Itogi vsesoyuznoy perepisi naseleniya SSSR 1970, 1979, 1989.) For details see Mole, *op. cit.* note 4..
5 Anders Aslund, The Last Shall be the First: the East European Financial crisis (Washington, DC, 2010), 41.
6 *Ibid*., 40.
7 *Ibid*.,41.

Adjustment of Public and Private Interests in the Public Service (1997); the Law on Declaration of Property and Income of Residents (1996); the Law on the Accounting for the Lawful Acquisition of Personal Property and for the Origin of Income (1997); the Law on Public Procurement (1999); the Law on Lobbyist Activity (2000); the Law on the Control of the Financing of Political Campaigns (1997), and the Law on Public Service (1999). The Criminal Code of Lithuania (presently in force) defines corruption as including corrupt behavior both in private and public sectors. Crimes with regard to the public service (concerning public officials and/or public servants) are taking a bribe (passively), subornation, and abuse of office. The Code also provided for exceeding official authority, failure to perform official duties, official forgery, and criminal liability for trading in influence.[1]

Like Estonia, Lithuania perceived reforms as a multidimensional task. The key priorities of national judicial reform included institutional reform of the judicial system, the development of real independence of courts and judges, and comprehensive transformation of court-procuracy relations. As in Estonia, Lithuanian reforms started early, shortly after regaining independence. However, legal and especially judicial reform was the longest and the most intensive one. A certain stability in the Lithuanian legal system was reached only in 2003–2003, when all basic codes came into legal effect. The first act that gave a start to judicial reform was the Law on the Judiciary of 31 October 1992. The legislative framework of Lithuanian judicial reform also includes the 1992 Constitution, the Law on Courts of 1994, and the Law on Administrative Courts of 1999, which established the two-level system of administrative courts. The Lithuanian Constitution established the fundamental principles of operation of the national judiciary, including judicial independence and decisional independence of judges (art. 109), a prohibition on applying laws which are in conflict with the Constitution (art. 110), and a prohibition on establishing courts with extraordinary powers in time of peace (art. 111)[2]. A separate article established that "Interference by institutions of State power and governance/ members of the Seimas and other officials, political parties, political and public organizations, or citizens with the activities of a judge or the court shall be prohibited and shall incur liability provided by law"[3]. Chapter VIII provided for the creation of the Constitutional Court, outlined its jurisdiction, and established requirements for justices. The Lithuanian Constitutional Court was set up remarkably early and provided a significant contribution to judicial reform and the transformation of the national judiciary. Some of its rulings (specifically those issued in 1994, 1995 and 1999) played an important role in the development of judicial reform.

1 For details, see Greco Evaluation report on Lithuania (2002), 6–7. Retrieved from http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan009762.pdf

2 For details, see Constitution of the Republic of Lithuania of October 25, 1992. Retrieved from http://www.lrkt.lt/en/about-the-court/legal-information/the-constitution/192

3 Art. 114 of the 1992 Constitution.

The 1992 Constitution enshrined the four-tier court system that included the Supreme Court, the Court of Appeal, regional courts, and local courts. The 1992 Law on the Judiciary lacked provisions on institutional changes, so the old two-level system remained unchanged, and the first signs of real transformation became visible in 1994.[1]

April of 1994 saw the adoption of the provisional law on the Economic Court, which was intended to replace the system of state and departmental arbitrazh of the Soviet type. However, the new court failed to live up to the expectations and was eliminated in September of 1998 for the following reasons. First, the Economic Court was the only specialized court in Lithuania that adjudicated commercial and economic disputes. Lithuania is a small country, so in reality the setting up of this court translated into a situation where the handling of all commercial and economic disputes in the country was in the hands of nine people. Such a system implied a high risk of corruption. Also, it was inconvenient for businesspeople to have only one economic court; some had their offices quite far from the Economic Court headquarters. Third, the Economic court applied the same civil and civil procedural legislation as did the general courts. And the last, but not the least — judgments of the Economic Court had to be appealed to district courts that were a part of the system of general courts, so most disputes had to be handled by general courts anyway[2].

Comprehensive institutional changes took place in 1995, when the Court of Appeal and regional courts came into existence. The structure of the Supreme Court underwent an essential transformation: The Presidium and the Plenary Session of the Supreme Court were eliminated together with the first instance jurisdiction. The Supreme Court became the cassation instance; also, it had to ensure uniformity of interpretation of legal norms by lower courts. The Supreme Administrative Court, which came into existence in 1999, was vested with a similar duty[3]. The reinstatement of the pre-Soviet court structure was both a symbolic gesture and a demonstration of continuation of the interwar judicial system that successfully operated in Lithuania. Restoration of the national judiciary was fast, but not flawless. Nekroshius noted that the new courts and a new judicial community were formed in the span of one year. This speedy process had a bad impact on the quality of selection of candidates: in order to form the new judiciary as soon

1 As stated by Professor V. Nekroshius, Chair of the Vilnius University Law School. For details see V. Nekroshius. Judiciary reform in the Lithuanian Republic: Main results and prospects. (Reforma sudebnoy vlasti v Litovskoi respublike: osnovniye resultaty y perspektivy). http://www.notiss.ru/usrimg/Nekroshius.pdf

2 *Ibid*.

3 Art. 31 of the Law on Courts of 1994. Retrieved from https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjmr_Sy5MLTAhVD94MKHeK7DLEQFggnMAA&url=http%3A%2F%2Fwww.teismai.lt%2Fdata%2Fpublic%2Fuploads%2F2014%2F12%2Frepublic-of-lithuania-law-amending-the-law-on-courts.doc&usg=AFQjCNESvO-9STSEZQgyq6galea-jPnr1Q&sig2=9qpvZJ0jwGnQkG70AkQ81A

as possible, the requirements for judges-to-be were not as strict as they should have been[1].

Formal guarantees of judicial independence were provided in the 1992 Constitution. Nevertheless, heated debates on judicial independence lasted for a decade. The focus of these debates was on relations between the judiciary and the Ministry of Justice. In April of 1998 the Seimas passed a set of important amendments to the Law on Courts. Many of these changes were developed with the use of the best practices of most European countries. The main idea was to put a clear demarcation line between the guarantees of decisional independence of judges in the course of administration of justice on the one hand, and in the administrative activities of the courts on the other hand. The new definition of administrative activities of courts applied to everything that was not directly related to administration of justice: financial and logistical support of courts, rules of case assignment, work schedule, the work of support staff, etc. Control over the administrative activities of courts was assigned to chief justices of the courts in question and to the Judicial Department of the Ministry of Justice. The employees of this department were judges delegated there by their courts for a one-year period (with a possibility of prolongation). The powers of the Minister of Justice were limited to approval of various regulations (on control over administrative activities of the courts, on case assignment, etc.) and the presentation of candidates for judgeships to the President. Salaries of judges had to be approved by an act of the Government.[2] In 1998 the issue was referred to the Constitutional Court of Lithuania. The ruling delivered by the Constitutional Court on 21 December 1999 became one of the fundamental acts of national judicial reform. The most important legal conclusions of this ruling included the following legal positions. First, "According to the principle of the separation of powers, all branches of power are autonomous, independent, and capable of counterbalancing each other. The judiciary, being independent, may not be dependent on the other branches of power also because it is the only branch of power formed on the professional but not the political basis"[3]. The Constitutional Court pointed out that "the organizational independence of courts and their self-government are the main guarantees of the actual independence of the judiciary. A constitutional duty of the other institutions of authority is to respect the independence of courts established in the Constitution. A duty of the state is to create proper work conditions for courts".[4] The Constitutional Court further elaborated the priority issue of judicial

1 For details see V. Nekroshius. Judiciary reform in the Lithuanian Republic: Main results and prospects. (Reforma sudebnoy vlasti v Litovskoi respublike: osnovniye resultaty y perspektivy). http://www.notiss.ru/usrimg/Nekroshius.pdf

2 For details see http://www.notiss.ru/usrimg/Nekroshius.pdf

3 Ruling of the Constitutional Court of the Republic of Lithuania of December 21, 1999. Retrieved from http://www.lrkt.lt/en/court-acts/search/170/ta922/content

4 *Ibid*, 8.

independence by stating: "While ensuring the independence of judges and courts, it is of much importance to separate the activity of courts from that of the executive. The Constitution prohibits the executive from interfering with administration of justice, from exerting any influence on courts or from assessing the work of courts regarding the consideration of cases. Supervision of courts and application of disciplinary measures to judges must be organized in such a manner so that the actual independence of judges might not be violated. Under the Constitution, the activity of courts is not and may not be considered an area of administration of any institution of the executive. Only the powers designated to create conditions for the work of courts may be granted to institutions of the executive. For their activities, the courts are not accountable to any other institutions of power nor any officials. It is only an independent institutional system of courts that may guarantee the organizational independence of courts and the procedural independence of judges"[1]. The Court interpreted Item 11 of Article 84 of the Constitution and emphasized that this constitutional provision "defines the powers of the President of the Republic in the sphere of the formation of the judiciary. The impugned norms of the Law on Courts provide that the President of the Republic may implement his constitutional rights only in case there is the proposal of the Minister of Justice. Thus, the proposal of the Minister of Justice conditions the implementation of the powers of the President of the Republic established in Item 11 of Article 84 of the Constitution, when the questions regarding professional career of judges are decided. Alongside, the principle established in Paragraph 2 of Article 5 of the Constitution by which the scope of powers shall be limited by the Constitution is violated"[2]. While interpreting article 115 of the Constitution, the Constitutional Court underlined that it contains a limiting list of due causes for the dismissal of a judge, and a judge cannot be dismissed on grounds other than those stipulated in the aforementioned article of the Constitution. Finally, the Court came to the conclusion that "taking account of the arguments set forth, the conclusion should be drawn that the impugned norms of Paragraphs 2 and 3 of Article 33, Paragraph 2 of Article 34, Paragraphs 5 and 7 of Article 56 of the Law wherein the proposal of the Minister of Justice to appoint and dismiss judges of respective courts and their presidents is established contradict Paragraph 2 of Article 5, Item 11 of Article 84, Paragraph 2 of Article 109 and Paragraph 5 of Article 112 of the Constitution"[3].

Another point made by the Constitutional Court stated that the principle of judicial independence applies also to organizational matters, so the initially established boundaries of institutional independence of courts must be extended. The ruling specified that state financing would go directly from the state budget to a court in question without any involvement of the Ministry of Justice. The Ministry

1 *Ibid*.8.
2 *Ibid*.,16–17
3 *Ibid*., 17.

of Justice as a part of the executive branch was deprived of its right to initiate disciplinary proceedings against judges. The possibility to delegate judges to serve on the Judicial Department of the Ministry of Justice was deemed as contradictory to the principle of independence of judges. The ruling stated that vesting the Ministry of Justice with the power to exercise control of administrative activities of courts was in breach of the principle of judicial independence, since it was related to the administrative functions of the Ministry of Justice. Finally, the ruling of 21 December 1999 served as a strong incentive for the development of a new version of the Law on Courts that came into effect on 1 May 2002 and is still in force. According to the 2002 changes, control over administrative activities of the courts was vested in the judiciary. These amendments also modified the composition and powers of the Council of Courts, and provided for the creation of a national judicial administration and a special Presidential collegium in charge of judicial appointments, promotions and dismissals.

A real judicial reform is impossible without changing the system of relations between the courts and the procuracy. It is another area where the Lithuanian Constitutional Court played a crucial role. In 1994 two first instance courts (the Skuodas District Court and the Šiauliai District Court) submitted petitions to the Constitutional Court of Lithuania requesting an investigation into whether Article 53 of the Code of Civil Procedure and Paragraph 3 of Article 21 of the Law on the Prosecutor's Office are in compliance with the Constitution of the Republic of Lithuania. Both petitioners based their requests on the fact that Article 118 of the Constitution of the Republic of Lithuania does not provide for the prosecutor's right to appeal to Court in the procedure prescribed by the Code of Civil Procedure[1].

In its ruling of 14 February 1994 the Constitutional Court recognized that the provisions of Article 53 as well as Articles 13 and 54 that provide for the prosecutor's right to join the case at any stage and carry out supervision in the civil proceedings contradict Articles 5, 109 and 118 of the Constitution of the Republic of Lithuania[2]. This ruling is another milestone of national judicial reform since it significantly modified court-procuracy relations.

For the time being, procrastination and occasional corruption cases are the most important factors that undermine the prestige of the national judiciary. According to Freedom House, some high-profile cases also damaged the reputation of the Lithuanian courts, including the cases of Egle Kusaite and Drasius Kedys. The independence and impartiality of the judiciary were widely challenged by the fact that senior politicians and specifically judges publicly encouraged diso-

1 Ruling of the Constitutional Court of the Republic of Lithuania of February 14, 1994, 2. Retrieved from http://www.lrkt.lt/en/court-acts/search/170/ta979/content

2 *Ibid*., 7.

beying court orders (as happened in the Kedys case)[1]. The 2013 Report mentioned the number of laws deemed unconstitutional by the Constitutional Court as another alarming development. This number grew threefold from 2010 to 2011, and lawyers view this phenomenon as an example of the low quality of the lawmaking process[2]. In 2013, the Lithuanian judiciary still scored low in public opinion: only 17% of the population trusted national courts. 2015 saw slight improvements in this realm: opinion polls reveal that 24% of the public trusts the prosecutor general and the judicial system at large. The public still perceives the judiciary as a rather opaque body that often caters to the presidential agenda and has taken particular issue with the Office of the Prosecutor General[3].

1 For details see the 2013 Nations in Transit report of Freedom House. https://freedomhouse.org/report/nations-transit/2013/lithuania

2 *Ibid*.

3 The 2015 Nations in Transit Report of Freedom House. Retrieved from https://freedomhouse.org/report/nations-transit/2015/lithuania

CHAPTER 4. REFORMS IN GEORGIA

After proclaiming independence in April 1991, Georgia went through a complicated and painful period of transition which was full of violence, impoverishment and interethnic tensions. Conflicts broke out in the autonomous regions of Abkhazia and South Ossetia, with fighting reaching the capital Tbilisi and parts of Western Georgia. The pro-Soviet South Ossetia demanded the status of a republic and decided to boycott elections to the Supreme Soviet. In return, Georgia repealed the autonomous status of South Ossetia in early December of 1990. Other national minorities residing in Georgia were also openly mistreated and sometimes oppressed in 1989–1991. When Zviad Gamsakhurdia, the first President of Georgia, came to power in 1991, from the very start of his career in politics he contributed greatly to the discrimination and severe suppression of ethnic minorities in Georgia. Such an approach was in sharp contrast with Gamsakhurdia's past. Unlike most post-Soviet Presidents, he was never a Communist party official. His family belonged to the Soviet intelligentsia, and his father was a famous Georgian writer. Zviad Gamsakhurdia was also a well-educated man and held a doctorate in philology. In Soviet times, he was a dissident and a human rights activist who spent two years in prison after publishing information about torture in Georgian pretrial detention centers. Georgians' expectations were high, and for many of them he was the messiah of Georgian independence from the Soviet Union[1]. Unfortunately, the rule of Gamsakhurdia clearly demonstrated that Plato's concept of *philosopher on the throne* did not work for Georgia. In 1990 he became the head of the Georgian Supreme Soviet. In April of 1991, he was elected president of the country at the emergency session of the Supreme Soviet. On 26 May 1991 national presidential elections took place, with Gamsakhurdia getting 87% of the vote. Shortly before that the famous Georgian philosopher and writer Merab Mamardashvily said, "If the people of Georgia vote for Gamsakhurdia, then I'll be against the people of Georgia"[2]. Gamsakhurdia's ascendance in politics unnerved the national minorities. His dissident writings often invoked the idea of an imperiled Georgian nation and the destruction of its land, language and culture[3]. So his cry

1 Christoph Zurcher, The post-Soviet Wars: Rebellion, Ethnic Conflict, and Nationhood in the Caucasus. NYU Press, New York, (2007),127.

2 Merab Mamardashvili. "I Believe in Common Sense" («Ya Veriu v Zdravy Smysl"), "The Youth of Georgia" ("Molodezh Gruzii") newspaper, 21 September 1990.

3 See Monica D. Toft (2001) Multinationality, Regions and State-Building: The Failed Transition in Georgia, Regional & Federal Studies, 11:3, 123–142. Retrieved from http://www.tandfonline.com/doi/abs/10.1080/714004709?tab=permissions&scroll=top

of 'Georgia for the Georgians' was interpreted as a battle cry for the suppression of minorities[1].

After being elected President of Georgia in an emergency session of the Georgian Supreme Soviet in April of 1991, Gamsakhurdia decided to get an additional confirmation of his powers from the electorate, so the national presidential elections were held on 26 May 1991. Gamsakhurdia received 86.52% of the vote. These elections also involved the greatest recorded number of voters (3,594,810) and the highest turnout ever was also recorded at 2,978,247[2].

The defects of Gamsakhurdia's presidential style included, but were not limited to, authoritarianism and a total lack of ability to compromise. Ignoring the urgent need to solve economic problems was another huge mistake. In 1991, the national economy of Georgia was on the edge of collapse. The Georgian Soviet Socialist Republic was an agricultural region with no mineral resources; nevertheless, living standards during the Soviet period in Georgia were noticeably higher than in the other parts of the Soviet Union, with the exception of the Baltic republics[3]. The 1980s in Georgia were a period of especially rapid growth in the shadow economy, and by the end of the decade (i.e., at the end of the Soviet Union) significantly more was produced in the shadow economy than in the official economy[4]. The collapse of the USSR and internal wars in Georgia resulted in a dramatic decline in the national economy: in 1990 by 11.1 percent and in 1991 by 26.2 percent.[5]

The country was swiftly moving to the point of economic breakdown. In June of 1991 the first elements of private enterprise were introduced in Georgia; however, Gamsakhurdia preferred to avoid such hard and painful options as privatization and liberalization of prices. Such an attitude postponed the collapse of the Georgian economy until the next year, when it shrank by 43.4 percent.

The ignoring of economic problems and the escalation of interethnic tensions resulted in the outburst of nationwide mass protests. The August putsch in Moscow turned out to be the starting point of Georgian civil war[6]. The opposition tried to initiate negotiations, but the President denied the very idea of a compromise. The point of no return was reached shortly before New Year's Eve. On 22 December 1991 approximately 500 National Guard soldiers entered Tbilisi and, after

1 Slider, Darrell, 'Democratization in Georgia', in Karen Dawisha and Bruce Parrott (eds.), Conflict, Cleavage, and Change in Central Asia and the Caucasus (Cambridge, Cambridge University Press, 1997), 170–171.

2 For details see "Georgia: History of Elections : 1990–2010", p. 5 (the report is available on the website of Election Administration of Georgia http://www.cesko.ge/en)

3 Christoph Zurcher. The post-Soviet Wars: Rebellion, Ethnic Conflict, and Nationhood in the Caucasus. (2007) 118.

4 Zurcher (2007), p. 118.

5 Zurcher, *op. cit*. note 1, 118.

6 *Ibid*.,127.

a short siege of the parliamentary building, drove the president into exile[1]. On January 2nd a newly established provisional extraconstitutional body named the Military Council declared Gamsakhurdia deposed, and on January 6th Gamsakhurdia fled Georgia. Starting the same day, the Military Council or First Triumvirate operated as the collective head of state.

The triumvirate of Tengiz Kitovani, Jaba Ioseliani and Tengiz Sigua[2] did not enjoy any international recognition and legitimacy, so they finally decided to invite Eduard Shevardnadze to return to Tbilisi.[3] Shevardnadze, the former First Secretary of the Georgian Communist Party, was one of Mikhail Gorbachev's first appointees. When Gorbachev came to power in March 1985, one of his primary goals was to change the international image of the Soviet Union. In order to do that he had to remove Andrey Gromyko, the infamous "Mister No", who was in charge of Soviet foreign affairs for almost four decades. On 2 July 1985 Shevardnadze was appointed the Minister for Foreign Affairs, and this nomination followed his promotion to a full member of the Politburo. Despite initial concerns that in the absence of diplomatic background Shevardnadze would fail as a foreign minister, he did amazingly well and played a significant role in bringing the Cold War to the end.

On 10 March 1992 the Military Council was replaced by the State Council or Second Triumvirate, headed by Shevardnadze and also including Kitovani and Ioseliani. Shortly after Shevardnadze's return to Georgia, the country was recognized by the international community. It joined the OSCE in 1992, and humanitarian and development projects were established with Western funding (including from the EU)[4]. Shevardnadze swiftly accumulated more and more power: he was made chairman of the Parliament in October of 1992 and head of state in November of 1992. As Grot notes, Shevardnadze obtained the top role in both the executive and legislative branches of government at the expense of a clear separation of powers between them. As Chairman of Parliament, he had the right to call ordinary and special sessions of Parliament, to preside over parliamentary deliberations, and to propose legislation and constitutional amendments. As head of state, Shevardnadze appointed the Prime Minister and the Deputy Prime Ministers, the chairman of the Intelligence Service, and the President of the National Bank of Georgia, subject to the approval of Parliament[5].

1 *Ibid*.,127.

2 Sigua never signed any documents on behalf of the Military Council.

3 Frederik Coene, Euro-Atlantic Discourse in Georgia: the Making of Georgian Foreign and Domestic Policy after the Rose Revolution (Post-Soviet Politics) Routledge, Abingdon, UK, (2016), 32.

4 Coene, *op. cit.* note 12, 32.

5 Rainer Grot, "Introductory note to the Constitution of Georgia," Oxford Constitutions of the World (Oxford University Press, 2011).Retrieved from http://oxcon.ouplaw.com/view/10.1093/law:ocw/law-ocw-cm625.document.1/law-ocw-cm625

Questions about a new constitution arose shortly after Shevardnadze's return to Georgia. At that time, Georgia lived under the old and repeatedly amended Soviet Constitution of 1978, which was totally unacceptable even for such an experienced apparatchik as Shevardnadze. In February 1992 the Georgian National Congress, the body elected in the alternative elections held by the opposition groups which had boycotted the parliamentary elections of 1990, formally designed the Georgian Constitution of 21 February 1921 as the effective constitution of Georgia[1].

The 1921 Constitution was the first Constitution of the Democratic Republic of Georgia, which was adopted in Tbilisi in 1921 by the Georgian Constitutional Assembly and remained in legal force for only four days — from 21 to 25 February 1921[2]. The 1921 Constitution did not provide for the office of president and the executive power belonged to the Government, with its Chairman elected on an annual basis. Obviously, this Constitution was a misfit for the time of the post-Soviet transition, and a Constitutional Commission was set up in March of 1993. The final version of the new fundamental law of Georgia was developed based on drafts prepared by several political parties and constitutional law experts, and the new Constitution of Georgia was adopted in August of 1995. The Constitution reflected the demand for the "powerful presidential hand" and envisaged the presidential constitutional system, where the President is both the head of state and the head of the executive[3]. According to Grot, the original 1995 Constitution had to some extent a provisional character, which it has retained up to the present day. This is borne out by its first and last chapters, and in particular by Articles 2, 4 and 108. According to these provisions, Georgia still awaits the full restoration of its sovereignty over the entire country. Only after such conditions have been created will the definitive parliamentary system, territorial organization, and system of local government be established.[4]

The Rose Revolution, which brought Mikheil Saakashvili to power, was triggered by further decline in the economy, rampant corruption in national administrative agencies, and the government's failure to solve ethnic problems. The new young leader began his presidential term by launching a comprehensive reform program, which included the revision of a number of basic provisions of the 1995 Constitution. The Constitutional Law of 6 February 2004 provided for the significant enhancement of presidential powers, a significant weakening of the Parliament, the creation of a new executive body of the government, and the separation of the sys-

1 Grot, *op. cit.* at note 14.
2 *Ibid*.
3 Article 69 of the 1995 Constitution of Georgia (the original version). Retrieved from http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/georgia/georgi-e.htm
4 Grot, *op. cit.* at note 14.

tem of prosecution from the judiciary[1]. New Chapter 4-1 outlined the role of the Government, which "ensures the exercise of the executive power and conducts the domestic and foreign policy of the State in accordance with the legislation of Georgia."[2] According to the constitutional wording, the Government was not supposed to exercise these powers independently. Since the President "directs and determines the domestic and foreign policy,"[3] "the Government can act only within the framework of the policy guidelines established by the President"[4]. Interestingly, the provisions of Article 69 mirror the wording of para. 3, Article 80 of the Russian Constitution, which states that "according to the Constitution of the Russian Federation and the federal laws the President of the Russian Federation shall determine the guidelines of the internal and foreign policies of the State". Though *de jure* the President was not the head of the Government, apparently he was the leader of the Cabinet, and the Government was accountable to both the head of state and to the parliament. Dr. Rainer Grot emphasized a unique feature of the 2004 amendments: the Parliament may withdraw its support from the Government by voting a motion of no confidence at any time[5]. In a parliamentary system, but also in most semi-presidential systems, the Government would then be forced to resign. In Georgia, however, the President may choose to ignore the vote of Parliament and carry on with the same Cabinet. Parliament then has the choice either to accept that the Government stays in office, or to vote a second motion of no confidence in the ten-day period between the 90th and 100th day following the first vote of no confidence. The purpose of this provision is to provide Parliament with a "cooling-off" period. Even if a second vote of no confidence is passed during this period, the President still is not obliged to dismiss the Government; he may opt for the dissolution of Parliament instead (Article 81 §1)[6].

The 2009 revision of a number of constitutional provisions resulted in comprehensive constitutional reform. A special constitutional commission, which was put in charge of drafting amendments to the Constitution, included members of the ruling party, representatives of opposition political parties, NGOs, and academics. Most constitutional amendments approved by the Georgian legislature in mid-October of 2010 (the Constitutional Law of 15 October 2010) became effective in December of 2013. The 2010 constitutional reform focused on the limitation of presidential powers and the strengthening of the powers of the govern-

1 Godoladze, Karlo, Constitutional Changes in Georgia: Political and Legal Aspects (January 10, 2014). Humanities and Social Sciences Review, CD-ROM. ISSN: 2165-6258 : 2(3): 443–460 (2013), 448. Available at SSRN: https://ssrn.com/abstract=2377245

2 The amended Constitution of Georgia as of February 6, 2004 is available here http://www.venice.coe.int/webforms/documents/?pdf=CDL(2004)041-e

3 Article 69 of the 1995 Constitution of Georgia (the 2004 version).

4 Grot, *op. cit.* at note 14.

5 Article 81 of the 1995 Constitution of Georgia (the 2004 version).

6 Grot, *op. cit.*, note 14.

ment and the prime minister. For the first time in the history of Georgia the government was envisaged as the supreme body of executive power on the constitutional level and was given a new role in foreign relations. Unprecedentedly, the government was made accountable only to the Parliament[1]. The president's consent for the appointment and the dismissal of the members of the Government is no longer needed. In the future this will be the exclusive prerogative of the prime minister, who is the head of the government—and thus also of the executive—and directs and organizes its work (Article 79)[2]. New provisions of Chapter IV outlined the new constitutional status of the president. The president was deprived of the right of legislative initiative, the right to hold any office or position in a political party, as well as of the powers to dismiss the Cabinet and to approve the submission of the state budget to Parliament. Part 2 of Article 69 was repealed, so the president no longer directs and determines the domestic and foreign policy of Georgia. Another constitutional limitation of presidential powers envisaged that "all legal acts of the President of Georgia shall be countersigned by the Prime-Minister, except the acts issued during the State of War".[3] Presidential powers to convene and preside over meetings of the Government on important matters of state were repealed. The new wording of para. 4 of Art. 78 established that the President of Georgia should have the right to request the discussion of specific matters at the meetings of the government and to participate in the discussion of those issues at government meetings attended by the secretary and other members of the National Security Council.

Other important changes introduced by the Constitutional Law of 15 October 2010 included the new Chapter VII-I "Local Self-Government", a slight modification of the procedure of appointment of Constitutional Court judges, and the lifting of the ban on re-election of the President of the Constitutional Court[4]; the length of pre-trial detention was limited to nine months[5].

In Soviet times, the Georgian militia was notoriously corrupt and criminalized. The period of Shevardnadze's rule saw Georgia and its militia force slide further into criminality and corruption. When Saakashvili came to power, police reform was made the central element of the new government's anticorruption strategy[6]. The problems of the police force were a legion, but four issues stood out from the rest. First and foremost, the levels of corruption in the police force were notorious.

1 New par. 1 of Article 78 (as inserted by Constitutional Law of 15 October 2010). Retrieved from http://www.legal.nbg.gov.ge/en/document/view/56

2 Grot, *op. cit.*, note 14.

3 Article 73-1 (as inserted by Constitutional Law of October 15, 2010).

4 New par.2 of Article 88 (as amended by Constitutional Law of October 15, 2010).

5 New par.6 of Article 18 (as amended by Constitutional Law of October 15, 2010).

6 Matthew Devlin, "Seizing the Reform Moment: Rebuilding Georgia's Police, 2004–2006," in Innovations for Successful Societies (Princeton University, 2010), 1–12. Retrieved from https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/Policy_Note_ID126.pdf

The World Bank simply noted that "corruption was at the core of Georgia's policing system."[1] The police had supported Shevardnardze, and in exchange had been given a carte blanche to engage in all manner of criminal activity[2]. Ordinary citizens bore the brunt of the police's criminality in the form of near-constant shakedowns and solicitations for bribes.[3] The organization functioned as a kind of a pyramid scheme: applicants paid superior officers in order to secure positions as officers. They then extorted local citizens and businesses in order to recoup their 'investment' in the position itself. Formal salaries were meager and rarely paid, and the police engaged in predatory behavior to support themselves.[4]

The second major challenge facing police reformers was the inordinate strength of the so-called "thieves-in-law." The thieves-in-law were a highly organized and disciplined mafia, who controlled so many aspects of the state that many believed that they were more powerful than the government itself[5]. In order for the new government to have any credibility, and for the police to combat criminal activity, the thieves-in-law had to be confronted.

The third challenge facing police reformers was the size and military nature of the police itself. The police was an unreformed Soviet institution comprising 50,000 armed officers with military ranks — a staggering 1.5% of the population.[6] The reformers would need to both demilitarize and downsize the force in order to bring it in line with civilian democratic policing standards and conventional "police to civilian" ratios.

Finally and unsurprisingly, due to a combination of the police's corruption, the unfettered behavior of the criminal element of society, and the police's aggressive military disposition, the public had a deeply negative perception of the police. In a thoroughly corrupt, weak state with many candidates for the most corrupt institution the police were consistently rated as the most corrupt of the lot.[7] The police had no history of public service or public protection. In order to reorient the police to being a "downward-responsive" organization, the reformers needed to build a new relationship between the public and the police.

While the police as a whole were widely regarded as corrupt and incompetent, the Traffic Militia (or the State Auto Inspection (*Gosudarstvennaya Autoinspektsiya*

1 The World Bank, Fighting Corruption in Public Services: Chronicling Georgia's Reforms (2012), 13. Retrieved from http://documents.worldbank.org/curated/en/518301468256183463/pdf/664490PUB0EPI0065774B09780821394755.pdf

2 Devlin, *op. cit.* note 30, 2.

3 The World Bank, *op. cit.* note 31,14.

4 *Ibid.*, p. 13.

5 Gavin Slade, "No Country for Made Men: The Decline of the Mafia in Post-Soviet Georgia," 46(3) Law & Society Review, (2012), 623–649, 626. Retrieved from http://onlinelibrary.wiley.com/doi/10.1111/j.1540-5893.2012.00508.x/abstract

6 Lili di Puppo, "Police Reform in Georgia: Cracks in an Anti-Corruption Success Story," U4 Practice Insight, (Chr. Michelsen Institute, 2010) 1,2.

7 The World Bank, *op. cit.* note 31,14.

or GAI) stood out for their particularly criminal nature.[1] Numbering around 15,000, they were the force with which the public was forced to interact the most due to their near-constant demands for bribes.[2]

In a single decisive move, the Saakashvili government dismissed the entire Traffic Militia.[3] Knowing that many of those dismissed had been involved in criminal activities, the government offered a kind of an unarticulated deal: two months pay and amnesty for past crimes in exchange for leaving quietly.[4] President Saakashvili took full responsibility for this move, and promised a new Patrol Police within a month.[5] For almost three months, no one controlled road traffic in Georgia. In defiance of all expectations, nothing horrible or disastrous happened and on August 15, 2004, the old traffic militia was replaced by a new agency based on the US model for traffic patrol. Job openings in the newly-created agency were competitive, and the salaries were above the national average.

The pressure was on for the government to build a new, modern police force. The government aggressively sought new recruits from the country's universities and law schools, ensuring that the new police service would be a more highly educated institution.[6] These new recruits underwent short and intensive training sessions in order to get the police back out on the beat as soon as possible. The training was conducted with much international assistance, including the OSCE; the International Criminal Investigative Training Assistance Program (ICITAP) of the U.S. Department of Justice; the Council of Europe; and various national embassies.[7] A key focus of the training was on "interacting with the public in a professional and courteous manner." 2005 saw the founding of the Georgian Police Academy[8]. The new police received increased salaries and were paid via bank accounts, rather than cash, which had fostered corruption under the old system.[9]

Another key task was to create a new image of the police force and to ensure the transparency of its activities. The government introduced a number of changes to emphasize the difference between the old police and the new. Police officers were issued new blue uniforms and new cars.[10] Police stations were renovated and, in an interesting move, were given glass fronts to emphasize the new era of

1 The World Bank, *op. cit.* note 31,14.
2 Devlin, *op. cit.* note 30, 5.
3 *Ibid.*, 5.
4 The World Bank, *op. cit.* note 31,16.
5 Devlin, *op. cit.* note 30, 5.
6 The World Bank, *op. cit.* note 31,16.
7 Jozsef Boda and Kornely Kakachia, The Current Status of Police Reform in Georgia (Geneva Centre for the Democratic Control of Armed Forces, 2005), 2.
8 The World Bank, *op. cit.* note 31,17.
9 *Ibid.*, 6.
10 Di Puppo, *op. cit.* note 36, 1, 2.

transparency.[1] This unprecedented opportunity to see from the outside what was happening inside the police stations eventually convinced people that these changes were real. Slowly but steadily attitudes began to change, and the level of people's trust in the police started to grow. The new police also made use of the media, producing their own reality-style primetime television show called "Patrol."[2] The result was a dramatic turnaround in both the perception and the performance of the police.

In the words of Shota Utiashvili, the Head of the Georgian Ministry of the Interior,

> "The most important consequence of the reforms is the apparent progress we have made in fighting corruption. Police officers have been notified that if they are found taking bribes, they will be put in jail. As a result, over 200 officers were imprisoned in 2005. The number was even greater in 2006. Since then, the number of police officers in jail for taking bribes has been on the decline. The second tack in fighting corruption was raising salaries for all Ministry of Interior personnel. For example, in 2004, my salary was only 100 lari a month (about $70). [In 2011], it is 2300 lari (almost $1610). That is 23 times what it used to be. Thirdly, we have eradicated the former custom of officials demanding 'tithes' [portions of money taken from bribes received—Ed.] from their subordinates, part of which they would keep, and part of which they would pass on to their superiors. Many people had to be laid off. When Eduard Shevardnadze was in power, there were 70,000 Ministry of the Interior employees. Today the staff numbers 16,000 employees, which includes all police and public safety departments. Young and motivated new recruits were hired to replace those who were laid off."[3]

In 2005 the government launched a blistering fast attack on the thieves-in-law. In order to do that, the best foreign solutions were studied and then implemented. Drawing on the anti-mafia experience in Italy, in the span of a few months the government introduced an assortment of new laws including those modeled on the US Racketeer Influenced and Corrupt Organizations (RICO) Act, a New Zealand law on harassment and criminal association, and a British conspiracy law.[4] The Criminal code was amended to allow thieves-in-law to be kept away from the

1 English Russia, Brand New Georgian Police (2011), at http://englishrussia.com/2011/02/25/brand-new-georgian-police/

2 Devlin, *op. cit.* note 30, 5.

3 See Ekaterina Mishina. "Is Russian Police Reform Doomed? Lessons from Estonia and Georgia," Institute of Modern Russia, 29 March, 2012. at www.imrussia.org.

4 The World Bank, *op. cit.* note 31,15.

general prison population in very harsh conditions.[1] By June 2006 all thieves-in-law were convicted and jailed. It was a swift and huge victory over organized crime.

Plea bargaining was introduced to encourage thieves and underlings to "roll."[2] In the Georgian Code of Criminal Procedure, plea bargain or *procedural agreement* is outlined in Chapter XXI. An agreement on *guilt* or on *punishment* serves as a basis for the *procedural agreement,* which *can* be suggested by the suspect, the prosecutor, or the court[3]. In case of entering into an *agreement on guilt*, the accused confesses to a crime[4]. Before the conclusion of the *procedural agreement*, the prosecutor must consult with the victim and notify the victim about the conclusion of the procedural agreement. The victim is not entitled to appeal the *procedural agreement* but can file a civil lawsuit[5]. While concluding a *procedural agreement*, the prosecutor must warn the accused that *procedural agreement* won't exempt him from civil or other liability. The court must assure itself that the *procedural agreement* was concluded voluntarily in the absence of violence, threat, fraud or any other illegal promise, and that the accused had a chance to receive professional legal aid[6].

Since 2010 the Criminal Code provides an option to conclude *an agreement on special cooperation,* which is a special type of *procedural agreement*. In specific cases, when in the result of cooperation between the accused/convict and the investigation and with his direct involvement the identity of an official who committed a crime, and/or an individual who committed a grave or especially grave crime has been established, the Chief Prosecutor of Georgia is eligible to petition the court requesting a complete release of the accused from liability or punishment, or a review of his punishment. A *procedural agreement on special cooperation* concluded between the accused/convict and the Chief Prosecutor of Georgia shall serve as a basis for this petition. While concluding such an agreement, the Chief Prosecutor of Georgia shall take into consideration the public interest, the gravity of crime committed by the accused/convict, and the degree of his/her guilt; in case of a convict, the unserved part of criminal sentence shall be additionally taken into consideration. Such an agreement shall be concluded only in the event when solution of a crime directly depends on the aforementioned cooperation, and the public interest in the solution of this crime prevails over that

1 *Ibid*..
2 Slade, *op. cit.* note 35, 627.
3 Article 209 (1,2) of the Code of Criminal Procedure of Georgia. Available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwi6mfW-4bflAhULHqwKHdLGCXQQFjAAegQIABAC&url=https%3A%2F%2Fwww.matsne.gov.ge%2Fru%2Fdocument%2Fdownload%2F90034%2F37%2Fru%2Fpdf&usg=AOvVaw0dO6DYL2ebcFwXj3cKxrD8
4 Article 209 (4) of the Code of Criminal Procedure of Georgia.
5 Article 217 (1,2,3) of the Code of Criminal Procedure of Georgia.
6 Article 212 (1,2) of the Code of Criminal Procedure of Georgia.

of holding the individual liable, sentencing him or having him serve the sentence.[1] The agreement on special cooperation must be signed by the accused/ convict, his defense attorney and the Chief Prosecutor of Georgia; also, such an agreement must clearly indicate that if the accused/ convict fails to cooperate with the investigation, this agreement will be declared void[2].

The judiciary as an independent branch of power was established by the 1995 Constitution of Georgia. The 1996 Law on General Courts envisaged a three-tier judicial system headed by the Supreme Court, which was initially designed as the top appellate court and was later vested with cassation powers in the course of the 2010 constitutional reform. The power of constitutional review belongs to the Constitutional Court, three judges of which are appointed by the President, three by the Supreme Court, and three elected by the Parliament. In the realm of judicial reform major changes became visible in 2004, when the government increased budget funding to the judiciary, resulting in substantial improvements in regards to salaries, infrastructure, equipment, and staff.[3] The Constitution of Georgia and acts regulating courts include provisions on the decisional independence of judges. The Constitution explicitly prohibits the exercise of "any pressure upon a judge or interference with his/her activity with the view to influence his/her decision"[4]. All acts restricting the independence of judges are void[5].

However, despite the reforms implemented and a commitment to using the European Convention on Human Rights as a model, the judiciary continues to suffer from the undue influence of the Prosecutor's Office and the executive branch during the adjudication of criminal cases, particularly those cases where the political leadership's interests are at stake[6]. As in most post-Soviet states, accusatory bias has been a big problem in Georgia.

Freedom House notes that, before 2012, the judiciary was characterized by high levels of politicization and, concomitantly, by low public trust. The acquittal rate was a fraction of one percent, and the plea bargaining system was widely regarded as a mechanism of extortion. The year 2012 saw the start of extensive reforms, which resulted in an increased rate of acquittals and a general improvement in the independence of the judiciary[7].

1 Article 218 (1,2,3) of the Code of Criminal Procedure of Georgia.
2 Article 218 (4,5) of the Code of Criminal Procedure of Georgia.
3 Nations in Transit 2014. Democratization from Central Europe to Asia, Rowman & Littlefield, London, 2015. 258.
4 Par.1 of Article 84 of the 1995 Constitution of Georgia.
5 Par.4 of Article 84 of the 1995 Constitution of Georgia.
6 Transparency International National Integrity System Report. Georgia.(2011). Retrieved from https://issuu.com/transparencyinternational/docs/national_integrity_system_2011_georgia_en?mode=window&printButtonEnabled=false&shareButtonEnabled=false&searchButtonEnabled=false&backgroundColor=%23222222
7 Nations in Transit 2016. Freedom House. Retrieved from https://freedomhouse.org/report/nations-transit/nations-transit-2016

Since the reforms, Georgia has earned a reputation as a key success case in the challenging world of police reform. The reform process significantly improved the public-police relationships. A February 2007 survey of Georgia voters noted that Georgians believed police reform to be one of the "most important achievements of the Georgian government."[1] The survey also revealed that 66% had a "favorable opinion of the police,"[2] a marked improvement after years of the police being reviled by the majority of the population. The government has also continued to enforce a "zero tolerance" approach to corruption and criminality within the police: 1,064 policemen were prosecuted for criminal behavior between 2003 and 2010, and 90 more for bribery between 2005 and 2010[3]. Furthermore, the offensive against the thieves-in-law was wildly successful. As early as June 2006, there was not a single thief-in-law left in Georgia who was not imprisoned.[4]Due to the combination of the anti-thieves-in-law policy and the police reform, surveys reveal, "feelings of security have increased significantly."[5] Powerful anecdotal evidence suggests a complete turnaround in the public perception of the police: by 2009, plainclothes detectives "would often request uniformed Patrol Police to accompany them when they went to question people, knowing that the population trusted the Patrol Police."[6]

1 Di Puppo, *op. cit.* note 36, 4.
2 *Ibid*., 4.
3 Government of Georgia, Seven Years that Changed Georgia 2004–2010, Rule of Law Reforms Report,.6. Retrieved from http://netherlands.mfa.gov.ge/files/netherlands/Rule_of_Law_Reforms_1.pdf
4 Slade, *op. cit.* note 35, 627.
5 *Ibid*.
6 Devlin, *op. cit.* note 30,10.

CHAPTER 5. REFORMS IN UKRAINE[1]

During the first decade of the country's independence, judicial reforms were of a limited nature. The few measures directed at transforming the then-existing judicial system produced no significant results. The first important changes in the judiciary occurred in 2001 with the adoption of a package of amendments to nine laws pertaining to the organization of the judicial branch, the status of judges, procedural questions, and the status of the Office of the Public Prosecutor. These changes were labeled "minor judicial reform." Even the 2002 law "On Court Organization in Ukraine" was not considered a full-scale judicial reform, since it did not make any fundamental changes to the judicial branch except for the creation of the system of administrative tribunals[2]. Procedural reforms were slow to occur as well. The new Ukrainian Civil Procedure Code, which replaced the 1963 Soviet code, was adopted only in 2004, and the Administrative Procedure Code was not adopted until 2005. Reforms to criminal procedure took the longest to be implemented: the new Criminal Procedure Code was not adopted until April 2012 and went into effect in November of the same year.

The process of constitutional change in Ukraine has been rather remarkable. The writing of the modern Constitution of Ukraine took five years, from 1991 to 1996, and was carried out by expert representatives of the legal community with the assistance of a number of international specialists in the sphere of constitutional law. There was no question of continuity, since the majority of the earlier versions of the Ukrainian Constitution were of a socialist nature. There was no point in using the 1710 constitution of the army of Zaporozhye, although from the point of view of historical importance this document, which limited the powers of the hetman (the Ukrainian military leader and head of state), established a representative body that was to meet three times a year, and guaranteed a list of "rights and freedoms of the army", is to a certain degree similar to the Magna Carta. Somehow the framers of the first post-Soviet Constitution of Ukraine ignored the 1918 Constitution of the People's Republic of Ukraine, which established Ukraine as a parliamentary republic and envisaged the principle of separation of powers: the All-People's Assembly of

1 This section partially draws on the country report prepared by the Centre for Political and Legal Reforms in Ukraine. The report was developed as a part of the international component of the Ford Foundation-sponsored project "Judicial reform in modern Russia — institutional-societal analysis of Transformation: Assessment of Results and Future Perspectives" (2009) through INDEM Foundation.

2 Gorbuz A.K., Krasnov M.A., Mishina E.A., Satarov G.A. Transformation of Russian Judiciary — a Complex Analysis, (Norma Publishing House, Moscow—Sankt-Petersburg, 2010), 253.

the PRU was the legislative branch, the Council of People's Ministers was the executive branch, and the judicial power was vested in the General Court of the PRU. Though adopted by the Central Rada of Ukraine, the 1918 Constitution never actually went into effect because of the revolution that swept through the country. The 1919 Constitution of the Ukrainian Soviet Socialist Republic also was not an acceptable option: in early March of 1919 the IIIrd Congress ruled that the new constitution of Ukraine should be modeled after the 1918 Constitution of Soviet Russia with due regard to local specifics.[1]

As a result, on 28 June 1996 Ukraine adopted its new Constitution, which followed the constitutional model with a strong presidential power. However, according to a number of experts, in spite of all efforts the final text of the 1996 Ukrainian Constitution was far from perfect. There were rumors that the text contained more than 170 mistakes. Also, the implementation of the Ukrainian constitutional model resulted in the concentration of power in the hands of the president[2].

In 2004, on the wave of the Orange Revolution a number of amendments were introduced to the Constitution that were later labeled "constitutional reform." These amendments were directed at weakening the power of the president, vesting considerably expanded powers in the Parliament and the government, and transforming Ukraine into a parliamentary republic.

Many saw the constitutional reforms as the result of a political compromise. These alterations also gave rise to criticism by the Venice Commission. According to Article 159 of the 1996 Ukrainian Constitution, "a draft law on making amendments to the Constitution of Ukraine shall be considered by the Verkhovna Rada of Ukraine upon the availability of an opinion of the Constitutional Court of Ukraine on the conformity of such draft law with the requirements of Articles 157 and 158 of this Constitution." Despite the fact that according to the Constitution, constitutional alterations cannot be made without the participation of the Constitutional Court, this body was left out of the process of amending the Constitution. Constitutional amendments were passed in the absence of an opinion of the Constitutional Court, i.e., with procedural violations and in breach of the Constitution.

In its opinion[3] on the amendment of the Constitution of Ukraine, the Venice Commission repeatedly expressed its concern about the open disregard for the

1 Oleg.I.Chistyakov . First Soviet Constitutions (1918–1922). Pravovedenie, 1968, No 5, 11.(Oleg I. Chistyakov. Perviye Sovetskie Constitutzii (1918–1922), Pravovedenie, 1968, No 5, 11).

2 European Commission for Democracy through Law (Venice Commission). Opinion on the constitutional situation in Ukraine. (17–18 December 2010, sec.XII). Retrieved from http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)044-e

3 European Commission for Democracy through Law (Venice Commission). Opinion on the procedure of amending of the Constitution of Ukraine No 305.2004 of 11 October 2004. Retrieved from http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2004)030-e

role of the Constitutional Court in the reform process and emphasized the necessity for that body to present its opinion in accordance with the existing Constitution. The Parliamentary Assembly of the Council of Europe (PACE), for its part, called on the Ukrainian political forces to resume work on the improvement of the Constitution of Ukraine and the related legislation in order to finally establish an effective system of checks and balances and bring the constitutional provisions in line with European standards. Constitutional reform was to be a part of the discussions aimed at the resolution of the current political crisis[1].

PACE found a number of the new provisions, such as the imperative mandate (which allowed political parties to recall representatives), absolutely unacceptable in a democratic state and strongly recommended that these provisions be brought into accordance with the recommendations made by the Venice Commission in 2004. Moreover, PACE expressed the hope that the Venice Commission would be actively involved in the process of drafting proposals for the next steps of Ukrainian constitutional reform.

The Orange Revolution and subsequent political perturbations affected the efficiency of national judicial reform. President Yushchenko had a huge reforming potential, which, sadly, could not be fully realized in the absence of political consensus at the top level of state power. As the Venice Commission pointed out, the 1996 Constitution resulted in constant legislative-executive confrontation.[2]

Regulations that were supposed to serve as the legal framework of the Ukrainian judicial system became victims of political battles. Draft laws on court organization and the status of judges were introduced to the Verkhovna Rada by then-Ukrainian President Viktor Yushchenko in late 2006 and were passed on the first reading four months later. It is worth mentioning that the then-pro-president minority caucus in the Rada refrained from voting on these bills.

After being passed on the first reading, the bills were sent to the relevant parliamentary committee for revision, where they were combined and recommended for passage on the second reading. However, the Chief Justice of the Supreme Court of Ukraine, who by an odd coincidence used to be a leader of Yulia Tymoshenko's bloc before taking this office, opposed the combined bill. He asserted that the legitimacy of passing the two initially introduced bills on the first reading was doubtful and argued that the propositions to reduce the number of judges on the Supreme Court to 16 and to remove the cassation instance for civil and

1 Parliamentary Assembly Working Papers. 2007. Doc.11255. Retrieved from https://books.google.com/books?id=qlip1fHXKNkC&pg=PA275&lpg=PA275&dq=Parliamentary+Assembly+Working+Papers.+2007.+Doc.11255&source=bl&ots=sagLrMZZDZ&sig=L8irf6juF3rNgOoGj67bs0VqjpU&hl=en&sa=X&ved=0ahUKEwju3L3trp_TAhUl4oMKHZP5CswQ6AEIIzAA#v=onepage&q=Parliamentary%20Assembly%20Working%20Papers.%202007.%20Doc.11255&f=false

2 European Commission for Democracy through Law (Venice Commission). Opinion on the constitutional situation in Ukraine. (17–18 December 2010, sec.XII).

criminal cases from the jurisdiction of the Supreme Court were unacceptable. Similarly, the Chief Justice questioned the constitutionality of a number of introduced changes (e.g., nomination of the presiding judge and his deputies by the president of Ukraine on the recommendation of the Supreme Council of Justice). Despite the fact that it was repeatedly introduced on the agenda, the bill was not adopted until 7 July 2010.

A nationwide public opinion poll conducted from 19 June to 2 July 2007 revealed dismaying results, with only 51% of respondents believing that defects in the national judicial system could be corrected or diminished in the course of judicial reform. Thirty-four percent could not provide an answer to this question. Forty-four percent of respondents had never heard about judicial reform in Ukraine, 37% knew very little about it, and only 10% stated that they were well informed about the reform[1]. In other words, slightly more than half of the population were aware of the judicial reform, while almost 50% were not interested or had a poor understanding of the issue.

Data provided by Ukrainian experts[2] revealed a low level of decisional independence of Ukrainian judges. Oftentimes judges experienced external influence and interference in the course of the administration of justice. Sixty-eight percent of judges claimed that they felt no external influence and faced no threats to their decisional independence, while 14% said that they felt pressure coming from politicians. Nine percent of judges experienced influence and threats to their decisional independence from the media; 8% from the court leadership; 8% felt pressure from the parties involved in the cases handled by the judges in question; 6% suffered from the interference of public officials; and 4% from the parties' relatives and friends[3].

At the same time, there are serious problems with access to justice. In 2006, scholars from the National Yaroslav Mudry Law Academy in Kharkiv conducted a survey among judges of local and appellate courts in four oblasts. The majority of respondents (66%) believed that at that time the organization and operation of the national judiciary only partially met the needs for ensuring access to justice, so certain changes were needed. 10% of judges took a firm stand stating that the national judiciary failed to ensure proper access to justice, which calls for a comprehensive transformation of the entire court system. Only 16.2% of respondents said that they were happy with the existing level of access to justice.

Negative factors listed by respondents included excessive workload (78.6%); poor material and technical support of courts and judges (77.3%); inadequate en-

1 Results taken from the website of USAID's Ukraine Rule of Law Project (http://www.ukrainerol.org.ua/index.php?option=com_docman&task=doc_download&gid=69&Itemid=23).

2 Country report developed for the Ford Foundation-sponsored project "Judicial reform in modern Russia — institutional-societal analysis of Transformation: Assessment of Results and Future Perspectives" (INDEM Foundation) in 2009.

3 Gorbuz A.K., Krasnov M.A., Mishina E.A., Satarov G.A., *op. cit.* note 2.

forcement of judgments (62.7%); deficiencies in the work of inquest and pretrial investigation bodies in criminal cases (60.8%); failure of parties to attend court hearings (56.4%); and the lack of an effective mechanism for providing legal aid to low-income individuals (51.8%).[1]

The change of power that took place in Ukraine in early 2010 initially brought about both positive and negative results. Adoption of the long-suffering Law on the Judiciary and the Status of Judges of Ukraine of 8 July 2010 was a milestone in the course of Ukrainian judicial reform. The Law outlined the four-tier structure of the national judiciary and established the basic principles of its organization[2]. Among the positive innovations provided by this law were the foundation for the institution of the jury system and the introduction of more stringent competence requirements for candidates for judicial office (mentioned in chapter 2 of the law), including the requirement of a mandatory six-month education in the National School for Judges (Article 69). The Law established the procedure for appointing judges to lifetime positions and stated that lifetime judicial appointments were subject to consideration during plenary sessions of the Verkhovna Rada[3].

Passage of the new Code of Criminal Procedure also was of key importance for the national judicial reform. The new code was put into legal effect on 20 November 2012, and was perceived as a satisfactory result of the cooperation between national and European experts. Progressive provisions of the new CPC included equal rights of the prosecution and defense in criminal proceedings, introduction of the adversarial system in criminal trials, vesting the defense with the right to collect and present evidence[4], and strict limitations on applying detention as a restraint measure[5]. However, some national experts criticized the new Code, since the opposition did not take part in the drafting process, making certain provisions in breach of the Constitution and national legislation[6]. While welcoming the adoption of the Code, PACE stated that the Code would have the intended effect only if it were properly enforced in its entirety[7].

These important legislative initiatives constituted the only positive development in the realm of judicial reform under the rule of Victor Yanukovich.

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1 Country report developed for the Ford Foundation-sponsored project, (INDEM Foundation), *op. cit*. note 1.

2 Par. 1 of Article 17 of the Law on the Judiciary and the Status of judges [Zakon o Sudoustroistve i Statuse Sudei] of Ukraine of 8 July 2010. Retrieved from http://online.zakon.kz/Document/?doc_id=30816286

3 Article 79 of the Law on the Judiciary and the Status of judges of Ukraine of 8 July 2010.

4 Par. 3 of Article 93 of the Criminal Procedure Code [Ugolovno-protsessualny Kodeks] of Ukraine of 13 April 2012. Retrieved from http://kodeksy.com.ua/ka/upku-2012.htm

5 Article 183 of the Criminal Procedure Code of Ukraine of 13 April 2012.

6 Freedom House. Nations in Transit. 2013. https://freedomhouse.org/sites/default/files/NIT%202013%20Booklet%20-%20Report%20Findings.pdf

7 Council of Europe, PACE Monitoring Rapporteurs Welcome Adoption of New Code of Criminal Procedure in Ukraine. // News release. 13 April 2012.

Following his visit to Ukraine from 19 to 26 November 2011, the Commissioner for Human Rights for the Council of Europe stated that substantial constitutional, legislative, institutional and practical reforms were still needed in Ukraine in order to meet the requirements of the European Convention for Human Rights and to remedy the longstanding systemic problems in the administration of justice.[1] The Commissioner underlined that the reform of the judiciary should be conducted in coordination with all other related reforms, i.e., those of the public prosecutor's office, pretrial investigation, legal aid, the system of execution of judgments, admission to the legal profession, notary system, and the penitentiary system. The reform of the judiciary in line with European standards was among the key commitments undertaken by Ukraine when it joined the Council of Europe[2]. In 2013 lengthy court proceedings, the low level of enforcement of judgments, and miserable conditions and abuses in detention facilities were mentioned by the European Court of Human Rights as structural problems of the administration of justice in Ukraine[3]. According to Freedom House experts, the balance of powers in general and the national judiciary in particular were negatively affected by political pressure and repeated attempts to change the Constitution.

Soon after Viktor Yanukovych was elected president of Ukraine, the Constitutional Court suddenly realized—almost six years after the 2004 constitutional reforms — what raw treatment it had received at the time. In a 30 September 2010 decision, the Constitutional Court declared the 8 December 2004 Law No. 2222, which authorized the reforms, unconstitutional, and thus repealed the constitutional amendments that restrained presidential powers and provided considerably wider powers to the parliament and the Government.

This legal pirouette overwhelmed even the experienced Venice Commission. In a 17–18 December 2010 opinion, the Venice Commission emphasized that the Constitution of Ukraine — both its original 1996 version and its 2004 version—explicitly requires a mandatory preliminary review by the Ukrainian Constitutional Court of any draft law on constitutional amendments. However, the Ukrainian Constitutional Court has no legal power to review the constitutional amendments once they have entered into force. The Venice Commission considered unprecedented the fact that such far-reaching constitutional amendments, including the change of the country's constitutional system, were declared unconstitutional by a decision of the Constitutional Court six years after the amendments went into force[4].

1 Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe. Administration of Justice and Protection of Human Rights in the Justice System in Ukraine. Strasbourg, 23 February 2012, 2.

2 Report by Commissioner for Human Rights of the Council of Europe (2012), 4.

3 Nations in Transit. 2013. Freedom House, *op. cit.* note 16.

4 European Commission for Democracy through Law (Venice Commission).Opinion on the constitutional situation in Ukraine. (17–18 December 2010, Clause 35).

According to the same document, "as Constitutional Courts are bound by the Constitution and do not stand above it, such decisions raise important questions of democratic legitimacy[1]. A change of the political system of a country based on a ruling of a constitutional court does not enjoy the legitimacy which only the regular constitutional procedure for constitutional amendment … can bring"[2]. However, at the time, the Venice Commission's concerns remained a problem of the Commission itself, since Yanukovych's government did not take any of that group's recommended actions — or rather, it did take action, but in a completely different direction.

On 17 May 2012 the Ukrainian president issued a decree establishing a Constitutional Assembly with the objective of drafting amendments to the Constitution of Ukraine. Opposition parties refused to participate in the work of this assembly, stating that this body did not serve the interests of society but represented a political instrument in service to the current president. The October 2012 parliamentary elections were yet another unpleasant step backward in terms of democratic standards. Later in 2012 a law on referenda was adopted, according to which amendments to the current Constitution could be made without the participation of the Verkhovna Rada. All these changes of the last several years demonstrate the escalation of authoritarianism in Ukraine, which began when Yanukovych came to power. According to a number of independent experts, the concentration of power in the hands of the president and the manipulation of courts for political purposes upset the system of checks and balances. This growing authoritarianism created a real threat to the Ukrainian political model that was once characterized by pluralism[3].

Yanukovych's refusal to sign the association agreement with the European Union on 28 November 2013 in Vilnius served as proof not only of the unwillingness of the current regime to see Ukraine integrated into the European community, but also of growing authoritarian tendencies. This process culminated in the adoption of a package of repressive laws on 16 January 2014 without any discussion in the Rada, which led to active protests by the civil society and the recent revolutionary events. The draconian "laws of January 16", among other things, introduced serious restrictions on holding mass demonstrations, criminal liability for libel, and harsh repressive measures against the media. On 22 January 2014 an address of appeal by Ukrainian lawyers, signed by prominent representatives of the legal profession, was published. This address stated that

> "the laws of January 16 are an 'autocratic response' to the two-month protest demonstrations of the Ukrainian people in support of democratic values. The changes to the legislation were made in an unconstitutional way and directly contradict the prin-

1 Venice Commission Opinion of 17–18 December 2010, Clause 36.
2 Venice Commission Opinion of 17–18 December 2010, Clause 37.
3 Nations in Transit. 2013. Freedom House, *op. cit.* note 16.

> ciples of the fundamental law, constitutional statutes relating to the rights and freedoms of men and citizens, the conditions and forms of the popular vote, the principles of parliamentarianism, and the fundamental judicial principles; [these changes] should be immediately canceled or officially declared illegitimate"[1].

On 21 February 2014 the Verkhovna Rada adopted Law No. 4163, which restored the 2004 constitutional amendments and the parliamentary constitutional model. Naturally, criticism was already being voiced on the ground that the adoption procedure was simplified and the law was passed in the first and second readings. Whatever the case, this step made by the Ukrainian Parliament had great symbolic importance, since it heralded great change and the wind of change was blowing in the right direction.

Political developments of November 2013 — February 2014 manifested the beginning of democratic changes and confidence restoration in the government of Ukraine stimulating further integration of Ukraine into the European Union. A renovation of the judicial system was simultaneously initiated. Adoption of the Law of Ukraine "On Restoring Confidence in the Judicial System of Ukraine" № 1188-VII of April 8, 2014 became the first post-Maidan lustration law. Its Art. 1 established the goals of screening of judges:

- entrenchment of the supremacy of law in the society and legality in operation of courts,
- restoring confidence in the judiciary in Ukraine,
- finding of facts indicating oath-breaking by judges,
- presence of grounds for instituting criminal proceedings against a judge or holding a judge administratively liable,
- entrenchment of the principles of independence and impartiality in the activities of judges[2].

Under Art. 2, screening of judges shall be performed by the Provisional Special Commission for screening of judges of general courts. A detailed list of grounds for the screening of general courts judges includes

- The delivering of individual or collegial decisions on limitation of citizens' rights to hold assemblies, rallies, marches and demonstrations in Ukraine within the period between November 21, 2013, and the effective date of this Law,
- on applying incarceration as a restraint measure to the participants of mass protest rallies that took place at that time, leaving the restraint measure unchanged,

1 http://news.liga.net/news/politics/964835-ukrainskie_yuristy_nazvali_zakony_16_yanvarya_nekonstitutsionnymi.htm

2 Art. 3 of the Law "On Restoring Confidence in the Judicial System of Ukraine" of 08 April 2014. Available at https://kodeksy.com.ua/ka/o_vosstanovlenii_doveriya_k_sudebnoj_vlasti_v_ukraine/statja-3.htm

- the prolongation of incarceration or the delivery of a guilty verdict in relation to the participants of these rallies in connection with their participation, or holding them administratively liable etc[1].

The Law faced comprehensive criticism as incompatible with the democratic standards, inconsistent, unsystematic and sometimes contradicting the Constitution. The Law aimed to solve the problem of the low confidence level in the judiciary only by updating the staff of judicial system; and, most likely, such effort won't eliminate the root causes of the problem. Also, only the judges of general courts are subject to screening, which is limited to the evaluation and review of decisions in criminal cases and cases on administrative offenses against those who participated in the political and social events from November 21, 2013 to February 21, 2014. Thus, the Law deprives citizens of the right to initiate such a verification in relation to the judges who made an unjust decision in another period of time[2].

Before the first lustration law was adopted on February 24, 2014, 5 out of 6 Justices of the Constitutional Court of Ukraine elected under the parliamentary quota faced an early termination of their powers. The Parliament recommended to the President and the Congress of Judges, which also delegated their representatives to the Constitutional Court, to dismiss them. Oleksandr Yevsieiev points out that such undue treatment of judges was facilitated by the wording of Art. 85 (26) and 106 (22) of the Constitution of Ukraine in its version of 08 December 2004, which was restored after the victory of Euromaidan on 22 February 2014. Under this Constitution, the President and the Verkhovna Rada were vested with the right both to appoint "their" thirds of the members of the Constitutional Court and to dismiss these justices at any time[3]. These constitutional provisions bring up serious concerns, since they apparently jeopardize the fundamental principle of judicial independence. Unsurprisingly, as Yevsieiev further notes, justices who voted for the annulment of political reform faced criminal charges[4].

The second lustration law, namely the Law on Government Cleansing, came into effect on October 16th, 2014. The new law envisaged a legal and organizational framework for lustration with the purpose to protect and promote democratic values, the rule of law, and human rights in Ukraine. Under its Art. 1, the cleansing of the authorities (lustration) is a prohibition established by this Law or a judicial decision which bans particular individuals from holding certain non-elected po-

1 Art.3 of the Law of 08 April 2014.

2 Ganna Rakhalska. Problems of Restoring Confidence in Judiciary in Ukraine. Available on the website of the Supreme Qualification Collegium of Judges of Ukraine https://www.vkksu.gov.ua/print/ua/about/visnik-vishoi-kvalifikatsiynoi-komisii-suddiv-ukraini/problems-of-restoring-confidence-in-the-judiciary-in-ukraine/

3 Oleksandr Yevsieiev. Judicial Power in Ukraine: between Law and Politics. Comparative Constitutional review. 2015, No 2 (105). P.103.

4 Oleksandr Yevsieiev. Op. cit., p 103.

sitions in the bodies of state power and local self-government. Cleansing of the authorities shall be performed with the purpose to prevent participation in the administration of state affairs of those individuals, who by their decisions, actions or the lack thereof performed or facilitated efforts aimed at the usurpation of power by President Victor Yanukovych, undermining the fundamentals of national security and defense. This cleansing shall be based on the principles of supremacy of law and legality, transparency, openness, publicity, presumption of innocence, individual responsibility, and guaranteeing of the right to defense[1]. The list of lustrated positions encompasses practically all positions (except for the elective ones) in central and local governments as well as in other public organs[2]. The list is not limited to political positions; there are also administrative positions, as well as a very wide category of other officials and officers of central and local governments. Notably, the Law deals with two historic periods of non-democratic rule in Ukraine: the Soviet period and the presidential term of Viktor Yanukovych. Article 3 lists the criteria of lustration, imposing a ban from the positions listed in Article 2 for either five or ten years depending on the position previously occupied. The **first category** entails a ban of ten years[3] and includes:

a) Individuals who occupied high positions in the state apparatus for at least a year between February 25th, 2010 and February 22nd, 2014;

b) Individuals who occupied certain positions, mostly within the military, police, judicial, or media sectors between November 21st, 2013 and February 22nd, 2014;

c) Individuals who occupied high positions in the Communist Party or the Komsomol during the Soviet period, or worked as employees or covert agents of the KGB in that period;

d) Individuals who obtained significant wealth in violation of the Law on the Principles of Preventing and Combating Corruption;

e) Law enforcement officers, public prosecutors and judges who took certain action in respect of persons falling under the Amnesty laws.

The **second category** entails a ban of five years[4] and includes:

a) Judges, prosecutors, police officers and other law enforcement agents who were actively involved in the prosecution of anti-Yanukovych activities and of Maidan demonstrators;

b) Officials and officers of central and local government authorities who occupied high positions in the state apparatus between February 25th, 2010 and February 22nd, 2014, are not included in the category 1a) above, have contributed to Mr. Yanukovych's power usurpation and were seeking to undermine fundamen-

1 Art. 1 (1,2) of the Law on Government Cleansing. https://zakon.ru/blog/2014/10/15/zakon_ukrainy_ob_ochishhenii_vlasti_lyustracii_perevod_na_russkij_yazyk

2 Art. 2-3 of the Law on Government Cleansing.

3 Art. 1.3 of the Law on Government Cleansing.

4 Art. 1.4 of the Law on Government Cleansing.

tals of the national security and the defense of the territorial integrity of Ukraine, which led to the violation of human rights and freedoms;

c) Officials and officers of central and local government authorities, whose decisions, actions or lack thereof sought to prevent the exercise of the constitutional right to hold peaceful assemblies, rallies, demonstrations and marches, or to harm human life, health or property between November 21st, 2013 and February 22nd, 2014;

d) Officials and officers of central and local government authorities with an effective court judgement in place against them, established that they had cooperated as secret informers with the special services of other countries to provide regular information; taken decisions, actions, failed to take actions and/or facilitated such actions, decisions or inaction to undermine the national security and the defense of territorial integrity of Ukraine; called publicly for the breach of Ukraine's territorial integrity and sovereignty; incited ethnic hostility; taken unlawful decisions, actions or the lack thereof that violated human rights and fundamental freedoms, provided that the violations were proven by the judgments of the ECHR[1].

The law on Government Cleansing immediately gave rise to criticism both in the country and abroad. Many provisions of the Law are unclear and vague, for example, what criteria should courts take into account when determining whether someone "contributed to power usurpation by … Viktor Yanukovych" under Article 3.5. The Venice Commission pointed out that, in view of the extensive scope of lustration and its decentralized implementation, the imprecise formulations could give rise to a non-uniform application of the Law and facilitate its misuse for personal or political purposes[2]. In some other cases the condition for applying the lustration measure is the mere fact of having occupied the specific position for a specified duration, without a judicial assessment. There are also major internal contradictions; the provisions of the law do not comply with the requirement of individual responsibility established in its Art. 1(2). With the exception of the persons mentioned in Articles 3.5, 3.6 and 3.7, the establishment of individual guilt by an independent organ is not required. Moreover, individuals subjected to lustration have no possibility to prove that, despite the position that they held, they may not have engaged in any violations of human rights or undertaken or supported any anti-democratic measures[3]. The lustration of judges looks especially questionable and problematic provided that the Law "On Restoring Confidence in the Judicial System of Ukraine" is still in force. There is an overlap between the two Lustration Laws as concerns the Maidan events. The Ukrainian authorities

1 Wording of the key provisions of the Second Lustration Law is cited as in the Interim Opinion of the Venice Commission http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)044-e

2 P. 59 of the Interim Opinion of the Venice Commission

3 P. 65 of the Interim Opinion of the Venice Commission

have explained that the inclusion of judges in the new law was justified on two grounds: first, the previous law has proved ineffective (the number of cases processed by the special commission is negligible); second, the previous law does not effectively enable the ban of the lustrated judge from public service. The Venice Commission finds that, if the previous law is deemed to be ineffective, it should be repealed and replaced by new, more effective provisions, which, however, duly respect the constitutional rules on the independence of judges. The current overlap creates problems of legal certainty and co-ordination: if a judge has already been the object of a procedure under the First Lustration Law, he or she should be immune from the application of the Second Lustration law pursuant to the principle of *ne bis in idem*. If no procedure has been carried out yet, it remains unclear which procedure prevails. In order to be at least partially effective, the lustration of judges should be regulated by one law only.[1]

On 17 November 2014 the Supreme Court of Ukraine appealed to the Constitutional Court of Ukraine, challenging the constitutionality of a number of provisions of the law. Concerned with the way lustrations were being carried out in Ukraine, the Parliamentary Assembly of the Council of Europe called for a revision of the law and noted that, although it was necessary for Ukraine to carry out lustrations, the procedure itself should be brought in line with Ukraine's obligations under the European Convention on Human Rights.

By December 1, 306 judges had stepped down from office. According to the Secretariat of the Higher Council of Justice, the biggest number of letters of resignation came from the Donetzk and Lugansk areas. Also on December 1, justices of the Supreme Court faced lustrations. According to Yaroslav Romanyuck[2], the Chief Justice of the Supreme Court of Ukraine, this was a necessary step; however, some provisions of the law on Government Cleansing contradicted the country's Constitution. Chief Justice Romanyuck was repeatedly contacted by court chairpersons of the city of Kiev and judges of the Higher Specialized Court on Civil and Criminal cases. Judges of various courts stated that the Second Lustration Law violated their rights and constituted a serious threat to decisional independence. In another source Chief Justice Romanyuck noted that, as of January 15, 2015, almost 300 lawsuits were submitted to administrative courts by the officers of procuracy, the Ministry of Interior Affairs, the Security Service of Ukraine, the fiscal service and other agencies, who were fired under the lustration process in the absence of due screening procedure[3].

1 P. 76 of the Interim Opinion of the Venice Commission

2 The interview with Chief Justice Romanyuck is available here https://news.liga.net/politics/interview/yaroslav_romanyuk_sudi_osporyat_lyustratsiyu_v_konstitutsionnom_sude

3 Ya. Romanyuck. Judicial Turmoil: A Conversation with the Chief Justice of the Supreme Court of Ukraine // Focus. 2015. No 3 (416), p, 19.

The Venice Commission analyzed[1] the law using the following four key criteria that summarize the essence of the international standards pertaining to lustration procedures. (1) Guilt must be proven in each individual case. (2) The right of defense, the presumption of innocence, and the right to appeal to a court must be guaranteed. (3) The different functions and aims of lustrations on one hand (namely, the protection of the newly emerging democracy) and those of criminal law on the other hand (i.e., punishing people proved guilty) have to be observed. (4) Lustrations have to be carried out within strict time limits in both the period of their enforcement and of the verification of their political reliability.

After analyzing the law, the Venice Commission concluded that applying lustration measures to the period of Soviet Communist rule so many years after the end of that regime and the enactment of a democratic constitution in Ukraine requires a cogent justification of the specific threat that former Communists pose to democracy nowadays. The Venice Commission thus found it difficult to justify lustrations at such a late hour. Also, applying lustration measures in respect to the recent period of Yanukovych's presidency would ultimately amount to questioning the actual functioning of the constitutional and legal framework of Ukraine as a democratic state governed by the rule of law. The Venice Commission noted that the lustration law has several serious shortcomings and recommended that at least the following aspects of the law be reconsidered. The list of positions subject to lustrations should be reconsidered, since lustrations must concern only positions that may genuinely pose a significant danger to human rights or democracy. The criteria for lustration should be reworked to specify that guilt must be proven in each individual case. Responsibility for carrying out the lustration process should be removed from the Ministry of Justice and entrusted to a specially created independent commission. The lustration law should provide for the guarantee to a fair trial. The lustration of judges should be regulated in a separate piece of legislation, and only the High Council of Justice should be granted the authority to dismiss any judge. Information on persons subject to lustration measures should only be made public after a final judgment by a court[2].

In its Final Opinion on the Law on Government Cleansing, the Venice Commission stated that this law differs from lustration laws adopted in other countries of Central and Eastern Europe since it is broader in scope. It pursues two different aims. The first is that of protecting the society from individuals who, due to their past behavior, could pose a threat to the newly established democratic regime. The second is to cleanse the public administration from individuals who have engaged in large-scale corruption. The term lustration in its tradi-

1 Venice Commission. Interim opinion on the Lustration law of Ukraine of 12–13 December 2014. Retrieved from http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)044-e

2 *Ibid*.

tional meaning only covers the first process[1]. The Commission welcomed certain improvements as reflected in the drafts of amendments to the Law on Government Cleansing provided by the Ukrainian authorities. However, the amendments still showed certain shortcomings. The Venice Commission underlined that the protection of a newly democratic regime from the elites of the previous non-democratic one and the fight against corruption are both valuable and legitimate political aims. Yet, they can hardly be achieved through the same means. Ordinary judges should be subject solely to the regime of the Law on the restoration of trust in the judiciary of Ukraine. Articles 2(11) and 2(12) of the Lustration Law should be deleted since they are misplaced and misleading. The ban on access to public positions does not prevent individuals from standing as candidates to any position. The Commission emphasized that it is for the Ukrainian authorities to consider whether all the positions listed under Articles 3(1)-(2) played a prominent role in the misuse of power by the regime of V. Yanukovych in 2010-2014 or during the Maidan events at the turn of 2013-2014. When doing so, they should take into account the specific situation in Ukraine, while at the same time respecting that *"where an organization has perpetrated serious human rights violations, a member, employee or agent shall be considered to have taken part in these violations if he was a senior official of the organization"*. Articles 3(5)-(6) should specify that the relevant court decision has to relate to the very act for which the disqualification occurs. Also, lustration should be administered in a centralized way. If the decentralized procedure is maintained, the competences of the Executive Body should be strengthened (or clarified). Most importantly, the Executive Body should serve as an organ of administrative review open to complaints by individuals subject to lustration. The administrative review must not serve as a substitute to judicial review, which shall be made operative as soon as possible[2].

In para.112 the Venice Commission also pointed out that Lustration must never replace structural reforms aimed at strengthening the rule of law and combatting corruption, but may complement them as an extraordinary measure of a democracy defending itself to the extent that it respects European human rights and European rule of law standards.

It is estimated by the Ukrainian "Respublika" Institute (an NGO that controls the fulfillment of lustration legislation) that circa 80% of dismissed officials lost their positions because they were in senior positions during the presidency of Yanukovych, circa 15% lost their jobs because of property lustration and only 5% were

1 Venice Commission, Final Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine. Adopted by the Venice Commission at its 103rd session in Venice on 19–20 June 2015. Para. 107.

2 Venice Commission, Final Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine. Adopted by the Venice Commission at its 103rd session in Venice on 19–20 June 2015. Para 111 a) – f).

dismissed under decommunization criteria (due to work in the CPSU, Komsomol or KGB)[1].

On 1 March 2016 the Higher Administrative Court of Ukraine ruled on the impossibility to further punish the judges who passed unlawful sentences on the activists of Euromaidan. In the opinion of the representatives of the Higher Court, the Law on Lustration of Judges had a controversial formula simultaneously stipulating one-year and three-year periods of limitation. The court preferred to limit the period of bringing to liability to one year[2].

The Ukrainian experience of delayed lustrations and the position of the Venice Commission on the matter are extremely important for Russia and those former Soviet states that have not yet undergone lustrations but where this question has not yet lost its edge. Lustrations are a medication for a society that needs treatment. This medication should be used in a timely fashion and according to legislative orders; otherwise, it will prove useless. Delayed lustrations that are carried out in violation of the constitution's own fundamental principles, are based on vague criteria, or target an unnecessarily wide circle of people can prove dangerous, as they risk turning the lustration process into another round of repression. As national experts point out, the fulfillment of lustration in Ukraine is characterized by inconsistency and the absence of genuine political will, which also may be said of other reforms which have been expected from the new powers by the Ukrainian people for three years. At present, it is necessary to concentrate not only on the fulfillment of full-scale lustration but also on the effective investigation of numerous new abuses[3].

The Post-Maidan period saw numerous efforts aimed at judicial reform. The Law "On Ensuring the Right to Fair Trial"[4] of February 12, 2015, introduced a number of important alterations. The Law introduced amendments to the 1984 Code of Administrative Offence, the 1992 Code of Commercial Procedure, the 2004 Code of Civil Procedure, the 2005 Code of Administrative Procedure, the 2012 Code of Criminal Procedure, the 2006 Law "On Access to Court Decisions", the Rules of Procedure of the Verkhovna Rada, and provided a new version of the 2010 Law on the Judiciary and the Status of Judges. In May of 2015 the Strategy on Reform of the Judiciary, Justice and other Related Legal Institutes for 2015–2020 (the Strategy) was adopted by the Presidential Decree # 276/2015. The strategy envisioned two stages: stage I would introduce general legislative changes and stage II would commence with the adoption of the constitutional changes

1 Evgenia Lyozina, Ukrainian Lustration. Two Years Later, Bulletin of Public Opinion No 3–4 2016), 175.

2 Oleksandr Yevsieiev & Iryna Tolkachova, Politicization of Constitutional Relationships in the Contemporary Period in Ukraine, 6(4) Russian Law Journal , 8–36 (2018), 16.

3 Oleksandr Yevsieiev & Iryna Tolkachova, *op. cit.*, 18.

4 The text of the Law is available here http://search.ligazakon.ua/l_doc2.nsf/link1/T150192.html

and result in setting up the institutional framework in line with the new legal framework. According to the Ukrainian authorities, Ukraine is currently at the second stage of the Strategy implementation[1].On June 02, 2016, constitutional amendments reforming the justice system and the Law on the judiciary and the status of judges were passed. The Law on the High Council of Justice193 was adopted on December 21th, 2016. The new legislation simplified the court system, transforming it from the four-level into the three-level system. Now the court system consists of local courts, appellate courts, and the Supreme Court[2].

Constitutional amendments changed the judicial appointment procedure: all judges are now appointed by the President upon a binding submission of the High Council of Justice following a competitive selection. The highly questionable power of the Verkhovna Rada and the President to dismiss the Justices of the Constitutional Court which were appointed by them was removed[3]. Decisions on judicial dismissal now have to also be approved by the High Council of Justice. The time limit on judicial tenure has been abolished. All judges are now to be appointed for life with no probationary appointment.

The 2017 Report highlights certain positive developments in the realm of the openness of court decisions. Access to the decisions of courts of general jurisdiction is secured through the Unified State Registry. The Law on Ensuring the Right to Fair Trial set some requirements on the inclusion of all decisions of general jurisdictions courts (including interim ones) into the Registry, as well as of the dissenting opinions of the judges executed in writing[4]. The introduction of the system of automated distribution of cases also shows progress. Amendments[5] to the 2010 Law on the Judicial System and Status of Judges provide a method for the assignment of a judge or judges by considering a specific case through the automated case-management system in the manner prescribed in the procedural law. The cases are distributed taking into account the specialization of judges, the caseload of each judge, restrictions on participation in the review of the decision imposed on the judges who rendered the court decision in question, leave, absence on the ground of temporary disability, business trips, and other cases provided by the law that prevent a judge from exercising justice or participating in a trial. When a case is heard with the participation of the jury, the panel of jury is also assigned with the System[6]. Information on the results of the distribution is

1 Report on the Anti-Corruption Reforms in Ukraine. 4th Round of the Monitoring of the Istanbul Anti-Corruption Action Plan. adopted at the ACN meeting on 13 September 2017 at the OECD in Paris. Available at www.oecd.org/corruption/acn/istanbulactionplan/.

2 Report on the Anti-Corruption reforms in Ukraine. 2017, 76.

3 The amended version of the Constitution of Ukraine is available here https://rm.coe.int/constitution-of-ukraine/168071f58b

4 Report on the Anti-Corruption reforms in Ukraine. 2017, 84.

5 Art. 15 of the Law on the Judicial System and Status of Judges (as amended in 2017). The amended version of the law is available at https://zakon.rada.gov.ua/laws/show/1402-19

6 Report on the Anti-Corruption reforms in Ukraine. 2017, 85.

saved in the System and must be protected against unauthorized access and interference. Unlawful interference with the system entails criminal liability[1].

According to the 2017 Report, despite the positive legal changes the judiciary continues to be perceived as a weak branch, often lacking independence and suffering from corruption and improper outside pressure, including prosecutorial interference. Starting from February 2016, all sitting judges are being submitted to the qualification assessment (with vetting) before they are granted life tenure. This is being done in addition to the vetting procedures under both Lustration laws. In 2016, 1 449 judges resigned in addition to the 47 who left on their own accord, which constitutes almost one fifth of the judicial posts. The safety of judges, including their physical security and the security of their families and property, is another issue. The judges shared that they often do not feel safe in the courtrooms. Security measures that were in place in the courtrooms before are no longer provided, and national police protection was removed due to the lack of funds in the budget[2]. Notwithstanding the obvious achievements of the 2016 judicial reform, there still a lot to be done, especially in the area of the decisional independence of judges.

Significant efforts were aimed at de-Communization and de-Sovietization. On April 9th, 2015 the Law "On Condemnation of Communist and National-socialist (Nazi) totalitarian regimes in Ukraine and prohibition of propaganda of their symbolics" (De-Communization Law) was adopted. With the purpose to ensure the enforcement of this Law, the Criminal Code of Ukraine was amended with Article 436-1, which criminalized the production, distribution and public use of Communist and National-Socialist symbolics (including souvenirs and gifts) and the propaganda of Communism and National-socialism. These offenses are punishable with the limitation of freedom for the period of up to five years, or with imprisonment for the same period of time with additional confiscation of property (similar offences committed by a public official, repeatedly, by an organized group, or with the use of media are punishable by incarceration for the period of 5 to 10 years, with additional confiscation of property or without it)[3]. The De-Communization Law was adopted in a package with three other laws — "On Access to Archives of the Repressive Authorities of the Communist totalitarian regime of 1917–1991", "On Legal Status and Perpetuation of Memory of Fighters for Independence of Ukraine in XX century" and "On Immortalization of Victory over Nazism in the World War II 1939–1945". Whereas the law on the access to archives was almost unanimously welcomed by national and Western experts, other laws

1 Article 376-1 of the Criminal Code of Ukraine https://meget.kiev.ua/kodeks/ugolovniy-kodeks/razdel-1-18/

2 Report on the Anti-Corruption reforms in Ukraine. 2017, 88.

3 Article 436-1 of the Criminal Code of Ukraine https://meget.kiev.ua/kodeks/ugolovniy-kodeks/razdel-1-20/

became subjects of heated debates.[1] Inter alia, they recognized the fact of Ukraine's occupation by the Soviet Russia in 1917–1991 and officially established the title "World War II" for the historic period which before that was defined as the "Great Patriotic War"[2]. Subsequently, war veterans and the participants of various national liberation movements, which were labeled "nationalist bands" under the Soviet rule, were equalized in their rights. Yevsieiev asserts that the De-Communization Law, the constitutionality of which was later challenged in the Court, did not come from nowhere. On the contrary, it was perfectly in line with the de-Sovietization approach, which came up on the agenda after the victory of Euromaidan. By the time when the Constitutional Court started the examination of the de-Communization Law, Ukraine already had first convictions made under Art. 436-1 of the Criminal Code.

In May 2017, the parliamentary opposition referred the De-Communization Law to the Constitutional Court. The claimants offered the following arguments. First, unlike the Basic Law for the Federal Republic of Germany, the 1996 Constitution of Ukraine does not include a direct prohibition of national-socialist or Communist ideology. Moreover, the Constitution of Ukraine unequivocally establishes the principles of political, economic and ideological diversity[3] and guarantees freedom of thought, speech, and the free expression of one's views and beliefs.[4] Second, the claimants asserted that the legal definition of the notion "criminal propaganda" looks questionable, especially the part concerning the "public use of products which includes symbolics of both regimes". They stated that the ambiguousness of this norm can create possibilities of unrestricted discretion on the part of courts and law-enforcement agencies.

The Constitutional Court delivered its decision[5] on July 16th, 2019. The Court stated that the right to freedom of thought, speech, and the free expression of one's views and beliefs is not absolute, and its enforcement can be limited by law for the purposes of national security, territorial integrity or public order. The Constitutional Court assumed that the Communist regime restricted human rights and made the democratic organization of state power impossible. The usurpation of power by the Communists was performed, inter alia, by the liquidation of freedom of political activity and the elimination of political opponents. The Court emphasized that for several decades the red star, the hammer and sickle, and other

1 O. Yevsieiev. How the Constitutional Court "judges" History. A Commentary to the Decision of the Constitutional Court of Ukraine of 16 July 2019 No 9-p/2019// Comparative Constitutional Review. 2019. No 6 (133) (to be published shortly).

2 in post-Soviet historic discourse, the Great Patriotic War (1941–1945) is recognized as a part of the World War II (1939–1945)

3 Art. 15 of the Constitution of Ukraine.

4 Art. 34 of the Constitution of Ukraine.

5 Decision of the Constitutional Court of Ukraine № 9-r/2019. Available at https://ips.ligazakon.net/document/view/ks19021?an=1

symbols of the Communist regime were actively used by anti-Ukrainian forces for the purposes of spreading fear, hatred, aggression and the denial of Ukrainian independence. The condemnation of the Nazi and Communist regimes and the introduction of a ban on the symbolics of these regimes were fueled by a legitimate purpose: to prevent a potential return to the totalitarian past. This ban was intended to render impossible any speculations on the historic past which are linked to the totalitarian regimes and to prevent the justification of crimes committed during such regimes. "*Having established the legitimacy of the goals of the adoption of the Law and after its comprehensive analysis, the Constitutional Court of Ukraine concluded that propaganda of the Communist and Nazi regimes and the public use of their symbols constitute an attempt to justify totalitarianism and equal to denial of the constitutional principles and democratic values, which must be mandatorily protected by all public authorities*"[1]. The Constitutional Court emphasized that several European organs of constitutional review, including the Constitutional Court of the Czech Republic and the Constitutional Court of Lithuania, also officially recognized that the state policy of totalitarianism, repressions and despotism is unacceptable, and condemned the totalitarian practices of the Nazi and Communist regimes in their rulings[2]. Subsequently, the Constitutional Court of Ukraine found the De-Communization Law to be in compliance with the Constitution.

1 Decision of the Constitutional Court of Ukraine № 9-r/2019.

2 P. 9 of the Decision of the Constitutional Court of Ukraine № 9-r/2019.

CHAPTER 6. REFORMS IN KYRGYZSTAN[1]

Setting up the basics of a legal state[2] in a post-totalitarian country which had had almost no experience of independent statehood was a tough and challenging task. This task was made the top national priority in the former Kyrgyz Soviet Socialist Republic after it proclaimed independence in August of 1991. The Kyrgyz SSR was one of the poorest and most conservative republics of the Soviet Union, so it was quite unexpected when all of a sudden Kyrgyzstan became the nearest thing to a Western-style democracy to be found in Central Asia. The main role in this rapid transformation belongs to Askar Akayev, who became president of the Kyrgyz Republic in October of 1990. A physicist turned politician, Askar Akayev was an outlier compared to other Central Asian presidents, who were former republican Communist leaders. Sophisticated and intellectual, Akaev, who holds a doctorate from the Moscow Institute of Engineering and Physics and in 1989 was the president of the Kyrgyz Academy of Science, looked and spoke very atypically for the Soviet *nomenclatura* of that time. He acted differently as well by making democratization his top priority, and for seven years after Akayev became president, Kyrgyzstan worked to maintain its reputation of being the most open and democratic society in Central Asia, not only to keep the aid and loan money flowing, but also to attract investors[3]. Subsequent developments showed that those democratic achievements were not as durable as they seemed during the period of 1989–2000. Martha Brill Olcott argues that the main reason why democracies have not developed in Central Asia is that the region's leaders have not wanted

1 The official name of the state is the Kyrgyz republic (Kyrgyzstan) (art. 1 of the Constitution of the Kyrgyz Republic of 5 May 1993, Art. 1 of the Constitution of the Kyrgyz Republic 27 June 2010).

2 The expression "Rechtsstaat" (Legal State) was coined in the 19th century. It was born of the initiative of Christian Theodor Welcker and denotes originally a state that is ruled by the rational volonté general. In the 19th century the opinion prevailed that it was not possible to derive the rationality of the law by pure rational philosophical thinking. Rather, one saw it as the task of the ruler, to help rationality to break through by creating positive laws. From the beginning the sense and the function of the Legal-State principle was safeguarding and protection of individual freedom through positive laws. Paul Tiedemann, "The Rechtsstaat Principle in Germany: The Development From the Beginning Until Now". James R. Silkenat , James E. Hickey Jr, Peter D. Barenboim (eds), The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat) (Springer International Publishing, 2014), 171–193.

3 Joyce Connery, "Caught Between a Dictatorship and a Democracy: Civil Society, Religion and Development in Kyrgyzstan", (XVI) The Fletcher Journal of Development Studies, (2000), 6.

them to[1]. At the same time she makes an exception for Kyrgyzstan, stating that Akaev, who was probably the most astute observer of the West in the region, understood that advancing the cause of democracy in the country would be in the national as well as in his own personal interest. This strategy worked for the first several years. Kyrgyzstan was considered a model in the region, a state committed to democratization and economic reform[2].

The expectations were high, but the problems hampering the political transformation of Kyrgyzstan were even bigger. The newly elected president of multinational and multiconfessional Kyrgyzstan had a perfect understanding of the dangers of interethnic conflicts, especially after the recent sharp confrontation between Uzbeks and Kyrgyz in the Osh district. Uzbeks have historically played an important role in this region because they made up most of the agricultural sector and controlled the railroads. In pre-Soviet times the Uzbeks were settled farmers who occupied the valley and the Kyrgyz were nomadic herdsmen traditionally living in the mountainous regions. Tensions between the two flared into violent conflict in 1990. Some attribute the incident to anti-Gorbachev factions, claiming that they staged the incident to make Gorbachev look weak. Whatever caused that uprising, tensions between the two factions persisted for years[3]. Another violent conflict took place in June of 2010.

Ethnic problems also played a huge and sometimes disruptive role. Akayev repeatedly insisted that Kyrgyzstan was a multinational state and that all its ethnic groups should have a role in shaping the new country. That was the main reason why many politicians accused Akayev of not being a real Kyrgyz patriot. Criticism intensified when Akayev vetoed the land reform bill establishing that all land was the property of ethnic Kyrgyz and issued a number of decrees providing for the prohibition of activities of the Communist party and the confiscation of its assets. Democratic parties, where membership was ethnic-based, accused Akayev of not giving priority to Kyrgyz national interests.

The economy of Kyrgyzstan was severely affected by the collapse of the Soviet trading bloc. In 1990, some 98 percent of Kyrgyz exports went to other parts of the Soviet Union. The nation's economic performance in the early 1990s was worse than any other former Soviet republic's except for the war-torn Armenia, Azerbaijan, and Tajikistan[4]. Economic reform progress was impeded by the near collapse of the Kyrgyz national economy, which had been more closely tied to the economy of the rest of the USSR than to the economies of other Central Asian states, and accordingly suffered more from the disruption of previous sources of

1 Martha Brill Olcott, Democracy in the Central Asian republics. Testimony of 1 April 2000. http://carnegieendowment.org/2000/03/31/democracy-in-central-asian-republics-pub-400

2 *Ibid*..

3 Connery, *op. cit*. note 1, 8.

4 For more details see http://www.state.gov/outofdate/bgn/kyrgyzstan/49804.htm

supplies. Another reason for the miserable state of the national economy was offered by the first president of Kyrgyzstan: socialism as a system of life in the former Soviet Union proved to be a system without real owners. This made it impossible to have civilized economic and civil relations and nullified any potential for persons to be economically and juridically free actors. It created a way of life based on dependence[1]. The deepening economic decline was one of the greatest threats to Kyrgyzstan's aspirations to become a model democracy. A series of natural disasters in the spring and summer of 1992 made the country's economic situation even worse. In 1992, industrial and agricultural production declined by 20 percent, and mass unemployment became a real threat. 1992 also saw the start of the privatization program and the liberalization of prices. In 1993, Kyrgyzstan was the first central Asian State to introduce its own currency, the *som*[2], and became the first of the CIS countries to become a member of the World Trade Organization (1998). Akaev's government actively promoted the creation of the fundamentals of the market economy and did its best to keep inflation under control.

In 1993 the Djogorku Kenesh (the unicameral parliament of Kyrgyzstan) adopted the new Constitution of Kyrgyzstan. As in many other post-Soviet states, it was based on the French semipresidential constitutional model. The 1993 Kyrgyz Constitution displayed a number of similarities with the Russian Constitution. Part 7 of Article 71 of the Kyrgyz Constitution stated that if, in the span of three months, the Djogorku Kenesh twice expressed no confidence in the Government of the Kyrgyz Republic, the President would either announce the dissolution of the Government or dissolve the Djogorku Kenesh. Part 3 of Article 42 of the Constitution of Kyrgyzstan actually nullified the principle of the separation of powers by copying the wording of Part 3 of Article 80 of the Russian Constitution, repeating that the President shall determine the guidelines for state internal and foreign policies.

Kyrgyz lawmakers even went one step further: their Constitution included a provision allowing the president to give the Government instructions without consulting with representatives from other government branches. Part 1 of Article 71 stated that the president could take part in the Government sessions in order to set the tasks and objectives toward realizing the main guidelines for internal and foreign policies. However, Article 7 of the Constitution of Kyrgyzstan envisaged the separation of powers as one of the fundamental principles of their government.

The 17 years that the semi-presidential system existed in Kyrgyzstan demonstrated a progressive increase in the power of the President. The critical point in this development came when Kurmanbek Bakiyev became the President of Kyrgyzstan. Under his rule, the semi-presidential system transformed into tyranny, and in the

1 Askar Akayev, "Kyrgyzstan: Central Asia's Democratic Alternative" (1) Demokratizatsiya (Winter 1993), 9 23, 10.

2 Connery *op. cit*. note 1, 3.

beginning of April of 2010 the Kyrgyz people decided they would no longer take it. After riots broke out throughout the country, Bakiyev was overthrown and forced into exile. The political elite of Kyrgyzstan has definitely learned from this, and the new constitution provides for a parliamentary republic.

Judicial reform in Kyrgyzstan was always carried out as a part of a comprehensive reform agenda established on the governmental level. Usually the main issues of judicial reform were addressed in the governmental programs, including the "Strategy of Development of the Kyrgyz Republic", which was in force until 2010. Under the rule of Askar Akayev and then Kurmanbek Bakiev, the main achievements of judicial reform included prohibition of the death penalty, life imprisonment as a substitute for the death penalty, a significant increase in the accessibility of justice and number of judges, and establishment of the Constitutional Court in 1993 and of mediation courts in 2002[1]. The law "On Jurors in the Courts of the Kyrgyz Republic" was adopted in July of 2009. The initial idea of the lawmakers was to have a gradual introduction of jury trials in 2012–2014. New legislation on courts and the status of judges provided that judges in Kyrgyzstan were to be appointed (or elected) for their entire term with no possibility of life appointment. Judges of local courts could hold their offices until they turned 65 years old. The age of retirement for the judges of upper courts was 70 years. The 2004 presidential decree[2] established a National Council for Judicial Affairs, the purpose of which was to improve the process of selection of candidates for judgeships in local courts and to regulate the process of transfer and dismissal of judges from local courts. The National Council for Judicial Affairs operated on a regular basis until 7 April 2010, when it was dissolved by a Decree of the Provisional Government. Its functions were transferred to the Judicial Department of Kyrgyzstan.

Revival of the courts of *acksakals* is the most remarkable feature of Kyrgyz judicial reform. The Courts of Acksakals are the traditional Kyrgyz courts that resumed operation in 1993, and their activity is regulated by national law[3]. These courts are set up by local self-government institutions and consist of the most respected individuals, both men and women, who are elected by the local communities. The Courts of Acksakals handle cases referred to them by courts, the procuracy, and agencies of interior affairs as well as by their officials, in accordance with

1 Mediation courts were set up by the law "On Mediation Courts in the Kyrgyz Republic" [O Treteyskikh Sudakh v Kyrgyzskoy respublike] No 135 30 July 2002. Available at http://www.uni-kiel.de/leobalt/Datenbank/Kirgistan/Gesetze%20ua/SchiedsVerfG%202002%20rus.htm

2 The Law on National Council for Judicial Affairs of the Kyrgyz Republic [O Natsionalnom Sovete Po Delam Pravosudiya] was passed in 2007. Available at http://base.spinform.ru/show_doc.fwx?rgn=18520

3 The Law On the Courts of Acksakals [O Sudakh Acksakalov] of the Kyrgyz republic 5 July 2002. Available at http://old.mkk.gov.kg/index.php?option=com_content&view=article&catid=130:2012-10-03-05-29-16&id=1324:-l-r

the Kyrgyz legislation in force[1]. Also, the Courts of Acksakals resolve cases related to small property claims, minor zoning violations, ill-fulfillment of parental obligations, and other minor violations and disputes[2]. The Acksakals handle cases in accordance with the Kyrgyz Constitution, the Law on Acksakals and other legislative acts of Kyrgyzstan[3]. The key elements of activity of acksakals are their high moral standards and principles that have roots in the traditions and common practices of the peoples of Kyrgyzstan, and the fact that they must comply with the legislation in force. In fact, courts of Acksakals can act in the capacity of local ombudsmen, especially in small villages, where neither qualified lawyers nor access to legal information are available. These courts also serve as mediators; made up of highly respected members of the community, they offer advice and services that help to solve the most complicated and controversial problems. Courts of Acksakals have oversight of the enforcement of their judgments[4]. They are also accountable before their founders: not less than once a year each court of acksakals presents a report to the founders' meeting[5]. Judgments of the Courts of Acksakals can be appealed to regular courts within 10 days after the day the judgment is delivered[6].

Courts of acksakals have often been criticized as lacking legal expertise and for having insufficient material and logistical support. Throughout almost the entire country, courts of acksakals have often not had enough copies of the legislation necessary for their work on hand. In many villages Internet was not available. Another point of criticism has been that the acksakals themselves lacked knowledge of procedural rules and legal writing. With respect to this factor, the substantial contribution of the Kyrgyzstan office of the Organization for Security and Cooperation in Europe deserves mention. Together with a local NGO named "The Foundation for Cooperation and Support to Legal and Economic Reforms", the Osh office of OSCE launched a project targeting support for the activity of the courts of acksakals in the realm of protection of human rights and prevention of conflict situation in the non-urban areas. The aims of this project included optimization of operation of the courts of acksakals by means of the systematic training of court chairpersons in the southern part of Kyrgyzstan. The main purpose of this training was to provide basic knowledge on the fundamentals of material and procedural law of Kyrgyzstan, as well as on conflict resolution and settlement of disputes, and to increase the efficiency and sustainability of the courts of acksakals in the region. Another aim was the development of a special questionnaire, which was circulated among acksakals of the southern region. The collected data helped to identify other weak points in

1 Art.1 of the Law on the Courts of Acksakals of 2002.
2 Art. 15 of the Law on the Courts of Acksakals of 2002.
3 Article 2 of the Law on the Courts of Acksakals of 2002.
4 Art.31. of the Law on the Courts of Acksakals of 2002.
5 Art.35.
6 Art.30.

the activities of the courts of acksakals. The project plan included a new series of training seminars, where acksakals were provided with deliverables including texts of key pieces of national legislation including the Civil Code, The Family Code, The Land Code, The Labor Code, The Code of Administrative Offenses and the following laws: "On Ombudsman", the Law "On the Courts of Acksakals", the law "On Social and Legal Remedy in Cases of Family Violence", and the law "On the State Guarantees of Gender Equality".

Representatives of the OSCE and their local counterparts strongly believed that in the multinational southern part of Kyrgyzstan, where several interethnic conflicts had already resulted in bloodshed, the role and contribution of the courts of acksakals in the realm of solution of interethnic conflicts could not be overestimated.

Efficient contributions of international organizations turned out to be another important feature of Kyrgyz judicial reform. The EU Project "Support for reform of the judicial system in Kyrgyzstan" (2009–2010) consisted of four main components: (1) analysis of the Kyrgyz legislation in force and drafting of the concepts of possible amendments, (2) support of the reform of the penitentiary system of Kyrgyzstan, (3) improvement of enforcement of judgments, and (4) training of judges.

Component No. 4 offered trainings and seminars on (1) interactive methods of training, (2) judicial psychology, judicial rhetoric, judicial ethics, (3) legal writing for judges with a focus on reasoning, (4) judicial ethics in the EU countries, (5) criminal law and criminal procedure, including new methods of forensic examination. The component also envisaged pilot training for Justices of the Constitutional Court (meaning and the direct application of the Constitution, key tasks and importance of constitutional review and its contribution to the law-making process, media relations) and study tours for judges and court personnel. The purpose of study tours was to familiarize judges and court employees with the selection process and the initial training of candidates for judgeships, the operation of Probation services in the Western and Eastern European counties, and the specific features of constitutionalism in Austria, France and Germany. The participants of the study tours were judges from the courts of different levels, including several justices of the Supreme Court of Kyrgyzstan. Significantly, the output of the study tours ultimately exceeded prior expectations. One of the study tours focused on the EU way to select and train candidates for judgeships. The group of participants of this study tour included 10 justices, including the Chairman of the Supreme Court, one member of the Parliament, and the Chairman of the Parliamentary Committee on Judicial Affairs. Justices of the Supreme Court and other participants of the study tour were so impressed by the EU practices of selection of candidates for judgeships and by the professional mandatory training of such candidates, that, upon their return to Kyrgyztsan, they submitted a report to the President. The result of this report was a Presidential Decree of 14 December 2009

"On initial training and selection of candidates for judgeships in accordance with the West European models".

In the course of the realization of this project professional trainings were provided to 70% of all judges, 65% of all bailiffs and 57% of all Probation Service employees.

Sixty-seven legal professionals, including 22 judges, 21 bailiffs, and 24 employees of the Probation Service completed a special course and became qualified trainers. Judges who qualified as trainers became very active in conducting training in the regions. The main topics of these trainings included problems of judicial ethics, democratization of criminal procedure, and new methods of forensic investigation in criminal procedure. Development, publication and circulation of educational materials (17 textbooks and study guides) for different target groups from middle schools to judges was an important part of the project.

The year 2009 saw the development of the draft Concept of Reform of the Judicial System and other Law Enforcement Agencies. The draft Concept clearly listed priorities and ways to improve the organizational structure and operation of judicial and law enforcement agencies. Key tasks stated in the draft Concept included (a) optimization of the legislative framework regulating operation of courts and law enforcement agencies, (b) strengthening of decisional independence of judges and providing proper conditions for administration of justice in Kyrgyzstan, (c) improvement of the legal consciousness of the people, (d) improvement in the professional legal consciousness and legal culture of judges, law clerks, and other court employees and law enforcement officials, (e) fundamental improvement of cooperation between courts and law enforcement agencies in the realm of protection of rights and legitimate interests of individuals and legal entities, (f) an increase in accessibility and transparency of justice by means of the efficient and highly professional handling of cases, (g) a fundamental increase in the efficiency of enforcement of judgments, (h) development of mediation procedures, (i) prevention of disrespectful and humiliating treatment of parties in court proceedings, as well as the prompt, impartial and efficient investigation of cases of application of torture or threats to apply torture, (j) an increase in efficiency in the work of law enforcement bodies both in the area of fighting crime and in the area of prevention of crime, (k) the creation of better conditions for prisoners in order to help them to decide to break with their criminal past, and the creation of friendly conditions for released convicts in order to help them re-integrate into society.

When the Revolution of 2010 ended and the country got a chance to enjoy the first moments of peace, judicial reform issues were raised again. In the realm of the judiciary, the first immediate result of the change of regime was the elimination of the Constitutional Court, which was done on the somewhat shaky grounds that the Court had become too politicized. Instead of replacing justices of the Constitutional Court, the new Government decided to change the system and to

transfer the function of constitutional review to the Constitutional Chamber of the Supreme Court[1]. But actually there was more to this action than appeared at first sight, and it could be construed differently given past history. Problems in the relations between the Constitutional Court and the President of the country started in 2007, when the Constitutional Court ruled that the amendments made to the Kyrgyz Constitution in 2006 were unconstitutional. The Djogorku Kenesh decided to interfere in the conflict and passed a vote of no confidence in the Constitutional Court. Moreover, the Djogorku Kenesh set up a parliamentary committee in order to investigate previous and current activities of the Constitutional Court. Justice Cholpon Bayekova, the Chairwoman of the Constitutional Court, responded with a letter to President Bakiyev, in which she said that the Parliament had no authority to start the investigation of the activities of the Constitutional Court. The Venice Commission made the point that it cannot be the task of the Venice Commission to review decisions by national constitutional courts, which are the institutions with the authority to provide a final interpretation of the Constitution[2], but nevertheless, expressed its concern. In its Opinion of 17 December 2007, the Venice Commission noted that it is indeed highly unusual, if not unprecedented, that a Constitutional Court declares the full text of an acting constitution to be unconstitutional. As a general rule, constitutional courts have to make their decisions on the basis of the Constitution valid at the moment of their decision[3]. The Constitutional Court of Kyrgyzstan was dissolved in April of 2010. In June of 2010, after the adoption of the new Constitution, the Constitutional Court, a unique body of constitutional review that was always headed by women, was discontinued. Again, the Venice Commission expressed its concern and criticism:

> "The Venice Commission considers that the abolition of the Constitutional Court as a separate institution is not a good solution. It hopes that this matter will be reconsidered and that the system of constitutional control chosen by Kyrgyzstan will nevertheless be exercised in such a way as to provide the full protection of constitutional rights and freedoms and to contribute to the creation of a stable political and legal culture in the country"[4].

1 Article 97 of the Constitution of the Kyrgyz Republic of 27 June 2010. Translated. Retrieved from http://www.gov.kg/?page_id=263&lang=ru

2 Opinion on the constitutional situation in the Kyrgyz Republic. December 17, 2007, Venice Commission, 9. Retrieved from http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)045-e

3 Opinion on the constitutional situation in the Kyrgyz Republic. December 17, 2007, Venice Commission, 10.

4 Opinion on the draft Constitution of the Kyrgyz republic June 4, 2010, Venice Commission, 69. Retrieved from http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)015-e

The draft of the new Constitution was presented to the experts of the Venice Commission and was assessed as a step towards improving the system of the separation of powers[1]. Apparently Kyrgyzstan learned a lot from 17 years of semi-presidentialism: the clear aim of the reform was to limit presidential powers and to involve more state organs in the decision-making and appointment processes[2].

However, leading national constitutional law experts note that the new Constitution is not ideal. Professor Kairat Osmonaliev and his colleagues state that Kyrgyz lawmakers failed to strengthen constitutional responsibilities of the highest organs of state power and their officials[3]. In the commentary to the new Constitution, they criticize the ban on amending certain parts of the Constitution before 2020 as unreasonably long[4].

The change of the constitutional system brought swift and impressive results: using Freedom House's terminology, Kyrgyzstan displayed signs of consolidated authoritarianism until 2013, but is now a parliamentary republic with a semi-consolidated authoritarian regime. Also according to Freedom House, since April 2010 Kyrgyzstan has developed the most dynamic political system in post-Soviet Central Asia. The 2010 elections were called the most fair of their kind in Central Asia[5]. According to Freedom House, the 2015 parliamentary elections were marked by a high degree of political competition and unpredictability. In a region notorious for autocratic leadership, these elections stand out as an important shift toward greater political dynamism. Civil society groups played a key role in observing the election process, raising the alarm when suspecting fraud[6].

The year 2012 saw the setting up of the Commission on Elaboration of Coordinated Proposals on further reform of the judicial system of Kyrgyzstan[7]. After six months of research and consultations, the commission came up with the recommendations[8] identifying the primary goals of national judicial reform. One of the priorities of the reform agenda was the modernization of the current Kyrgyz leg-

1 Opinion on the draft Constitution of the Kyrgyz republic June 4, 2010, Venice Commission, 8.

2 Opinion on the draft Constitution of the Kyrgyz republic June 4, 2010, Venice Commission, 27.

3 K.Osmonaliyev, R.Azygaliyev, T.Zhumabeckova. Commentary to the Constitution of the Kyrgyz Republic, (Altyn Print, Bishkek, 2014), 5. (K.Osmonaliyev, R.Azygaliyev, T.Zhumabeckova. Naucho-pralticheskу Kommentary k Konstituzii Kyrgyzskoy Respubliki. Altyn Print, Bishkek, 2014).

4 *Ibid*.

5 Nations in Transit, Kyrgyzstan, Freedom House (2015). https://freedomhouse.org/report/nations-transit/2015/kyrgyzstan

6 Nations in Transit, Kyrgyzstan, Freedom House (2016). https://freedomhouse.org/report/nations-transit/2016/kyrgyzstan

7 Decree of the President of the Kyrgyz republic "On Setting Up the Commission on Elaboration of Coordinated Proposals on further reform of judicial system of Kyrgyzstan" of 17 January 2012. Available at http://cbd.minjust.gov.kg/act/view/ru-ru/61255

8 Available at http://cbd.minjust.gov.kg/act/view/ru-ru/61388?cl=ru-ru#p

islation, including legislation on the issues related to administrative law, criminal law, criminal procedure and civil proceedings, court organization, and administration of justice, provided that the legislation should be in compliance with the EU standards. The judicial system must become transparent. Operation of courts shall be an object of oversight by civil society. A strong judiciary must be the guarantor of stability of the national economy and will contribute to the competitive ability of the national economy of Kyrgyzstan. As follows from the text of the recommendations, the most prudent and budget-friendly way would be to modernize the existing system of courts and law enforcement agencies. Gradual modernization was supposed to secure the transformation of the existing structures.

Recommendations of the Commission were summarized in the presidential decree No 147 of 08 August 2012[1], which listed the goals for the current stage of judicial reform in Kyrgyzstan, including the restructuring of an autonomous and independent judiciary as one of the branches of power in Kyrgyzstan, an increase in the efficiency of administration of justice, the securement of transparency of the judicial system, a system of guarantees of judicial protection of human and civil rights and legitimate interests, the increase of professional qualifications of judges, law clerks, and other court employees, the optimization of financial and logistical support of operation of the courts, the increase of responsibility of judges for the proper and highly professional administration of justice. Bringing the Kyrgyz legislation into compliance with international law and international standards in the realm of human rights protection was also outlined as a major task. Such changes were supposed to result in a considerable extension of the possibilities for judicial remedy and an increase of accessibility of justice. The Decree listed the priorities for the current stage of judicial reform, among them: further improvement of the court organization and judicial proceedings, humanization of justice, setting up of a modern system of training of judges-to-be, strengthening of requirements for judges, especially in the area of judicial ethics, introduction of an efficient system of disciplinary charges for breaching the provisions of the Code of Honor of a Kyrgyz Judge, securement of realization of the principle of openness of judicial proceedings, increase of the people's trust in judiciary and judges, introduction of alternative measures of conflict resolution, and formation of the democratic legal consciousness and legal culture.

In the area of lawmaking, the Concept of Reform of the Judicial System and other Law Enforcement Agencies established the tasks to introduce efficient measures of correction of judicial mistakes and to ensure efficient protection and restitution of the violated rights of individuals and legal entities in court proceedings. Another important task was the liberalization of criminal law and the decriminalization of crimes that do not pose serious danger for society, especially

1 Decree of the President of the Kyrgyz republic "On the Measures for Improvement of Justice in the Kyrgyz Republic No 147 of 08 August 2012. Translated. Retrieved from http://www.president.kg/ru/apparat_prezidenta/reformirovanie_sudebnoj_sistemy/

economic crimes, with the possible transfer of these decriminalized crimes to the category of administrative offenses (with appropriate strengthening of administrative liability for the commission of such offenses), and the extension of possibilities for using the mediation procedures.

The court system was to be changed in the following way: second instance courts shall be the only appellate courts, cassation shall be the exclusive competence of the Supreme Court of the Kyrgyz Republic, military courts shall be eliminated, and the system of justices of the peace shall be introduced.

Some of these recommendations were replicated in the Governmental Program for Development of the Court System in 2014–2017, which was approved by Jogorku Kenesh in 2014[1]. According to the Program,

> "the national judicial system is still facing both old problems and new challenges in the society, which call for fundamental quality changes in the judicial system. The quality and culture of administration of justice, the reputation of courts and public trust to judges remain on low level"[2].

However, the following legislative developments look impressive. The recommendation to eliminate military courts was successfully enforced in December of 2016[3]. The day before, on 22 December 2016, the Jogorky Kenesh adopted the new Criminal Procedural Code of the Kyrgyz Republic[4]. The Code of Administrative Proceedings of 25 January 2017 will become effective on 01 July 2017[5]. The new Criminal Code[6] and Penal Code[7] will come into force on 01 January 2019. The new version of the Code of Civil Procedure[8] suggests essential changes in delineation of jurisdiction of all three levels of judicial system. First instance courts shall try all civil cases on the merits, regional courts shall be appellate courts, and the

1 The Governmental Target Program for Development of the Court System of the Kyrgyz Republic in 2014–2017 [Gosudarstvennaya Zelevaya Programma "Razvitiye Sudebnoy Systemy Kyrgyzskoy Respubliki na 2014–2017", 26 June 2014. Translated. Retrieved from http://www.jogorku.sot.kg/sites/default/files/images/2014.06.25_gosudarstvennaya_celevaya_programma_utverzhdennyy_variant_v_zhk_kr_russkiy_variant.pdf

2 The Preface to the Governmental Target Program for Development of the Court System of the Kyrgyz Republic in 2014–2017.

3 The Law of the Kyrgyz Republic "On Amending Certain Legislative Acts of the Kyrgyz Republic" 23 December 2016 [O Vnesenii Izmemeniy v Nekotoriye Zakonodatelnye Akty Kyrgyzskoy respubliki] http://cbd.minjust.gov.kg/act/view/ru-ru/111498?cl=ru-ru

4 The text of the new Criminal Procedural Code is available here http://www.president.kg/files/docs/Laws/upk_kr.pdf

5 The text of the Code of Administrative Proceedings is available here http://cbd.minjust.gov.kg/act/view/ru-ru/111520

6 The text of the new Criminal Code is available here http://online.adviser.kg/Document/?link_id=1005566451

7 The text of the new Penal Code is available here http://mvd.kg/index.php/rus/explore/normative-base/247-ugolovno-ispolnitelnyj-kodeks-kyrgyzskoj-respubliki-31-01-2017

8 The new Code of Civil Procedure was signed by president Atambayev on 01 February 2017.

Supreme Court shall be the cassation instance[1]. The law on probation was signed by President Atambayev in February 2017.

The judicial system of Kyrgyzstan includes local courts and the Supreme Court of the Kyrgyz republic. According to the law, local courts are first instance courts (district courts, district courts in cities, city courts, and interdistrict courts) and second instance courts (regional courts and the city court of Bishkek[2]).

The Supreme Court is the court of last resort for all civil, criminal, economic, administrative, and other cases. The Supreme Court includes the Constitutional Chamber[3]. Interestingly, the national legislation establishes a gender balance requirement for the Supreme Court: not more than 70% of representatives of one gender.[4]

Introduction of jury trials is still on the agenda in Kyrgyzstan. The right to be tried by jurors is guaranteed by the Kyrgyz Constitution, which states: "everyone has the right to have his case considered in court with the participation of jurors in cases stipulated by law", and provides for the right of Kyrgyz citizens to "participate in the judicial process in the cases and in the order specified by the law".[5] The original Law on Jurors in Kyrgyz Courts (2009) provided for the gradual introduction of courts with jurors in selected Kyrgyz provinces during the period of 2012–2014. The Law provided for the participation of panels consisting of nine active and three substitute jurors in cases of severe and extremely severe crimes, for which the accused might face life in prison or a long prison term. Due to financial and administrative difficulties related to several public revolts and changes in the nation's government system, however, this law was not implemented[6]. On 30 May 2012 the Law on Jurors in Kyrgyz Courts was amended, with the new law stating that the provisions of the 2009 Law will be implemented as of 1 January 2015 in the courts of the capital city, Bishkek, and in the second largest city, Osh. As of January 1, 2017, jury trials were to be established throughout the country[7]; however, it did not happen. Prospects of jury trials in Kyrgyzstan are still debated: it will be a challenging task to form unbiased juries in a country whose culture is

1 Judicial systems of Central Asia. A comparative overview, G.Dikov (ed.), Moscow, Jurisprudence (2015), 124.

2 Art. 25 of the Law on the Supreme Court of the Kyrgyz republic and local courts of 18 July 2003 (as amended on 23 December 2016). Translated. Retrieved from http://cbd.minjust.gov.kg/act/view/ru-ru/1279

3 Art.12 of the Law on the Supreme Court of the Kyrgyz Republic and local courts of 18 July 2003.

4 Art.15 (2) of the Constitutional Law On the Status of Judges in the Kyrgyz Republic of 8 July 2008. Retrieved from http://jogorku.sot.kg/sites/default/files/konstitucionnyy_zakon_kyrgyzskoy_respubliki_o_statuse_sudey_kyrgyzskoy_respubliki.pdf

5 Art. 26.6 and 93.1 of the Constitution of the Kyrgyz Republic of June 27, 2010.

6 Peter Roudik, "Kyrgyz Republic (Kyrgyzstan): Implementation of Jury Trials Postponed", Global Legal Monitor, Library of Congress (16 July 2012).

7 *Ibid*.

historically based on tight kinship and clannish connections and whose population is slightly over 5.5 million people.

In 2015 Kyrgyzstan experienced mixed developments, some nudging the country toward democratization, others pulling it toward greater authoritarianism. The outgoing parliament was on the verge of banning "gay propaganda" and regulating "foreign agents" with legislation mimicking laws passed in Russia in 2012 and 2013. Legislation banning "gay propaganda" and labeling NGOs that receive foreign funding as "foreign agents" was a major topic for much of the year in the pre-October parliament, but it did not pass all the way to presidential signature.[1]

Over the last six years, Kyrgyzstan has displayed a visible decrease in the level of corruption. According to the TI Corruption Perceptions Index, Kyrgyzstan was rated 164 out of 178 in 2010, 150 out of 173 in 2013, 136 out of 176 in 2014, and 123 out of 167 in 2015. According to a study by the INDEM Foundation[2], courts, militia, the hiring process, and career promotion are extremely affected by corruption. INDEM experts explain this fact by the dominance of hierarchic relations, which put individuals in a degraded position. Weak and dormant ethical norms also play a crucial role together with a dominating paternalistic consciousness[3].

Summing up the general outcome of the post-Soviet transformation of Kyrgyzstan, the following key points should be mentioned. Political, economic, legal and judicial reforms were not isolated. By contrast, all these reforms came up as constituent elements of the comprehensive national reform program. The reform vector was repeatedly corrected based on the assessment of available positive and negative results.

The constitutional transformation of Kyrgyzstan was not easy. In the early 1990s, President Akaev announced his plans to transform Kyrgyzstan into a democracy of the Western type. Nevertheless, after several years of consistent democratization, the leadership of the state succumbed to the temptations of authoritarianism. After sufficient convincing evidence that the semipresidential constitutional model turned out to be a misfit for this part of Central Asia, the need to change the constitutional system became obvious. Finally, Kyrgyzstan became one of the few post-Soviet states that opted for a parliamentary republic. In the course of reforms, the interests of ethnic minorities were taken into account.

Specific features of the Kyrgyz judicial reform include the presence of traditions and best practices that turned out to be easily adaptable to the transition period (the Court of Acksakals). Reform policy papers addressed real problems

1 Nations in Transit, Kyrgyzstan, Freedom House (2016). https://freedomhouse.org/report/nations-transit/2016/kyrgyzstan

2 Society and Corruption in the Kyrgyz republic. A sociological research of the corruption in the Kyrgyz Republic initiated by the Bishkek Centre of the Organization for Security and Cooperation in Europe. November 2014. Available at http://www.indem.ru/russian.asp

3 *Ibid*., at 303.

(improvement of conditions in the penitentiary system, prevention of humiliating treatment of parties to the proceedings). Another important feature of the national judicial reform was the readiness of the members of the judicial community for retraining and increase of professional qualification (an attitude demonstrated by the courts of all levels — from judges of the first instance courts to Justices of the Constitutional Court) and the understanding of the necessity of different forms of training for prosecutors, judges, investigators, and attorneys. Contributions by international donor organizations and national civil society institutions also deserve mentioning.

Of course, even given such a comprehensive approach to reform and active participation and input from many persons and institutions, the reform process in the Kyrgyz Republic is nonetheless not complete, and there will be a continued struggle to improve the legal and judicial system, during which there will be rough spots and problematic areas.

CHAPTER 7. REFORMS IN KAZAKHSTAN

Kazakhstan, with vast fossil fuel and other natural resources, is a land giant that shares a more than three thousand mile border with Russia. According to the census of 1989, Kazakhs and Russians each made up to 40% of the population of the republic. Kazakhstan was also economically more closely tied to Russia than was any other Central Asian state, and its industrial population has faced severe economic dislocation as a result of the collapse of inter-republic economic relations[1]. Kazakhstan was also the last Soviet republic that left "the unbreakable Union of freeborn Republics"[2]. The Constitutional Law on the Independence of the Republic of Kazakhstan was adopted on 16 December 1991, eight days after the signature of the Belaveza Accords, which provided for the dissolution of the Soviet Union.

The incumbent president Nursultan Nazarbaev has served uninterruptedly as the leader of Kazakhstan since 1989 and, like many post-Soviet presidents, is a former head of the republican Communist Party. Nazarbaev's ambitious economic reform program did not involve comprehensive personnel changes; most Communist Party officials remained in high-ranking positions. Nazarbaev's critics repeatedly made the point that his economic reform was to be administered by the same apparatchiks who had run the socialist economy in the region under Soviet rule. Similarly, almost all new regional officials appointed by Nazarbaev were former local Communist Party leaders.

Kazakhstan and Kyrgyzstan are the two fastest and most efficient reformers in Central Asia. While the differences in natural resource endowments, economic structures, and sociocultural factors undoubtedly influenced attitudes toward reform, at the outset of transformation Kazakhstan and the Kyrgyz Republic were at the opposite ends of the spectrum in many respect, with Kazakhstan having a much richer resource base and a more diversified economic structure.[3]

However, when the Soviet Union collapsed, Kazakhstan and Kyrgyzstan started with highly similar initial conditions. Subsequently, the two countries followed reform and transition paths that can be categorized as polar opposites. While Kazakhstan stayed mostly authoritarian and put the highest priority on attracting foreign investment, Kyrgyzstan engaged in full-fledged democratic reform and deep institutional transformation, punctuated by short periods of rollback.

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1 Martha Brill Olcott, "The Central Asian States: An Overview of Five Years of Independence". 5 (4) Demokratizatziya (Fall 1997), 522.

2 First words from the 1977 USSR anthem.

3 "Economic reforms in Kazakhstan, Kyrgyz Republic, Tajikistan, Turkmenistan and Uzbekistan", IMF papers, (1999). http://www.imf.org/external/pubs/nft/op/183/

The following table illustrates the various dimensions of similarity between Kazakhstan and Kyrgyzstan at the time of the Soviet Union's breakup.

Similarity dimension	Details
Geographic	The two countries border each other and include substantial areas with similar topography and climate
Cultural and historic	Both Kazakhs and Kyrgyz were traditionally nomadic and lacked experience of independent governance for at least the past 175 years. Both countries are multiethnic and multi-confessional.
Institutional	Both countries inherited similar Soviet-style governance hierarchies and institutions

Both countries were fairly dependent on the rest of the Soviet Union and deeply integrated in inter-regional production chains and trade flows, and thus unprepared for independent statehood. Tellingly, the popular push for independence was much less pronounced among Central Asian countries compared to other post-Soviet states.

After gaining independence, both countries opted for constitutional systems with strong presidential powers (semi-presidential republics), but this is where the similarities ended. In Kazakhstan, the transition to a market economy was made the top priority, with economic development ahead of democratization. By contrast, early on Kyrgyzstan set out on a path of democratic transformation and political reforms; however, these efforts did not bring economic growth. Given the similarities in initial conditions and, most importantly, the common legacy of Soviet institutions and mentality, the variance in the outcomes can be traced back to specific reforms and/or new institutions.

Comparing just a few fundamental outcomes reveals the broad range of impacts that reforms may have. Comparisons reveal nothing short of polar opposite institutions and polar opposite economic development outcomes, but not in the expected direction: Kazakhstan is a relatively economically successful autocracy, while Kyrgyzstan is a relatively economically underdeveloped democracy.

The table below documents key differences in transition paths and eventual outcomes.

Outcome	Kazakhstan	Kyrgyzstan
Political institutions	A semi-presidential constitutional system with a consolidated authoritarian regime. The First President — the current Leader of the Nation — can be re-elected an unlimited number of times.	A parliamentary republic with a semi-consolidated authoritarian regime (consolidated authoritarianism until 2013). According to Freedom House, in the three years since the April 2010 ouster of President Kurmanbek Bakiyev, Kyrgyzstan has developed the most dynamic political system in post-Soviet Central Asia. The 2010 elections were called the most fair of their kind in Central Asia. There are substantial positive developments in the operation of civil society institutions and the freedom of press.
Economic development	According to World Bank, within the last decade, Kazakhstan acquired the reputation of a state which enjoys macroeconomic stability, has a robust budget structure and keeps on improving the public administration and its business climate.	The economy of Kyrgyzstan was severely affected by the collapse of the Soviet trading bloc. In 1990, some 98% of Kyrgyz exports went to other parts of the Soviet Union. Thus, the nation's economic performance in the early 1990s was worse than any other former Soviet republic's except for the war-torn Armenia, Azerbaijan, and Tajikistan. While economic performance has improved in the last few years, difficulties remain in generating the needed fiscal revenues and providing an adequate social safety net.
Corruption index	Kazakhstan was rated 105 out of 178 in 2010, 140 out of 175 in 2013, 126 out of 176 in 2014, and 123 out of 168 in 2015 (according to the TI Corruption Perceptions Index)[1]. Surprisingly, the economic growth of Kazakhstan goes together with the escalation of corruption. There is a striking contrast between the strict anticorruption measures envisaged by the comprehensive anti-corruption legal environment and the inefficiency of enforcement of these legislative provisions.	Kyrgyzstan was rated 164 out of 178 in 2010, 150 out of 173 in 2013, 136 out of 176 in 2014, and 123 out of 168 in 2015 (according to the TI Corruption Perceptions Index). It appears that the change of regime and of the constitutional system that took place in 2010 has brought positive transformation not only in politics.

From the first days of its independence, Kazakhstan was efficiently shaping the fundamentals of a free market. Success with stabilization, in addition to augmenting domestic savings, helped to attract direct foreign investment, which aided the recovery process and brought in much needed capital and technological expertise[2]. However, economic stabilization and transition to the market economy were put ahead of democratization: the political regime was and still is obviously authoritarian, and all power is concentrated in the hands of President Nazarbaev.

1 https://www.transparency.org/cpi2015/#results-table

2 Op. cit.

Within the last decade, Kazakhstan has acquired the reputation of a state which enjoys stability in macroeconomics, has a solid budget structure, and continues to improve public administration and the business climate. In 2012, the World Bank's Doing Business rating of Kazakhstan went up from 67 to 47 and rose to 41 in 2016. Unsurprisingly, national propaganda widely used the successful economic reform as a justification for the accumulation of as much power as possible in the hands of Nazarbayev.

Kazakhstan has had two Constitutions, the first one adopted in 1993, the second in 1995. Even before the first Kazakh Constitution was adopted, certain provisions of the Kazakh constitutional laws envisaged some features of the presidential constitutional system. The 1993 Constitution provided for the principle of separation of powers and of the direct application of the Constitution. Its Article 75 established that the President was the head of state and the head of the uniform system of executive power. The Parliament (the Supreme Soviet) was the only legislative body and the supreme representative body of the Republic of Kazakhstan[1]. With the consent of the Supreme Soviet, the president had the authority to appoint the prime minister, deputy prime ministers, the ministers of foreign affairs, defense, finance, interior, and the head of the Committee of National Security. The President also controlled the activities of the Government, and had the authority to create and eliminate ministries and other administrative agencies. However, the 1993 Constitution did not vest the President with the power to dissolve the Supreme Soviet. The Government (the Cabinet of Ministers) was responsible to the President (art. 85). Individual members of the Cabinet of Ministers were responsible to the Supreme Soviet on the issues of enforcement of the laws of the Republic of Kazakhstan (art. 88).

Less than a year after the Constitution was adopted, on 13 December 1993, the Kazakh Parliament was dissolved in breach of the Constitution. Two days before that, on 10 December 1993, the Law "On Temporary Delegation of additional powers to the President of the Republic of Kazakhstan and heads of local administrations" was adopted. Provisions of this law openly ignored the principle of separation of powers and conferred almost unlimited powers on the President, who was authorized to make appointments to all important government structures, appoint all key government officials, announce referenda, and introduce a state of emergency at his own discretion. At the same time, the head of state was vested with law-making powers for the period before the opening of

1 Art. 62 of the Constitution of the Republic of Kazakhstan of 28 January 1993. Retrieved from https://ru.wikisource.org/wiki/%D0%9A%D0%BE%D0%BD%D1%81%D1%82%D0%B8%D1%82%D1%83%D1%86%D0%B8%D1%8F_%D0%A0%D0%B5%D1%81%D0%BF%D1%83%D0%B1%D0%BB%D0%B8%D0%BA%D0%B8_%D0%9A%D0%B0%D0%B7%D0%B0%D1%85%D1%81%D1%82%D0%B0%D0%BD_1993_%D0%B3%D0%BE%D0%B4%D0%B0

the first session of the newly elected Supreme Soviet[1]. The President was also authorized to perform certain functions of the Supreme Soviet, namely to appoint members of the Supreme Court and the Supreme Arbitrazh Court of the Republic of Kazakhstan, to appoint and dismiss the Prosecutor General and the Chairman of the National Bank, to dismiss the Chief Justices and Justices of the Constitutional Court, the Supreme Court, and the Supreme Arbitrazh Court, to ratify and renounce international treaties[2].The 1993 law on the delegation of additional powers stands as a landmark statute symbolizing the escalation of authoritarianism in Kazakhstan.

The constitutional system provided for in the subsequent Constitution adopted in 1995 was a perfect fit for the legitimization of the authoritarian regime, since it vested the President with enormous powers. The president controls the legislature and judiciary, as well as regional and local governments. Par. 1 of Article 40 replicates the famous wording from the 1993 Constitution of the RF by vesting the Kazakh President with the power to determine guidelines of foreign and domestic policy. Though the Constitution explicitly establishes that Kazakhstan has a presidential form of government, it stipulates certain features of a semipresidential constitutional system. According to Article 64, the Government exercises the executive power of the republic of Kazakhstan and heads the system of bodies of executive power. The Prime Minister of the Republic of Kazakhstan organizes and guides the activities of the Government and bears personal responsibility for the operation of the Government[3]. The Constitution also provides that both the Parliament and its lower house (Mazhilis) can be dissolved[4]. The President is empowered to completely or partially protest the decisions of the Constitutional Council, the national body of constitutional justice. The President's objections can be overruled by two thirds of the votes of the total number of members of the Constitutional Council[5]. In case the objections of the President are not overruled, the decision of the Constitutional Council shall be considered unadopted[6]. According to the U.S. State Department's Country Report on Human Rights Practices for 2015, the 26 April 2015 presidential election, in which President Nazarbayev received 97.7 percent of the vote, was marked by irregularities and lacked genu-

1 Art.1 of the Law of the Republic of Kazakhstan "On Temporary Delegation of additional powers to the President of the Republic of Kazakhstan and heads of local administrations" [O Vremennom Delegirovanii Prezidentu respubliki Kazahstan y Glavam Mestnyh Administratziy Dopolnitelnykh Polnomochiy]of 10 December 1993. Retrieved from http://online.zakon.kz/Document/?doc_id=1002635

2 Op. cit., note 7, at paragraphs 12–15 and 18 of Art. 64 .

3 Article 67 of the Constitution of the Republic of Kazakhstan of 30 August 1995. Retrieved from http://www.akorda.kz/ru/official_documents/constitution

4 Article 52 of the 1995 Constitution.

5 According to Art. 71(1), the Constitutional Council of the Republic of Kazakhstan consists of 7 members.

6 Art. 74 (3).

ine political competition. The 2012 national legislative elections for the Mazhilis fell short of international standards[1].

The 1995 Constitution makes it perfectly clear that the President of Kazakhstan and the First President of Kazakhstan have different statuses and scopes of powers. Article 46(4) states that the Constitution and a constitutional law shall determine the status and powers of the First President of Kazakhstan. The constitutional law[2] followed in 2000 and determined the political and legal status of the First President of the Republic of Kazakhstan as the founder of the new independent state of Kazakhstan, the Leader of the Nation, who ensured its integrity, protection of the Constitution, and human and civil rights and freedoms. The 2000 constitutional law confirmed that the limitation established in art. 42(5) of the Constitution ("the same person shall not be elected the President of the Republic for more than two consequent terms") does not apply to the First President of Kazakhstan. Under the 2000 constitutional law, "hampering of the lawful activities of the First President of the Republic of Kazakhstan — the Leader of the Nation, public insult or other encroachment on the honor and dignity of the First President of the Republic of Kazakhstan — the Leader of the Nation, as well as desecration of an image of the First President of the Republic of Kazakhstan — the Leader of the Nation, are not allowed and shall be punishable by law"[3]. The 1997 Criminal Code of the RK established criminal responsibility for the aforementioned offences[4]. Art. 317-2 of the 1997 Code criminalized violations of the guarantees of inviolability of the First President of the Republic of Kazakhstan — the Leader of the Nation. The 1997 Criminal Code offers another confirmation of the statement that the First President of the Republic of Kazakhstan — the Leader of the Nation and the President of the Republic of Kazakhstan have different statuses: the attempt on the life of the former and the latter are dealt with in two separate articles[5]. Interestingly, these articles were placed in Chapter V, "Crimes against the fundamentals of the constitutional system and the security of the state". Similar offenses were specified in the 2014 Criminal Code[6].

1 See the US State Department's Country Report on Human Rights Practices for 2015. Available at https://www.state.gov/j/drl/rls/hrrpt/2015humanrightsreport/index.htm#wrapper

2 The Constitutional Law on the First President of the Republic of Kazakhstan — the Leader of the Nation [Konstituzionny Zakon O Pervom Presidente Kazakhstana — Lidere Nazii] No 83-II of 20 July 2000. Retrieved from https://online.zakon.kz/Document/?doc_id=1019103#pos=0;0

3 Article 1 of the 2000 Constitutional law of the Republic of Kazakhstan.

4 Article 317-1 of the Criminal Code of the Republic of Kazakhstan of 1997. Retrieved from http://online.zakon.kz/Document/?doc_id=1008032

5 Art. 166-1 and 167 of the 1997 Criminal Code.

6 Art. 177, 178, 373 and 374 of the Criminal Code of the Republic of Kazakhstan of 2014. Retrieved from https://online.zakon.kz/Document/?doc_id=31575252

Another specific feature of Kazakhstan's transition is an obvious mismatch between the strict anti-corruption legislative framework and the high level of corruption. As mentioned above, at various times, Kazakhstan received almost critically poor ratings. Initially, the national anti-corruption legislative framework included the 1998 law "On anti-corruption activities", the anti-corruption provisions of the 1997 Criminal Code, and the appropriate chapters of the 2001 Code of Administrative Offences. The 1997 law established the basic categories and principles of anti-corruption activities, defined corruption wrongdoings and grounds for liability, and sought to eliminate the consequences of corrupt acts. The amendments of 2009–2010 strengthened its provisions. The definition of a "governmental official" to be subjected to all the restrictions applying to this category of individuals was broadened to include all persons performing administrative functions "in the governmental organizations and also in organizations where the state's share of the charter capital (at least 35%) was transferred to national holding companies, national development institutes, national companies, or their subsidiaries"[1]. Chapter 13 of the 1997 Criminal Code addressed corruption-related crimes and other crimes against the state service and public administration. Other chapters of the 1997 Criminal Code also specified certain corruption-related crimes: Article 231 "Commercial bribery"[2], and Article 349 "Provocation of a commercial bribe or a corruption-related crime"[3]. Business corruption was also criminalized: this type of crime includes, but is not limited to, bribe-giving and bribe-taking, money-laundering, illegal participation in entrepreneurial activity, hampering lawful entrepreneurial activity, and abuse of power. The new Criminal Code of 2014 also includes a chapter on corruption-related crimes[4], which almost replicates Chapter 13 of the 1997 Criminal Code and provides for criminal liability for commercial bribery, provocation of commercial or other kind of bribery, and other corruption-related crimes.

The Strategic Anti-Corruption Plan for 2010–2014 and the Ministry of Justice's Sectoral Program of Anti-Corruption for 2011–2015 mainly addressed the improvement of the existing anticorruption legislative framework. According to the Ministry of Justice's Program, the Republic of Kazakhstan has significant potential for an effective anti-corruption policy. A SWOT (strengths and weaknesses, opportunities and threats) analysis showed:

1 Art.8(1) of the 1998 Law "On Anti-Corruption Activities"[O Borbe S Korruptsiey] . Retrieved from https://online.zakon.kz/Document/?doc_id=1009795 . https://online.zakon.kz/Document/?doc_id=1009795

2 Chapter 8 "Crimes against the Interests of the Employer in Commercial and Other Organizations" of the 1997 Criminal Code.

3 Chapter 15 "Crimes Against Justice and the Order of execution of Punishment" of the 1997 Criminal Code.

4 Chapter 15 of the Criminal Code of 2014.

Strong aspects	Weak aspects
1. The presence of the legal framework to combat corruption 2. Available capacity of public authorities in the field of information infrastructure 3. Anti-corruption is a priority of the state policy	1. The widespread corruption in all spheres 2. The lack of legal awareness in the population 3. Lack of openness in the activities of state and local executive bodies 4. The mentality of the people and civil servants
Opportunities	**Threats**
1. High standard of living 2. Improvement of existing legislation to fit international standards 3. Improving the investment climate 4. Improved performance of Kazakhstan in the international rankings assessing the level of corruption 5. Strengthening of cooperation between state institutions and civil society	1. The increase in the "shadow economy" 2. Reduction of investment attractiveness 3. The rising cost of public projects due to the "corrupt" component 4. Reduction of cost-effectiveness 5. Decline in living standards and rising social tensions 6. Loss of support from civil society[1]

Key tasks envisaged in the Sectoral program for 2011–2015 included the enhancement of the international cooperation and the improvement of national legislation on combating corruption, as well as the improved performance of government agencies to reduce the risk of corruption, enhancement of the anticorruption outlook, and the reduction of the shadow economy.

In 2014, the experts of the Business Anticorruption Portal[2] argued that corruption was booming in courts, police, customs services, agencies in charge of property rights regulation or of land property registration, and in the construction area. Export and import in Kazakhstan required a lot of time and paperwork for clearing customs on the border, and the entire process was highly corrupt. The experts stated that the most common type of corruption in Kazakhstan is corruption in the administrative area ("shadow control" by officials over private companies), and anticorruption initiatives are almost non-enforceable. According to the 2016 Kazakhstan Corruption Report of the Business Anticorruption Portal[3], the situation did not change much, especially in the national court system, where corruption has deep roots and judicial outcomes are easily influenced due to a lack of judicial independence. Bribes and irregular payments are often exchanged in order to obtain favorable court decisions. Corruption is present at every stage of judicial processes, and courts are perceived as untrustworthy[4]. According to Transparency International, in 2013 almost two thirds of citizens perceived the judiciary to be corrupt, thus ranking it as the second most corrupt institution in Ka-

1 Text of the Ministry of Justice's Sectoral Program of Anti-Corruption for 2011–2015 is available here http://www.adilet.gov.kz/en/node/47917

2 http://www.business-anti-corruption.com/

3 http://www.business-anti-corruption.com/country-profiles/kazakhstan

4 Op. cit. note 16.

zakhstan. No wonder that public trust in the impartiality of the judicial system is low, and Kazakh citizens generally hold no expectations that justice will be dispensed professionally in court proceedings[1].

A new anti-corruption law followed in 2015. The new law established a range of anti-corruption measures, including anti-corruption monitoring, analysis of corruption risks, support for anticorruption culture, detection of corruption-causing norms in the course of expert legal evaluations, framing and observance of anticorruption standards, anticorruption restraints, prevention and solving of conflicts of interests, etc.[2]. The 2015 law includes provisions on compulsory declarations of assets and obligations (to be submitted by presidential candidates, members of Parliament, heads of local executive bodies, and members of the elected bodies of self-government and their spouses) and declarations of income and property (to be submitted by governmental officials of various ranks and their spouses)[3].

The issue of legal reform was first addressed in the 1994 Presidential Decree "On the State program of legal reform in the Republic of Kazakhstan". The 1995 Constitution eliminated the system of arbitrazh courts and made handling of economic disputes one of the functions of general courts. After adoption of the Constitutional law "On Judiciary and the Status of Judges" in 2000, the specialization of courts started, and economic courts, administrative courts, military courts, and specialized courts for criminal cases were set up. The Concept of Legal Policy of 2002 prioritized the optimization of national courts, which was to be focused on the first level courts. "The lower level of the judicial system adjudicates the majority of all cases. That's where individuals and legal entities get acquainted with the administration of justice"[4]. The Concept stated that the further strengthening of decisional independence of judges remained the key priority for the improvement of the national judiciary. Development of efficient measures for the protection of judges, witnesses and crime victims from the threats of criminal networks was outlined as one of the persisting problems on the national agenda. The 2002 Concept mentioned the preparation and training of the judges-to-be and the educational and professional improvement of judges as an important part of the legal policy and the mechanism of its implementation. In contrast to these very important provisions, one small statement was scarcely noticeable: *"The priority of human rights shall be in harmony with the interests of the state and the society".* In July of 2009, the First President of Kazakhstan approved the new Concept of Le-

1 For details, see Freedom House, Nations in Transit (2014) at https://freedomhouse.org/report/nations-transit/nations-transit-2014

2 Article 6 of the Law on the Anti-Corruption Activities of the Republic of Kazakhstan of 18 November 2015.

3 Art. 11 of the 2015 Law.

4 The Concept of Legal Policy [Kontseptsiya Pravovoy Politiki] of the Republic of Kazakhstan of 2002. Retrieved from http://adilet.zan.kz/rus/docs/U020000949_

gal Policy for 2010–2020. The document summarized the results of the implementation of the 2002 Concept and emphasized achievements in certain domains, including the rule-making area.

In their 2013 project Appraisal Document, World Bank experts pointed out that in recent years Kazakhstan had undertaken a set of measures for the modernization of the court system, including the increase of its institutional potential, efficiency, the quality of services and people's trust. These measures included the drafting of a number of new codes (including the 2014 Criminal Code, the 2014 Criminal Procedural Code, the 2014 Administrative Code, and the 2015 Civil Procedural Code), the adoption of the National Plan for Human Rights protection (2009–2012), the National Strategy of the Reform of the Penitentiary System (2012–2015), etc. The Financial Court created in Almaty was modeled after the Dubai and Singapore courts; hearings are conducted in Kazakh, Russian, and English depending on the language of the statement of claim. Currently, Kazakhstan has a full-fledged juvenile justice system; a system of private court enforcement officers has been in operation since 2010.[1]

The year 2010 saw the elimination of the supervisory instance and the setting up of the cassation instance in the regional courts; the appellate instance of the Supreme court was discontinued at the same time. Jury trials started operation on 1 January 2007[2]. In 2014, 65 criminal cases (less than 1 percent of the total number of completed criminal cases) were adjudicated with the participation of jurors[3]. The 2015 amendments to the Criminal Procedural Code extended the jurisdiction of jury trials: starting from 1 January 2016, jury trials were extended to cases of murder committed by a criminal gang, kidnapping, involvement of minors in criminal activities, and trafficking of minors[4].

A general assessment of the Kazakh judicial reform is not easy. National experts praise its achievements: "A true judiciary power can emerge and establish itself only in parallel with the country's progress towards a democratic legal state. The development of our judiciary results from the self-restraint of the government that allows judicial control over its activities"[5]. In November of 2013, Kairat Mami,

1 "Project Appraisal Document on a Proposed Loan to the Republic of Kazakhstan for a Justice Sector Institutional Strengthening Project". 2013. Retrieved from http://documents.worldbank.org/curated/en/989511468047790706/pdf/809920PAD0P143010Box382156B00OUO090.pdf

2 The Law "On Jurors" [O Prisyazhnuh Zasedatelyah] of the Republic of Kazakhstan No. 121 of 16 January 2006. http://www.pavlodar.com/zakon/?dok=03261&all=all

3 Judicial systems of Central Asia. A Comparative Overview, G. Dikov (ed.)(Moscow, Jurisprudence, 2015), 70.

4 *Ibid*, 71..

5 Prosessor Aytkhozhin (the Kunayev's University) review of G. Zh. Suleymenova's "Judicial reform of the Republic of Kazakhstan. An overview of the main stages." [Sudebnaya Reforma v respublike Kazakhstan: Obzor Osnovnikh Etapov] (Almaty, 2010). Translated. Retrieved from http://www.iuaj.net/node/368

the Chief Justice of the Kazakh Supreme Court, reported to the VI Congress of Judges of Kazakhstan that the concept of judicial reform was implemented in full.[1] Some international experts are less optimistic: according to the 2016 report of Freedom House, "Kazakhstan's constitution recognizes the separation of powers and safeguards the independence of the judiciary, but in practice the courts are subservient to the executive and protect the interests of the ruling elite. The courts regularly convict public figures brought to trial on politically motivated charges, often without credible evidence or proper procedures".[2] The case of Vladimir Kozlov, an opposition leader controversially convicted in 2012 on charges of fomenting social unrest in order to topple the government, serves as the best example. In July of 2016, Kozlov was transferred to a stricter detention regime for alleged breaches of prison regulations, which he denied[3]. Kozlov held a brief hunger strike in July in protest of his treatment in jail, where relatives say he was suffering from ill health and not receiving appropriate medical attention[4].

2015 saw the adoption of several pieces of restrictive legislation, which included amendments to Kazakhstan's Criminal Code, Criminal Procedural Code, and Code on Administrative Violations, and placed further restrictions on public assembly and criminalized the spreading of rumors, making it punishable by up to 10 years in jail. Maina Kiai, the UN's special rapporteur on the right to freedom of assembly and association, concluded after a visit to Kazakhstan in 2015 that the government severely restricts civil liberties guaranteed by the constitution, including the rights to freedom of assembly, conscience, and expression[5]. The law on funding for nongovernmental organizations, which effectively granted the state a monopoly on deciding which nongovernmental organizations (NGOs) receive funding and for what types of activity, was signed by President Nazarbayev in December 2015[6]. In May 2015, the Constitutional Council ruled that the draft that criminalized "propaganda" of homosexuality to minors was in breach of the Constitution[7].

1 http://www.inform.kz/rus/article/2607132
2 Nations in Transit 2016. Kazakhstan. Available at https://freedomhouse.org/report/nations-transit/2016/kazakhstan.
3 For details see http://www.eurasianet.org/node/74381
4 Nations in Transit 2016. Kazakhstan. Available at https://freedomhouse.org/report/nations-transit/2016/kazakhstan.
5 *Ibid*.
6 The text of this law is available here https://online.zakon.kz/Document/?doc_id=38381898
7 The Normative Ruling of the Constitutional Council of the Republic of Kazakhstan No 3 18 May 2015. Available on https://online.zakon.kz/Document/?doc_id=37647015#pos=0;0

CONCLUSION

The first and most important conclusion is that the *path dependence* factor (in the form of the impact of the Soviet past) is operative in the case of practically all the former republics of the Soviet Union, albeit to a various extent. Even the Baltics could not avoid it even though, unlike other member republics of the USSR, in the interwar period they were independent parliamentary republics. The sad fact that in the late 1930s all three Baltic countries ended up with authoritarianism did not mean that the population easily accepted the forceful incorporation into the Soviet Union and appreciated Soviet ideology. However, five decades under Soviet rule could not pass without leaving a trace. At the times of the restoration of their independence, Estonia, Latvia and Lithuania also experienced the impact of the Soviet past and undertook strict measures for de-Sovietization, inclusive of lustration, which proved to be very efficient.

Estonia's primary instruments of lustration were the 1938 Citizenship Act (reinstated in 1992) and the 1996 Local Government Council Election Act. According to para. 3 of the 1996 Election Act, aliens could not run as candidates in local elections, but were eligible to vote in case they met numerous requirements envisaged in the 1996 Act. The Citizenship Act granted automatic citizenship almost exclusively to those who were citizens in 1940 (before the Soviet takeover) and their descendants. As a result, about one third of Estonia's population (mostly ethnic Russians and other Russian-speaking minorities) became (de facto) stateless[1], or, in Estonian official terms, 'individuals with undefined citizenship'[2]. The law also included provisions for naturalization, which required the applicant «to speak Estonian, fulfill a two-year residency requirement, and submit to a one-year waiting period.»

Like Estonia, Latvia also utilized citizenship restrictions to effect lustration, and the promulgation of strict election laws also played a key role.[3] In October 1991 the Saeima passed an act that deprived one third of all Latvian voters, mainly non-

1 Priit Jдrve, Vadim Poleshchuk, Report on Estonia (European University Institute, Florence. Robert Schuman Centre for Advanced Studies EUDO Citizenship Observatory, 2013), 1.

2 The term 'individuals with undefined citizenship' (mддratlemata kodakondsusega isikud) is widely used in Estonian official documents. However, it has never been legally defined. See ibid.

3 Lavinia Stan, Transitional justice in Eastern Europe and the former Soviet Union: reckoning with the Communist past, (Routledge, 2009), 231, 234.

Latvians, of the right to receive citizenship automatically.[1] In January 1991, the newly independent government of Latvia outlawed the Latvian Communist Party. In late 1993, **the Law on Registering Public Organizations** was amended to bar any public organization, specifically 'Communist' and 'Nazi,' whose 'activities would contravene the Constitution.'[2] In Lithuania, Governmental Decree No. 418 of 12 October 1991 banned former KGB employees and collaborators from holding local or national governmental positions for five years. The Law "On the Assessment of the USSR Committee of State Security (NKVD, NKGB, MGB, KGB) and the Present Activities of the Regular Employees of This Organisation" of 16 July 1998[3] limited the right of former regular employees of the KGB and its predecessors to freely choose an occupation. Former KGB employees were banned in a wide range of government offices and private sector jobs for ten years. The constitutionality of certain provisions of this law was quickly challenged in the national Constitutional Court. In its 1999 ruling, the Constitutional Court of Lithuania found that the contested provisions were in compliance with the Constitution[4]. Dr. Tomas Balkelis and Dr. Violeta Davoliute argue that

> "in the course of 1998–1999 Lithuania managed to create a lustration mechanism designed to filtrate former KGB agents from state services. On 23 November 1999 Lithuania adopted the Lustration law which defined several categories of former KGB employees who were required to go through lustration. For this purpose in 1999 Lithuania created the Lustration agency that processed more than 1,500 people who admitted their employment in KGB"[5].

At the same time, the authors point out that "there was no real 'de-Sovietization' of the state service in Lithuania (lustration was very limited). Many of judges are former Communists unwilling to bring justice to the perpetrators"[6].

According to Andrey Ryabov, Estonia was the most successful reformer among the former Soviet republics. It completed the democratic transition and fully de-

1 Vadim Poleshchuk, Chance to survive: minority rights in Estonia and Latvia (Moscow: Foundation for Historical Outlook, 2009), 166.
2 Mark Ellis, «Purging the past: the Current State of Lustration Laws in the former Communist block», Law and Contemporary problems (1997), 191.
3 Official Gazette Valstybės žinios, 1998, No. 65-1877.
4 Ruling of the Constitutional Court of Lithuania of 4 March 1999. Available at http://www.lrkt.lt/en/court-acts/search/170/ta1139/content
5 Tomas Balkelis and Dr. Violeta Davoliute, National Report on Lithuania. How the Memory of Crimes Committed by Totalitarian and/or Other Repressive Regimes in Europe is Dealt With in the Member States, 16. Available at http://www.academia.edu/10066635/National_Report_on_Lithuania._How_the_Memory_of_Crimes_Committed_by_Totalitarian_and_or_Other_Repressive_Regimes_in_Europe_is_Dealt_With_in_the_Member_States
6 *Ibid*, 13.

parted from the post-Soviet space[1]. Signs of the Soviet past are most visible in Latvia, which can be explained by the considerably larger part of its population that is Russian-speaking compared to Estonia and Lithuania. Ryabov argues that

> "given the presence of the elements of post-Soviet attitudes in politics and economics of Latvia and Lithuania, the gap between these countries on one hand, and other post-Soviet states on the other hand, is not obvious. Pursuant to this criterion, Latvia and Lithuania are somewhere in the middle between Estonia and other former union republics».[2]

In this work, I have argued that the achievements of Latvia and Lithuania are not on an equal level, and that Lithuania is much closer to Estonia in terms of its level of success than Latvia, which is still struggling with certain impacts of the Soviet past.

The level of success of the reforms strongly correlated with the fact of "who was the boss" at the starting point. In most former Soviet republics, former Communist party officials came to power. Boris Yeltsin and Nursultan Nazarbayev turned out to be the most successful reformers of the 1990s. Both prioritized the reform of the national economy, but their methods were significantly different. The success of Russian reforms was ensured by the joint efforts of a former Communist party apparatchik, who understood and appreciated the importance of democratic values, and a team of "young reformers". Yeltsin was not afraid to work together with bright and intellectual people, so he chose a team of sophisticated young professionals. Yeltsin assumed responsibility for the unpopular and strict economic reform; for him, this reform was a *conditio sine qua non* both for instituting the market economy and for transitioning to the democratic political regime. Narzabayev, however, saw no connection between economic transformation and establishing the fundamentals of democracy. National propaganda actively used the goal of successful economic transformation of Kazakhstan as a justification for the necessity of authoritarianism. The main goal of Nazarbayev's reforms was to ensure economic growth and to attract foreign investment.

In the Baltics, new governments were formed from the representatives of the political parties that came to power as a result of the independence movement. Among them, the Estonian team of "young reformers" proved to be the most successful. The efficiency of the Estonian reformers can be compared only with that of the team of Mikheil Saakashvili in Georgia. Given the tremendous difference in the starting points, the achievements of Saakashvili's reforms look even more impressive. Mart Laar's government had to handle the consequences of fifty years of

1 Andrey Ryabov. "Post-Soviet States: the deficit of Development in the Context of Political and Economic Pluralism" [Postsovetskiye gosudarstva: deficit razvitiya na fone politico-economicheskogomnogoobraziya]. Issue No 23, Newsletter of Kennan Institute in Russia, 2013, 7–18. Retrieved from http://www.imemo.ru/files/File/ru/publ/2013/Vestnik-23.pdf

2 *Ibid*, 10–11.

Soviet occupation; unlike Georgia, Estonia enjoyed the benefit of using its interwar experience, legislation and infrastructure. Mikheil Saakashvili's government inherited, along with the problems of the Soviet past, the legacy of his predecessors Zviad Gamsakhurdia and Edward Shevardnadze, whose activities deepened ethnic conflicts and brought Georgia to the edge of economic disaster. The phenomenon of Askar Akayev, a physicist turned politician who headed one of the poorest post-Soviet states, must be analyzed separately. The outcome of Akayev's presidency can be assessed variously, but his well-balanced foreign and domestic policies of the early 1990s greatly contributed to certain achievements of the Kyrgyz reforms of that time.

The following conclusions are based on the analysis of reforms in Georgia, Kazakhstan, Kyrgyzstan, the Baltics, Ukraine, and Russia.

- Economic hardships do not necessarily result in the emergence or escalation of authoritarianism. It is in this respect that the experience of Kyrgyzstan is very telling. Once the poorest republic of the Soviet Union, which initially opted for constitutional systems with strong presidential power and then shifted to a system with a stronger Parliament in 2012–2016, Kyrgyzstan was the only Central Asian state with a semi-consolidated authoritarian regime (others have consolidated authoritarianism). Sadly, in 2017 the country's democracy score went down. Freedom House notes that 2017 was controversial for Kyrgyzstan. On one hand, the country witnessed a peaceful transfer of power with the former prime minister Sooronbai Jeenbekov elected as Kyrgyzstan's fifth president. The elections were contested and their outcome remained, at least until several weeks before the voting day, unpredictable. On the other hand, the heavy use of state resources to stifle political competition and silence criticism cast major doubt on the readiness of the political elites to allow elections to be genuinely free and fair[1].
- Availability of a strategic reform document(s) outlining the goals, tasks and methods of judicial reform does not guarantee the efficient transformation of the court system and connected institutions (procuracy, investigative service, police). The most efficient reformers did really well without such concept papers. On the other hand, the existence of one or more conceptual documents on judicial reform does not ensure its consistent implementation, as witnessed in the cases of Ukraine and Russia.
- The active promotion of judicial reform and its support by the public are not necessarily congruent. Latvia had a lot of discussion of the main approaches of the judicial reform and of its importance, and the media coverage was intense, but the public remained mostly uninterested. In Kyrgyzstan, the intensity of promotion of judicial reform was moderate, but nevertheless the re-

1 Nations in Transit 2018. Available at https://freedomhouse.org/report/nations-transit/2018/kyrgyzstan

form was actively supported both by members of the judicial branch and by the public at large.

- A successful reform of one of the connected institutions (courts, procuracy, judiciary) does not ensure the efficient transformation of the others. Georgian judicial reform pales in comparison with the tremendous success of its police reform.
- A high level of resistance of the members of the judiciary may not necessarily occur during the judicial reform. Judges can be cooperative and do not always confront and resist judicial reforms. In Kyrgyzstan, judges of all levels, including justices of the Constitutional Court and the Supreme Court, were receptive to the judicial reform and actively used the suggested options for professional improvement. Justices of the Supreme Court of Latvia played a very active role in the beginning of the reform.
- All the countries studied which were independent before Sovietization are actively using their interwar legislation and institutional design in their present judicial systems.
- Reforms were especially efficient in the countries which used lustration.
- Though the reform of criminal procedure was a high priority, it was the slowest one in all transition countries.
- The level of corruption in the former Soviet republics, as measured by the Corruption Perception Index of Transparency International — according to which a higher number indicates more corruption — varies tremendously: 28 in Estonia in 2013 and 22 in 2016; in Lithuania, 43 in 2013 and 38 in 2016; in Latvia, 49 in 2013 and 44 in 2016; in Georgia, 55 in 2013 and 44 in 2016; in Russia, 127 in 2013 and 131 in 2016; in Kazakhstan, 140 in 2013 and 131 in 2016; in Ukraine, 144 in 2013 and 131 in 2016; and in Kyrgyzstan, 150 in 2013 and 136 in 2016[1].
- The impact of a previous career as one of the features of the Soviet judicial mentality is still strong in those post-Soviet countries that ignored lustration and did not replace those judges who worked under Soviet rule. Former prosecutors, investigators and policemen who became judges should have been provided professional and psychological retraining in order to minimize the impact of their previous careers and adjust them to the functions of administration of justice. The ECHR case law confirms this statement; a number of judgments address the necessity of special retraining of former prosecutors and police officers. Such retraining is vitally important in order to prevent former prosecutors and police offices from using old familiar patterns in the course of the administration of justice. Consistent and repeated retraining of judges who got their law degrees and started to practice law under socialism can become a valuable contribution to the success of judicial reform.

1 http://www.transparency.org/news/feature/corruption_perceptions_index_2016

Of course, the success of legal and judicial reforms depends upon a multitude of factors, some of which may take unpredictable and surprising forms, like the course of history itself. The personality and priorities of a particular leader (a Yeltsin versus a Nazarbayev); interethnic strife or civil war (as in Georgia); relative economic prosperity or hardship; great power political intrigues; the evolution of corruption, and other factors too numerous to mention can either support or overwhelm the intentions of even the most dedicated legal reformers. However, ensuring judicial independence is the factor of crucial importance to all judicial reforms. As Professor Tamara Morschakova, a former Chief Justice of the Russian Constitutional Court, argues, " in the contemporary world, the universal goal of judicial power is to ensure protection of human rights and freedoms and, at the first place, to secure them from unlawful activities and decisions of the authorities. If such activities and decisions cannot be challenged at the independent court, this will pave the way for the arbitrariness of the authorities"[1]. Justice Sandra Day O' Connor pointed out that "judicial independence doesn't happen all by itself. It's tremendously hard to create, and easier than most people imagine to destroy."[2] Alexander Hamilton repeatedly addressed the importance of judicial independence in the Federalist papers:

> "the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers'"[3].

1 Ekaterina A. Mishina, Mikhail A. Krasnov, Tamara G. Morshchakova , eds. Otkrytye glaza rossiyskoi Femidy (The Opened Eyes of the Russian Themis) (Moscow, Liberal Mission Foundation, 2007) 4.

2 Retrieved from https://www.law.ufl.edu/flalaw/2005/09/oconnor-defend-judicial-independence

3 Federalist No 78. Retrieved from http://www.constitution.org/fed/federa78.htm

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A PICTURE OF JUDICIAL REFORMS IN THE TRANSITION ERA

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