

## A 'Common European Home'? The Rule of Law and Contemporary Russia

By Michael Frei & Malcolm MacLaren\*

### A. Introduction

Russian President Vladimir Putin was quoted in a newspaper article last year as claiming that “[b]y their mentality and culture, the people of Russia are Europeans”.<sup>1</sup> The accuracy of this claim has been a topic of considerable debate in Russian literature and politics from the time of Czar Peter the Great at least.<sup>2</sup> The pressing question is whether Russia wants to be part of today’s Europe. Mounting evidence from the domestic and foreign policy of the Russian Federation suggests that the answer to this question is ‘nyet’.

By examining the relation between Russia and the rule of law we hope to make a contribution to a more specific discussion, namely to how far one can speak today of a ‘common European home’. It is undeniable that Russia has formally become a *Rechtsstaat* (a state under the rule of law) on the international legal model, as alone demonstrated by the new Constitution’s proclamation of the supremacy of international treaties over contrary domestic legislation. What impact these constitutional and legal reforms will have, however, on the actual operation of the Russian legal system remains to be seen. It is unclear whether Russia also has the means – and more the will – to act according to the rule of law.

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<sup>1</sup> Steven Lee Myers, *Russia turns away from the European “idea”*, INTERNATIONAL HERALD TRIBUNE, 31.12.03, at 1.

<sup>2</sup> See generally Felix Philipp Ingold, *Liebe zum Sonderweg – Die slawophile Utopie – Europa als Westprovinz Rußlands*, FRANKFURTER ALLGEMEINE ZEITUNG, 25 April 2001.

## B. "Common European Home"

During the heyday of *perestroika* and *glasnost*, the prospects looked good that Russia would become a part of contemporary Europe. In July 1989, a delegation from the USSR was invited for the first time as a special guest to the 40<sup>th</sup> anniversary celebrations of the Council of Europe. The Council's purpose and object according to its founding statute is the protection and fulfilment of the ideals and principles that make up Europe's common heritage. In keeping with the event's historic nature and this institutional understanding, the then Soviet President Mikhail Gorbachev presented in a paradigmatic speech his concept of the "common European home". The goal was nothing less than the "rebuilding of the European order", such that "the common European values come to the fore". As an essential aspect Gorbachev identified the "humanitarian content of the pan-european process". He called for the general observance of human rights and for the enforcement of the rule of law in all of Europe, with the aim of "creating of a European legal space". Lastly, in the course of the speech, he described law as the "solid foundation", on which the European order must be based.<sup>3</sup>

We can all still agree with Gorbachev that as regards the character of the state the foundation of a common European home must be democracy, the observance of human rights and a state under the rule of law. Opinion may diverge on whether the spirit of 1989 continues to animate Russian policymaking.<sup>4</sup> The Russian Federation's new Constitution does proclaim and commit the country to be a state under the rule of law. It appears to many observers, however, as if this desire to integrate fully into the international order has given way to disillusionment with the West and even a willingness to reject its standards.<sup>5</sup> The government's actions and other developments in Russia belie the notion that ever-deeper integration is inevitable.

## C. Rule of Law

What does 'a state under the rule of law' mean in western Europe today? The term comprises various principles and escapes a simple, standard definition. Consensus

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<sup>3</sup> Denis Huber, *Ein historisches Jahrzehnt, DER EUROPARAT 1989-1999*, Munich 2001, at 28ff. (Translation from the German by the authors.)

<sup>4</sup> See, for example, ambivalent opinion of Mikhail Gorbachev, in a newspaper interview earlier this year, Arkady Ostrovsky, "Without freedom this country has no future": Ex-president admires his successor's record - with reservations, *FINANCIAL TIMES*, 12 February 2004, at 3.

<sup>5</sup> For example, Dmitri Trenin, Deputy Director of the Carnegie Moscow Center, speaks of Russian leaders viewing the West more and more, "as a source of resources for modernization and geopolitical challenges - not as a common home where Russia itself may find its proper place". Myers, *supra* note 1.

exists, however, about which elements belong to it. To a state under the rule of law in the *formal* sense belong the separation of powers, lawful government as well as an administrative and constitutional jurisdiction. Further formal elements include legal equality and legal security through the same treatment of all people and publicly accessible, substantively clear legal norms. The commitment to laws in itself has little meaning, however, when the content of the laws does not at the same time meet certain liberal demands. The formal elements of a state under the rule of law are accordingly complemented by elements in a *material* sense, in particular by the guarantee of fundamental rights.<sup>6</sup> Lastly, it is essential that these rule-of-law principles are also implemented in practice.

The qualification of Russia as a state under the rule of law is a very broad topic that cannot be covered in its entirety here. Two aspects appear to us particularly interesting and insightful, namely the transfer of legal ideas between countries and the integrative force of international law. At first glance, these may not seem directly related to the theme of the rule of law. As will be shown, however, they facilitate a partial overview of the Russian legal system and provide a basis for considering problems with the rule of law in contemporary Russia.

#### *I. Transfer of Legal Ideas*

One of the most extensive movements of rules and systems of law in modern history has taken place in the former Communist lands after the opening of the Iron Curtain. The well-known political reforms in the USSR / Russia since *perestroika* were at the same time legal reforms: e.g. abolition of the constitutional provision for one-party rule, gradual democratization of the electoral system, relicensing of private enterprise, passage of the new Russian Constitution. The Constitution's passage in December 1993 by no means signified the legal reforms' completion; it was then that the reforms really began. Legal reform required that each and every law and regulation conform to the new Constitution. Not only the most important but almost all parts of the law in Russia were reformed; a fully new system had to be created down to the details.

This sweeping legal transformation has been promoted by an army of western experts and by large sums of money from Europe and the USA. At the beginning, the political elite in Russia showed great interest in securing western help for reforming the legal system so as to rid themselves of their authoritarian past. The west

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<sup>6</sup> The addition of material elements to the definition distinguishes 'law' (enactments of legislatures) from 'Law' (first principles for the regulation of human relations). A state that is governed by laws is beholden merely to positivist procedural requirements and may be unjust, whereas a state ruled by Law is subordinated to other normative standards not of its own creation.

reciprocated this interest in assisting in the transformation process: foremost was the (not entirely altruistic) thought that a stable, democratic and liberal market economy could only exist in the context of a functioning rule-of-law system. In accordance with this supply and demand, a veritable industry from the first world sprung up devoted to technical legal assistance.<sup>7</sup>

The transfer and adaptation of western legal ideas is for Russia nothing new.<sup>8</sup> The Russian Constitution from 1993, the most important result of these multilateral and bilateral efforts, is an exemplary result of this longstanding cooperation. It has been described as the constitutional equivalent to the European Airbus, which is assembled from parts manufactured in several countries. For example, French and US influences are unmistakable in the chapter over the presidency, even without the checks provided by cohabitation and exclusive legislative prerogative in these respective countries. The parliamentary electoral system and the Constitutional Court's structure model themselves on the German equivalents. For their part, Spain and Belgium contributed to the development of the asymmetrical federalism. Last – but, in the present context, by no means least – chapter two of the Russian Constitution reflects international and European agreements on human rights.<sup>9</sup>

Seen formally, this eclecticism by no means led to a failed constitution; the new Russian Constitution fulfils all the requirements of the principle of the rule of law. It identifies the country in Art. 1(1) with this principle, stating that the Russian Federation is a “democratic federal rule-of-law state”. The other aforementioned elements of the rule of law are also set out in the Constitution in exemplary fashion. Art. 10 prescribes in the abstract the separation of powers, whose competences are

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<sup>7</sup> See Robert Sharlet, *Legal Transplants and Political Mutations: The Reception of Constitutional Law in Russia and the Newly Independent States*, EAST EUROPEAN CONSTITUTIONAL REVIEW 59, 62 (Fall 1998). Many foreign institutions and development organisations have participated in the transfer such as the European Union through the TACIS-Program, the World Bank, the UNHCR and the Council of Europe. Twenty-six agencies from the US government alone have concerned themselves with different areas of law. The Dutch, German, British and French governments as well as private foundations like the Rockefeller, Ford, MacArthur, Soros and Eurasia have also engaged in various law-related projects. Stephen Holmes, *Can Foreign Aid Promote the Rule of Law?*, EAST EUROPEAN CONSTITUTIONAL REVIEW 68 (Fall 1999).

<sup>8</sup> Among the Czar(ina)s, Peter the Great adapted Swedish law and administrative practice above all; Empress Elisabeth built on Belgian and Austrian models of law and state; and Catherine the Great imported large portions of Italian criminal law. In the Soviet regime's early years, Lenin led a process of legalisation that involved the reception of modern European law codes; in its last years, Gorbachev opened the Soviet system so that western legal ideas could flow in. Sharlet, *supra* note 7, at 63. Despite this positivist borrowing, the traditions of Russian law remained very different from those of common and civil law Europe. What we may be seeing in the attempt to establish the rule of law in contemporary Russia is history repeating itself. (See Section V below.)

<sup>9</sup> Sharlet, *supra* note 7, at 64.

regulated in detail in chapters 4 to 7. Art. 15 emphasizes the principle of lawful government, and chapter 7 demarcates a fully developed constitutional jurisdiction. The material elements of the rule of law are provided for in a comprehensive fundamental rights catalogue that encompasses civil, political, economic, social and cultural rights largely based on universal standards.<sup>10</sup> The relevant chapter is regarded as one of the most successful parts of the Constitution.<sup>11</sup>

All in all, it can be said that the 1993 Constitution is systematic, clear in its contents and composed in a simple, accessible style. Its provisions seek to advance the rule of law in the Russian Federation and thereby make "a bold political commitment to the international community and its fundamental values expressed in principles and norms of international law."<sup>12</sup> Many jurists have even described the Constitution - at least on paper - as "state of the art".<sup>13</sup> The key question with this as with all other legislative reforms is whether the on-paper advances will actually be implemented and complied with.

## *II. Integrative Force of International Law*

The law in Russia has been transformed not only through the adaptation of western legal codes. International law can - and has already in Russia - exercise(d) an integrative force as well.<sup>14</sup> Legal systems grow together through international law in two different ways: first, international law sets out common guidelines for national legal orders and second, international organisations are often *fora* for the collective, ongoing development of law. Its recognised integrative force raises the specific question as to whether international law, and its 'regional affiliate' in particular, could participate in building a common European legal house.

Although the Soviet Union was already bound by international law, and the Russian Federation is its successor state, an important change in the relationship between the country and international law occurred nonetheless with the transition

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<sup>10</sup> Art. 17(1) proclaims that in the Russian Federation human rights are recognized and guaranteed "in conformity with the generally recognized principles and norms of international law".

<sup>11</sup> LJUBA TRAUTMANN, *RUSSLAND ZWISCHEN DIKTATUR UND DEMOKRATIE* 100 (1995).

<sup>12</sup> Gennady M. Danilenko, *The new Russian Constitution and International Law*, 88 *Am J Int'l L* 470 (1994).

<sup>13</sup> Jeffrey Hsu, *The Russian Judicial System and the Right to Due Process*, WWS TASK FORCE ON "HUMAN RIGHTS IN EASTERN EUROPE" 2 (2001).

<sup>14</sup> See generally Alexander Trunk, *Westeuropa - Osteuropa: Rechtsangleichung als Integrationsinstrument*, ANTRITTSVORLESUNG AN DER UNIVERSITÄT KIEL, 28 January 1999, available at <http://www.uni-kiel.de/eastlaw/antrvor.htm>.

from the USSR to Russia.<sup>15</sup> In the Soviet Union, the system of complete *dualism* applied: i.e. each rule of international law had to be first transformed into municipal law for it to have domestic legal force and applicability. By relying on dualism the Soviet Union committed itself to numerous international legal obligations that in municipal law remained meaningless. (For example, the USSR ratified various human rights treaties and was accordingly bound by international law to keep to them. These were, however, never considered as directly applicable, which prevented individuals from vindicating internationally guaranteed rights before domestic courts, tribunals and administrative agencies. The implementation of human rights came within the sovereignty of the state.<sup>16</sup>) The new Russian Constitution prescribed a system change. Art. 15(4) states that the system of *monism* is now to apply, according to which international law and municipal law belong to the same sphere of regulation.<sup>17</sup> Monism has 'opened' Russia to international law. By virtue of the system change the Russian Federation has been confronted with many treaties possessing direct applicability in municipal law and that have the potential to bring about profound change in prevailing laws and practices.<sup>18</sup> International law has thus become a critical catalyst for democracy and human rights in Russia.<sup>19</sup>

Upon and after the change of regimes, Russia has also sought – for whatever reasons, idealistic and / or expedient – to integrate into the western community of

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<sup>15</sup> See generally, Danilenko, *supra* note 12, at 458ff.

<sup>16</sup> "From the very beginning [...], the Soviets considered it imperative to grant a package of human rights; they only made sure, both through the invention of a spurious theory as well as through its legislative implementation, that Soviet new-style civil rights would in no way hamper the regime's complete freedom to act". Ferdinand Feldbrugge, *Human Rights in Russian Legal History*, in, HUMAN RIGHTS IN RUSSIA AND EASTERN EUROPE 65f (Ferdinand Feldbrugge & William B. Simons eds., 2002).

<sup>17</sup> The relevant paragraph provides "[t]he generally recognized principles and norms of international law and the international treaties of the Russian Federation shall constitute an integral part of its legal system. If an international treaty of the Russian Federation establishes other rules than those stipulated by the law, the rules of the international treaty shall apply".

<sup>18</sup> Accompanying this change in the status of international law in Russian municipal law was a general reform of the judicial system. The judicial reform enabled the Constitutional Court to become an important institution promoting the direct application of international law by introducing constitutional review of official acts and decisions. Analysis of its jurisprudence shows that the Court in practice invokes international law in almost all review cases concerning fundamental rights, especially as a means of interpretation of the applicable constitutional provisions. Where domestic human rights law has conflicted with the generally recognized principles and norms of international law, the latter has been typically accorded a higher status by the Court. Gennady M. Danilenko, *Implementation of International Law in Russia and Other CIS States*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 61 (1999)

<sup>19</sup> See also TARJA LANGSTRÖM, TRANSFORMATION IN RUSSIA AND INTERNATIONAL LAW 424ff., 433ff. (2003).

states and to join various international organisations.<sup>20</sup> In addition to those treaties ratified by the Soviet Union came - and come - new ones. Three such treaties are of special significance for Russia's legal transformation and integration through international law: admission to the Council of Europe in 1996, signing of the partnership agreement between the Russian Federation and the European Union (EU) in 1994 (in force since 1997)<sup>21</sup> and membership in the Commonwealth of Independent States (CIS, since 1992).<sup>22</sup> The on-going Russian efforts to join the World Trade Organisation should also be mentioned here. These efforts have already led to some domestic legal reforms, furthering in their own way the international openness and integration of Russia.

Our focus will be on relations with the Council of Europe, which may be understood as *the* international organisation that could determine Russia's international legal integration. Since its application to be admitted to the Council, the topic of full legal alignment in Europe stood on the agenda, as admission to this organisation is not only a political step but also a step into a community of laws.<sup>23</sup> The Russian Federation entered into two sets of obligations upon admission: the first set related to the traditional basic demands made of all new members and included signing and ratifying the Council's key conventions, especially those concerning human rights (e.g. the European Convention on Human Rights from 1950); the second set complemented the first through a whole range of specific measures that Russia is to take in order to meet the Council's standards in the middle- to long-term. (These include reforms of criminal law and procedure, civil law and procedure, the functioning and administration of penal detention and improvements in the conditions in detention centres.) Taken together, the obligations assume, in the words of the Human Rights Convention, "a common heritage of political traditions, ideals, free-

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<sup>20</sup> Russia's readiness to enter into such international commitments is affirmed in Art. 79 of the new Constitution.

<sup>21</sup> The EU-Russia partnership agreement provides for the development of cooperation *inter alia* in the area of law. The Russian Federation has in this agreement even committed itself to render its legislation EU-compatible where possible. (The emphasis here is on business law broadly defined, where in the Council of Europe it is on criminal law.) EU-compatibility of Russian law offers *prima facie* proof that it corresponds to European rule-of-law standards. How far Russia fulfils this commitment depends, of course, on Moscow's political will.

<sup>22</sup> Via the CIS the Russian Federation strives to maintain special relations with other USSR successor states. An essential element of these special relations are measures to approximate municipal laws. In contrast, efforts within the organisation to ensure successful transnational protection of human rights and economic rights look less likely to achieve their goal. The possibility of participation in the CIS having any significant impact on the domestic implementation of international law is accordingly to be doubted. Danilenko, *supra* note 18, at 68f.

<sup>23</sup> Trunk, *supra* note 14, at 1.



dom and the rule of law” as well as a resolve to undertake the collective enforcement of certain rights. As will be shown, membership in the Council of Europe and ratification of its conventions accordingly represents a constant challenge for the establishment of the rule of law in Russia.

The preceding brief assessment of Russian law suggests that the multimillion-dollar, multilateral and bilateral effort at legal transfer was successful and that international law has aligned the Russian and European legal systems to a great degree, even integrating them partially. Transfer and alignment of laws are not, however, ends in themselves but means to broader legal and general political goals.<sup>24</sup> In the present case, they were conceived as instruments of integration. How far have they in fact contributed to Russia’s integration into the European community of laws?

#### D. Practice

At the outset of the last section, we listed the individual components of the European or western understanding of the rule of law. In the analysis until now, we have left out the last component, the actual implementation of the rule-of-law principles. An evaluation of the rule of law in Russia turns out less positive, if current practice, i.e. the legal reality today, is taken into account.

The Russian Federation has provided itself with a model constitution as regards the rule of law, which through its openness to international law also offers formal proof that the international legal obligations entered into have all been adopted by Russian law. This undoubtedly represents a step in the direction of establishing the rule of law. In itself, however, the Constitution’s passage does not ensure that Russia will keep to the standards set in it; a discrepancy between such undertakings and their practical application is reasonably to be expected. The question as to whether the high aspirations of the 1993 Constitution are fully realizable or whether they should be regarded teleologically we will leave for others to debate. The concern here is whether these constitutional undertakings risk being ignored and eventually becoming a dead letter.

Legal reality made itself apparent in exemplary fashion as Russia applied for admission to the Council of Europe. The Parliamentary Assembly’s 1994 Report on the conformity of the Russian legal order with Council of Europe standards came for many different reasons to the unequivocal conclusion that “so far the rule of law

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<sup>24</sup> *Id.*



is not established in the Russian Federation".<sup>25</sup> That Russia was admitted despite this unfavourable report owes itself to non-legal considerations. A moral and political obligation was felt among existing members to open up the Council to the new post-Communist governments. Moreover, it was hoped that membership would encourage Moscow to stay on 'the right path' of legal reform and that more influence could be exerted on Russia inside rather than outside the Council.<sup>26</sup>

Whether in fact the logic behind 'therapeutic admission' holds, time will tell; so far, scepticism is warranted about the impact of Council membership and initiatives<sup>27</sup>. There was initially cautious optimism that Russia was indeed on the right path, heading toward normality. However, more recent headline news out of Russia as well as academic studies about the more mundane operation of its legal system give a different, even contrary, impression of the legal situation to that set out on paper: the miscarriages of justice are apparently many, ongoing and occurring on all levels. The troubling developments that may be cited are numerous and varied – the brutal conflict in Chechnya, the harassment of human-rights and environmental activists<sup>28</sup>, the heavy-handed treatment of non-Orthodox Christian minorities<sup>29</sup>, the

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<sup>25</sup> Rudolf Bernhardt et al., Report on the Conformity of the Legal Order of the Russian Federation with the Council of Europe Standards, 7 October 1994, AS/Bur/Russia (1994), reprinted in 15 HUMAN RIGHTS LAW JOURNAL 287 (1994). See also: "It would be unrealistic to assume that, where human rights are concerned, all is now well in a Russia that has proclaimed itself to be a democratic, law governed state and that has explicitly embraced the universal principles in the field of human rights and freedoms. The heritage of many centuries of autocracy, dictatorship and enforced orthodoxy and unity is a heavy burden which has a strong psychological impact on the Russian polity. Most of the defects of the present state of Russian democracy and of the system of government are connected with the inability or unwillingness to let go of the 'winner-takes-all' mentality". Gordon B. Smith, *The Struggle over the Procuracy, in REFORMING JUSTICE IN RUSSIA, 1864-1996* 348 (Peter H. Solomon Jr ed., 1997).

<sup>26</sup> Put in terms of a broader geo-political context, Europe and the USA have so far chosen to treat post-Cold War Russia according to what a former US Ambassador to NATO called the German model, namely „promoting post-defeat inclusion and encouragement rather than punishment and isolation". Robert Hunter, *The west must now reassess its gamble on Russia*, FINANCIAL TIMES, 19.04.04., at 13.

<sup>27</sup> Western governments and international organisations appear to be currently reconsidering their approach to relations with Russia: the so-called German model may no longer be exclusively applied. See, for example, a policy paper released earlier this year by the European Commission. The paper expressly criticized problems with democracy, human rights and press freedom in Russia and called for "discussing frankly Russian practices that run counter to universal and European values". *Dark skies to the east, Russia and the European Union*, ECONOMIST, 21.02.04., at 27.

<sup>28</sup> See, for example, the comments of President Putin during a State-of-the-Nation speech this spring. Putin criticized civic groups advocating democracy and human rights in Russia for claiming to support the people's welfare but in fact serving other, dubious foreign and domestic interests for pay. The groups criticized fear that his comments will be used to justify future restrictions on their activities. Seth Mydans, *Putin takes aim at outside forces: Speech shakes human rights groups*, INTERNATIONAL HERALD TRIBUNE, 17.06.04., at 1.

threats to journalists<sup>30</sup>, the pro- / persecution of independent academics<sup>31</sup>, the government's anti-democratic tendencies<sup>32</sup> and perhaps above all, the decidedly murky Yukos-affair<sup>33</sup>. Each suggests that 'something is rotten' in this would-be state under the rule of law. This impression is confirmed by the repeated critiques of Russia's weak legal institutions and poor human rights record by users of the system (such as company managers in Russia<sup>34</sup>) as well as by international observers (e.g. from NGOs like Human Rights Watch through *rapporteurs* from the Council of Europe to scholars worldwide). Despite some legal reforms that have raised hope, among observers generally "[a]nxiety has remained, however, with regard to broader con-

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<sup>29</sup> See, e.g., Steven Lee Myers, *Russia curtails activities of Jehovah's Witnesses*, INTERNATIONAL HERALD TRIBUNE, 17.06.04., IHT online. The Jehovah's Witnesses intend to appeal the ban of Moscow city authorities referred to in the article to the European Court of Human Rights. Remarked one long-standing Russian group member about the recent religious repression: "Nothing has changed since the fall of the Soviet Union".

<sup>30</sup> The recent murder of a U.S. journalist, Paul Klebnikov, is only the latest in a series of attacks on reporters and editors working in Russia. According to a former media envoy for the Organization for Security and Cooperation in Europe, attacks are especially likely when a case of corruption or illegal privatization is being investigated. (Freimut Duve, *quoted in* Mark McDonald, *Russia's alarming record*, MONTREAL GAZETTE, 11.07.04., at A7. According to the chairman of the opposition Yabloko Party, the murder of Klebnikov "speaks to two things. First, the authorities in Russia do not wish to fulfill their obligation to protect [...] citizens,] if their activities do not correspond with the interests of the ruling group. [...] Secondly, criminal elements are directly involved in politics". Grigory Yavlinsky, *Letter to the Editor*, INTERNATIONAL HERALD TRIBUNE, 17-18.07.04, at 5.

<sup>31</sup> The Russian historian Igor Sutjagin was sentenced to fifteen years' imprisonment, because he allegedly sold secret information to a foreign secret service. Sutjagin's lawyers argued that all the information that had been passed on came from publicly accessible sources; they are convinced that their client was tried due to his western contacts alone.

<sup>32</sup> Various reforms reconstituting the Russian state (e.g. strengthening the executive at the expense of the legislative, limiting press freedom, curbing regional governors' autonomy, enhancing the security services' - *siloviki's* - influence) have raised serious questions as to President Putin's commitment to political pluralism. See, for example, the opinion of a former US ambassador for the former Soviet Union: democracy in Russia is being "subordinated [...] to order, stability and bureaucratic authority". Stephen Sestanovich, *A Tale of Two Post-Soviet Presidents*, WALL STREET JOURNAL EUROPE, 30.07.-01.08.04, at A11.

<sup>33</sup> The prevailing opinion of informed international observers is that President Putin is using the judiciary in the Yukos-affair to selectively prosecute a political foe, Mikhail Khodorkovsky, and to gain (direct or indirect) control over the eponymous Russian energy giant. The affair represents in the words of one foreign newspaper, "a piece in a mosaic that shows an increasingly threatening picture of how the Russian ruler understands ideas like freedom and democracy". *Eröffnung des Prozesses gegen Chodorkowski in Moskau*, Neue Züricher Zeitung, 17.06.04., p. 1; translation from the German by the authors. According to a former Russian economy minister, the lesson to be drawn is that the government is above the law: it can ruin anyone or any company. Yevgeny Yasin, *The wilful destruction of Yukos tells us: be afraid*, FINANCIAL TIMES, 29.07.04., at 13.

<sup>34</sup> Timothy Frye, *The Two Faces of Russian Courts: Evidence from a Survey of Company Managers*, EAST EUROPEAN CONSTITUTIONAL REVIEW 125 (Winter / Spring 2002).

ceptions of governmental restraint and the retention of a legal sphere – private law – outside of governmental interference”.<sup>35</sup> One commentator has gone so far as to explain these recent developments as the expression of a deliberate, comprehensive governing technique: in the name of bringing law and order / stability and security to the country, civil and political rights are systematically violated.<sup>36</sup> Fear, and not competence, is, in other words, being used to legitimize and facilitate the current administration’s political control. According to this allegedly long-standing local technique, the law is a means to establish dominance, the executor of merely the ruler’s will. Russia has thus reverted to being a state ruled by law.

### E. Reasons and Causes

What are the reasons and causes for Russia’s not yet being a state under the rule of law? A broadly conceived, interdisciplinary study would help to find answers to this question, which is as complex as it is pressing. Here we can only mention some of its aspects and their connections that might point to answers. It seems to us sensible to classify the causes for the absence of a rule-of-law state and culture on the western model in Russia into two broad phenomenological complexes, first, a deficient rule-of-law consciousness in the population as well as among the political and intellectual elites and second, an overtaxing of all citizens through the attempt to transform the legal system.

A rule-of-law consciousness, i.e. a broad awareness of and sensitivity for the rule of law, is in the broadest sense conditioned through historical and personal experiences. The small progress made so far in establishing a rule-of-law state and culture in Russia undoubtedly reflects its lack of a rule-of-law tradition. Russia is an old as well as a new state, and this deficiency has been explained as a relic of its Imperial and Soviet past.<sup>37</sup> For a long time in Czarist Russia / USSR, state arbitrariness and

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<sup>35</sup> Jeffrey Kahn, *Russian Compliance with Articles Five and Six of the European Convention of Human Rights as a Barometer of Legal Reform and Human Rights in Russia*, 35 UNIVERSITY OF MICHIGAN JOURNAL OF LEGAL REFORM 654 (2002).

<sup>36</sup> Boris Schumatsky, *Die Vertikale der Macht: Angst – eine alte Herrschaftstechnik kehrt zurück*, NEUE ZÜRCHER ZEITUNG, 03.05.04., at 43.

<sup>37</sup> “Modern Russia has inherited its burdens of the past, both Imperial and Soviet. Many believe the Imperial pattern of autocracy, intolerance, russification, bureaucratism, backwardness, and the absence of a modern legal tradition, however much the Revolutions of 1917 may have been directed at these evils and abuses, contributed in the Soviet era to resistance to political pluralism, absence of religious freedom, disregard of the rule of law, a suspicion of legal rationalism, Stalinist arbitrariness, and a reluctance to subject the political system to legal intervention. The post-Soviet Russian legal order must come to terms with the entire Russian historical legacy”. WILLIAM E. BUTLER, *RUSSIAN LAW* 31 (1999).

low popular esteem of the law predominated.<sup>38</sup> It was not that there was no constitution and law, rather, that the authority of the state allowed itself only rarely to be guided by them. A west European-style state under the rule of law developed neither under the Czars nor following on the October Revolution. Under the Communist regime, law was clearly inferior to the state and the state to the party, which for its part could act with impunity. Individual rights suffered in full measure under this tyranny.<sup>39</sup>

Any belief or hope among Russians that laws embody justice was lost in this time, and this inherited burden still weighs upon the average Russian's sense of justice today. The majority of the population, according to survey research, sees a truly independent and honest judiciary as the principal necessity for safeguarding their rights.<sup>40</sup> Their attitudes have been nonetheless shaped by the experience of the previous regimes. A leading consequence is that a strong antinomy between law and justice continues to dominate the Russian consciousness. Russia is not, of course, the only country to experience this tension, but the tension appears greater there than elsewhere due to the historically explicable lack of confidence in the laws' justice and practical implementation. According to many observers, Russians accord little significance and respect to positive, statutory law. It is thought better in the circumstances to allow oneself to be led by one's allegedly unerring sense of justice when acting in both public and private capacities.<sup>41</sup> Such attitudes can quickly mutate into a dangerous legal nihilism, according to which "following the rules is the surest path to self-destruction".<sup>42</sup> This nihilism in turn finds its expression in the existence of social, political, economic and legal realities in parallel to those formally provided for.<sup>43</sup>

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<sup>38</sup> Trautmann, *supra* note 11, at 99ff.

<sup>39</sup> Use of the courts as a tool of government prosecution reached its apogee under Stalin's prosecutor-general, Andrei Vyshinsky, the architect of the purge trials, who coined the phrase, "Give me the man and I'll find the crime". Guy Chazan, *Saga of Russian Judge Makes Case That State Still Looms Over Courts*, WALL STREET JOURNAL EUROPE, 05.08.04, at 1.

<sup>40</sup> Richard Anderson, *Review: Tom Bjorkman, Russia's Road to Deeper Democracy*, INTERNATIONAL JOURNAL, CANADIAN INSTITUTE OF INTERNATIONAL AFFAIRS, Winter 2003-2004, at 226.

<sup>41</sup> Assen Ignatow, *Die mühsame Entdeckung des Individuums*, WERTEWANDEL UND WERTEKONFLIKTE IN RUSSLAND, 1997, at 14. Ignatow describes 'the law as too tight a corset for the broad Russian soul.'

<sup>42</sup> Stephen Holmes, *Introduction - Feature: Citizen and Law after Communism*, EAST EUROPEAN CONSTITUTIONAL REVIEW 70 (Winter / Spring 1998).

<sup>43</sup> See, for example, a Russian expert's characterization of the way in which the law functions: "It is not that Russian legislation is violated; rather it does not work. [...] Russian laws exist, but they do not regulate the real relations of those subject to the law. [...] the real relations [...] are established in a unique dimension that is parallel to the one at which formal legal regulation is only aimed". Vladimir

Perhaps a Council of Europe committee described best the adverse consequences of these social attitudes toward the law and legal institutions in its evaluation of Russian fulfilment of the fundamental requirements for full membership. Its opinion, though from 1996, merits quoting *in extenso*:

the mentality towards the law has not yet changed. In Soviet times, laws could be completely disregarded – party politics and ‘telephone justice’ reigned supreme. While it cannot be said that laws are ignored as a matter of course in present times, they are disregarded if a ‘better’ solution to a particular problem seems to present itself. This assertion is valid for every echelon of the Russian state administration, from the President of the Federation [...] down to local officials. [...] It is very difficult to enforce the law through the courts. Often, a complaint against administrative abuse cannot even be brought to court, since the prosecutor’s office is the competent state organ. But even when such cases are brought to court, and the court rules against the administration, the decision is sometimes not implemented due to the low standing courts and their decisions enjoy in public opinion.<sup>44</sup>

It should come as no surprise that these “conceptual legacies” and “the path dependency of prior institutional choices”<sup>45</sup> also afflict core elements of this would-be rule-of-law state: the constitutional principle of judicial independence and impartiality often does not correspond to legal reality in contemporary Russia. This shortcoming appears again to be the product of several influences. Many jurists were socialized in the Soviet era<sup>46</sup>, when there was no independent jurisdiction and a party functionary belonged to each court. Although the judiciary today is to a large extent structurally and constitutionally separated from the executive, many judges still consider themselves government officials. The idea that they are guardians of the lawfulness of government, let alone that they are foremost protectors of indi-

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Pastukhov, *Law under Administrative Pressure in Post-Soviet Russia*, EAST EUROPEAN CONSTITUTIONAL REVIEW 66 (Summer 2002).

<sup>44</sup> Opinion by the Committee on Legal Affairs and Human Rights on Russia’s Application for Membership of the Council of Europe, Eur. Consult. Ass., 1996 Sess., Doc. 7463 (Jan. 18, 1996), reprinted in 17 HUMAN RIGHTS LAW JOURNAL 218-9 (1996).

<sup>45</sup> KAHN, RUSSIAN COMPLIANCE 641.

<sup>46</sup> Boris Zheleznow, professor of law and a member of the Russian Academy of Scientists, concludes: “I should say that we lawyers were [...] apologists, freely or not freely, but we were apologists of all former laws and it was very difficult for lawyers to reconstruct themselves”. JEFFREY KAHN, FEDERALISM, DEMOCRATIZATION, AND THE RULE OF LAW IN RUSSIA 60 (2002). See also: “the Soviet lawyer whether he be a convinced Marxist-Leninist or not, of whatever disposition, his concepts of law, its origins, role, and purpose, has been affected by this [Marxist-Leninist] intellectual framework”. WILLIAM E. BUTLER, SOVIET LAW 27 (2<sup>nd</sup> ed. 1988).

viduals, has yet to become reality.<sup>47</sup> (The judges continue, for example, to accept overwhelmingly the state prosecution's claims,<sup>48</sup> a habit that has been variously referred to as 'prosecutorial bias', a 'no-acquittals policy' and a 'presumption of guilt'.) Russian judges are also subject to a double pressure. From above, the state attempts again and again to exert its former influence, particularly through Ministry of Justice officials, despite the recent legal reforms.<sup>49</sup> A new pressure from below has meanwhile arisen in the form of reprisals and acts of revenge by criminal gangs and organized crime.

Again not surprisingly, the courts have a bad image in the eyes of both Russian citizens<sup>50</sup> and politicians. As President Putin himself told Parliament in April 2001: "We badly need judicial reform today. The country's judicial system is lagging behind real life and is not very helpful [...] for many people who are seeking to restore their rights in law, the courts have not been quick, fair, and impartial."<sup>51</sup> Many legal disputes are accordingly not settled through the state. People hesitate to go to court, especially when – the President neglected to mention – the government has violated their rights. Where possible, they take the law into their own hands and seek to solve disputes themselves.<sup>52</sup> This lack of judicial independence and

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<sup>47</sup> Smith, *supra* note 25, at 348; Bernhardt, *supra* note 25, at 287. See also: "there are so far no traditions of understanding of separation of powers understanding. Contemporary jurists and politicians, who grew up in the preceding totalitarian era, still haven't really internalized the idea that the positive principle of the separation of powers constitutes a guarantee against an overweening, threatening concentration of power in the hands of a given state authority". And further: "The separation of powers is considered quasi as an obstacle to a productive combination and cooperation". M. Baglai, *Verfassungsgerichtsbarkeit und Gewaltenteilung in Russland*, in FÖDERALISMUS UND VERFASSUNGSGERICHTSBARKEIT IN RUSSLAND 13 (Johannes Ch. Traut ed., 1997). (Translation from the German by the authors)

<sup>48</sup> Official figures show that Russian judges still find defendants guilty in 99.2% of cases. Peter Baker, *Not for TV: Tycoon's Trial In Russia Could Lull An Insomniac to Sleep*, WALL STREET JOURNAL EUROPE, 20-22.08.04, at 1.

<sup>49</sup> It was only in 1996 with the passage of the Constitutional Law on the Judicial System that the traditional dependence of courts of general jurisdiction on the Ministry of Justice was officially ended. Until then, the Ministry provided them with logistical support and was charged with their oversight. Nonetheless, it is still the case, as the Organization for Economic Development and Cooperation recently reported, that "interference in judicial process by state institutions is [...] a problem. The courts are often subservient to the executive, while the security services, prosecutors and the police remain highly politicized". Chazan, *supra* note 39.

<sup>50</sup> A poll in 2003 indicated that twice as many Russians distrust their judges as trust them (56% vs. 28%). *Id.*

<sup>51</sup> Frye, *supra* note 34, at 125. See in more detail also PETER SOLOMON JR., COURTS AND TRANSITION IN RUSSIA: THE CHALLENGE OF JUDICIAL REFORM (2000).

<sup>52</sup> See also Holmes, who argues that the general public's lack of confidence in and hesitation about resorting to the courts results in the *absence* of another pressure determinative of the courts' ability to

impartiality helps lastly to explain why many Russians believe that theirs is a lawless land in which only the strong prevail<sup>53</sup>, and why President Putin's declared intention to rely on (what he curiously termed) "the dictatorship of law" to restore stability and legitimacy to federal power has found such popular resonance.<sup>54</sup>

In addition to the rule-of-law consciousness, the transformation process has without a doubt played a significant role in the (under-)development of a rule-of-law state and culture in Russia. The effort involved in creating a fully new legal system should not be underestimated: the transitional, institutional obstacles to the realization of the rule of law in a society that has never known it before are tremendous. Each and every law and regulation must be made to conform with the new Constitution. The result is a whole complex of new rules for the private person, entrepreneur and lawyer, an overhaul of the legal system that can from a western perspective scarcely be imagined. On top of that come the succession problems of transformation. These problems play out on two levels, both of which involve the overtaxing of jurists and other citizens.

Besides the multitude of new enactments a new legal dogma must be produced. The legal dogma in the USSR was little developed. After the change of regime, jurists, above all those who were educated and socialized in the USSR, cannot simply teach and practice the new legal norms; they must first come to an understanding as to how the new norms will be applied. The legal tools from the Soviet era are no longer adequate in many cases. Jurists must develop new rules regarding interpretation, collision of norms, filling of gaps, effect of precedents, legal sources, application of international law by courts etc..<sup>55</sup>

The second transformation problem, namely the relatively chaotic reception of law in post-Soviet Russia, was perhaps more decisive than that involved in implement-

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deliver justice, namely public oversight and where appropriate, censure. Stephen Holmes, *Introduction - Feature: Reforming Russia's Courts*, EAST EUROPEAN CONSTITUTIONAL REVIEW 91 (Winter / Spring 2002).

<sup>53</sup> See generally Christoph Schmidt-Häuer, *Russland in Aufruhr - Innenansichten aus einem rechtlosen Reich*, 1993.

<sup>54</sup> Open Letter from Vladimir Putin to Russian Voters, 25 February 2000, available at: <http://putin2000.ru/07/05.html>. A poll by the independent Russian Research Institute for Socio-Political and Economic Problems in Moscow from 2000 indicated that the Russian people placed their hopes in an autocratic enforcement of law and order: over three-quarters of those polled agreed with the statement that „Russia needs an iron hand to bring order in the country.“ (Quoted in: Alexander Tschepureenko, *Die Akzeptanz von Demokratie und Marktwirtschaft*, in: *RUSSLAND UNTER NEUER FÜHRUNG* 213 (HANS-HERMANN HÄHMANN / HANS-HENNING SCHRÖDER Eds.2001)

<sup>55</sup> As regards rules concerning the application of international law by Russian courts, see Danilenko, *supra* note 18, at 56ff.



ing a new legal system. The process was largely driven by coincidence and personal relationships. As mentioned, the laws were also derived from diverse sources: foreign experts' proposals and western constitutional ideas were picked among and the various parts sought to be fused.<sup>56</sup> Lastly, in the rush to transfer, the reception was barely filtered through the Russian culture, let alone revised and carefully adapted to local needs.<sup>57</sup> A transfer of ideas that does not take account of a country's pre-existing social and legal structures as well as its long-term ambitions is, however, difficult to implement. In short, the process as regards constitutional law has been described as the reception of "constitutions without constitutionalism".<sup>58</sup>

The transformation problems and the underdeveloped rule-of-law consciousness on all levels result in Russians generally having, as mentioned, less trust in their legal system and state institutions than other European citizenries. This situation is all the worse as it has given rise to a vicious circle from which Russia does not at the moment know how to free itself. The deficient trust in the legal system and the self-perception of many judges that they are government officials lead to courts and judges having a bad public image. Not least due to this image the judicial system and other branches of government suffer from severe under-funding: judges, police and to an even greater degree civil servants are woefully paid.<sup>59</sup> The inadequate compensation leads on one hand to a high susceptibility to corruption and bribery<sup>60</sup> and on the other to low-quality personnel and extreme understaffing.<sup>61</sup> The under-funding not only effects the level of salaries but also the formation and continuing education of jurists, who are not properly trained, including in international law.<sup>62</sup> Universities suffer from under-funding, making bad supervision, outmoded teach-

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<sup>56</sup> Sharlet, *supra* note 7, at 63.

<sup>57</sup> "Law is not a kitchen appliance that we can unplug in the United States or Germany and simply plug in again in Russia". (Holmes, *supra* note 7, at 71.

<sup>58</sup> Sharlet, *supra* note 7, at 63.

<sup>59</sup> Shawn S. Cullinane, *Can the Constitutional Court of the Russian Federation Lead the Way to the Creation of a True Democratic Society in the New Russia in the 21<sup>st</sup> Century?*, 17 *TOURO LAW REVIEW* 397 (2001). See also Alexander Trunk, *Auf dem Wege zum Rechtsstaat?*, *RUSSLAND UNTER NEUER FÜHRUNG* 272 (Hans-Hermann Höhmann & Hans-Henning Schröder eds., 2001). It should be noted that President Putin has since 2001 undertaken to raise judges' salaries and to build new courthouses.

<sup>60</sup> Solomon, *supra* note 51, at 157.

<sup>61</sup> The best qualified judges are moving to the private sector, leaving close to 5,000 vacancies on the bench. Chazan, *supra* note 39.

<sup>62</sup> Hsu, *supra* note 13, at 8ff.

ing methods and outdated law libraries common.<sup>63</sup> For their part, judges are given little chance to pursue continuing education, just what is of utmost importance in a period of transition. If, as the saying goes, the law is only so good as the jurists, and the jurists only so good as their formation in law school or continuing legal education, it is easy to see how shortcomings might arise in Russian legal dogma. All this results in a poorly performing judicial system, which naturally serves to weaken confidence in the legal system further.

In sum, this contemporary situation is simply not conducive to the establishment of a state under the rule of law on the western model. The dynamic of this vicious circle means that more recent experience in Russia can hardly have improved popular attitudes toward the law and legal institutions. In the immediate aftermath of the Soviet regime's demise, the European model of democracy and human rights was held in high regard and great hope was placed in western institutions. Sweeping reforms – economic, social, political as well as legal – were accordingly undertaken that imposed significant costs on the population. As a leading politician put it in general terms, “[e]veryone thought that this would lead to very close relations with the West, [...] that there would be European standards of living, freedoms. However, tomorrow has arrived, and it has turned out to be just as gloomy as yesterday”.<sup>64</sup> It is true that these popular expectations may have been unrealistic, and this politician's self-interested critique should be taken with a grain of salt. Nonetheless, it is undeniable that the reforms have disappointed and that the positive feelings toward the west have been replaced by a widespread disenchantment. Foreign ideas like the rule of law are now viewed by many Russians with distrust, and they fail to elicit the support from society necessary for their realization.

#### F. Influence of the ECHR?

We have attempted to put these possible explanations of the deficient rule of law in contemporary Russia in a context. We will not attempt to make concrete proposals to end this vicious circle, especially as concerns officials' salaries and funds for legal training, but will leave such proposals to specialists in the inner workings of the Russian legal system.<sup>65</sup> It appears to us, however, that efforts should focus not on

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<sup>63</sup> John M. Burman, *The Role of Clinical Legal Education in Developing the Rule of Law in Russia*, 2 WYOMING LAW REVIEW 89 (2002); Jane M. Picker & Sidney Picker, *Educating Russia's Future Lawyers – Any Role for the United States?*, 33 Vanderbilt Journal of Transnational Law 17 (2000).

<sup>64</sup> Dmitri Rogozin, leader of the Motherland party and deputy parliamentary speaker, *quoted in Myers, supra note 1*.

<sup>65</sup> Hsu, for one, makes a series of recommendations at the end of his paper as to how judicial independence, legal competence as well as timeliness and access to courts could be enhanced in the Russian Federation. Hsu, *supra note 13*, at 22f.

drafting new reforms, given that the system is already overtaxed by recent enactments and that public cynicism about the law would only be fanned by additional ineffective rules. Efforts should instead focus on compliance with and implementation of these enactments. More specifically, we wonder whether one reason for the deficient rule of law, namely the poor performance of the legal system, represents a small window that could be opened by the European Court of Human Rights (ECHR).

As aforementioned, the Council of Europe embodies and has set down in several conventions the basic state values of democracy, human rights and rule of law in Europe. The influence of the European Convention on Human Rights should be made itself felt in the Russian Federation through the possibility of domestic courts applying the ECHR's interpretation in their domestic jurisprudence by virtue of Art. 15(4) of the new Constitution<sup>66</sup> as well as through its direct invocation before these courts. Justices of the Russian Constitutional Court in particular hope that the ECHR can through time and the precedential effect of its judgments promote rule-of-law standards in Russia.<sup>67</sup> In addition, an exceptional feature of this regional system of protection is the ECHR, to which a citizen of a member can turn with an individual complaint of a violation by his / her own state of the Convention.<sup>68</sup> Citizens' ability in Strasbourg to complain of official breaches of the rule of law and their certainty that they will enjoy a procedure that is unobjectionable from a rule-of-law perspective could have a two-fold consequence. This process might not only serve to strengthen human rights protection in the Russian Federation by putting pressure on national authorities to take their convention obligations seriously. It might also serve to strengthen Russians' confidence in the legal system by affirming the law's justice and demonstrating its enforcement.<sup>69</sup> West European rule-of-law

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<sup>66</sup> See more generally "[i]t is well-known [...] the jurisprudence of the European Court of Human Rights exerts a strong influence on the attitude of domestic courts of the members of the Council of Europe". Danilenko, *supra* note 18, at 66.

<sup>67</sup> See, for example, a former chairman of the Constitutional Court of the Russian Federation, Baglai, *supra* note 47, at 13ff.

<sup>68</sup> Art. 46(3) enshrines this right in the new Constitution: it provides that everyone is entitled in accordance with international treaties of the Russian Federation to submit petitions to international human rights bodies after exhausting domestic remedies. The Constitutional Court has held that this provision means that "decisions of inter-state organs may lead to the reconsideration of specific cases by the highest courts of the Russian Federation and, consequently, establish their competence with respect to the institution of new proceedings aimed at changing the previously rendered decisions, including decisions handed down by the highest domestic judicial instance". Danilenko, *supra* note 18, at 68.

<sup>69</sup> The fate of high-profile cases appealed to Strasbourg will likely have a particularly great impact in these regards. The ECHR has agreed, for example, to examine the complaints of arbitrary detention and unlawful arrest of the Yukos' defendants. Andrew Jack, *Human rights court agrees to scrutinise Yukos probe*, FINANCIAL TIMES, 22.03.04., at 5. Its independent evaluation of the Russian authorities' legal pro-

standards might, in other words, be able to gain a foothold in Russia and in the Russian consciousness through the influence of the ECHR.

Due to Russia's lack of experience in protecting and remedying<sup>70</sup> human rights via its own legal order a great many complaints have been and will likely continue to be filed in Strasbourg.<sup>71</sup> Relatively few cases have, however, been decided so far by the ECHR on which to judge the Russian Federation's will to implement European human rights law.<sup>72</sup> Those that have evoke ambivalent feelings.<sup>73</sup> Thousands more proceedings are pending at the moment, concerning *inter alia* alleged abuses in Chechnya. Precisely the Chechen cases and Russia's compliance with any adverse findings<sup>74</sup> will be a litmus test indicating whether the country wants to be part of Europe. Russia is bound by international law to the judgments. Their implementation lies, however, in the hands of the government and administration, as there is no direct enforcement mechanism under the Convention.<sup>75</sup> It will be interesting to

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cedure will likely do much to shape perceptions of justice in the particular case and of defendants' ability to get a fair trial in Russia generally.

<sup>70</sup> The ECHR Registrar does not apparently consider the Constitutional Court to be an effective domestic remedy that must be exhausted before consideration in Strasbourg due to the discretionary nature of the Russian high court's judicial review of individual complaints. Kahn, *supra* note 35, at 686f.

<sup>71</sup> According the Russian judge sitting on the ECHR, complaints have concerned pensions and the right to a fair trial in particular. *Id.*, at 683.)

<sup>72</sup> To date (31.08.04), twelve ECHR judgments concerning the Russian Federation have been released. See <http://www.echr.coe.int>.

<sup>73</sup> As an example, the case of Kalashnikov v. Russia, App. No. 47095/99 may be cited. Valerii Kalashnikov was arrested on embezzlement charges and spent nearly five years waiting for his case to be heard. The Court found *inter alia* that the conditions of detention, in particular the severely overcrowded and insanitary environment and its detrimental effect on the applicant's health and well-being, combined with the length of his detention in such conditions, amounted to degrading treatment (Art. 3 ECHR). The Government had argued that Kalashnikov's detention conditions did not differ from, or at least were no worse than, those of most detainees in Russia: overcrowding was a problem in pre-trial detention facilities generally. It also acknowledged that, for economic reasons, the conditions of detention in Russia were very unsatisfactory and fell below the requirements set for penitentiary establishments in other member Council States. The judgment raises naturally the question of implementation. Russia will not be able in the next few years to guarantee appropriate conditions of detention, and a flood of similar complaints is accordingly to be reckoned with. Likewise, Russia will hardly be able to settle the many other complaints alleging a failure to try within reasonable time other than case by case given its many judicial vacancies (see above).

<sup>74</sup> In considering the likelihood of adverse findings, the ECHR's doctrine of the margin of appreciation should not be overlooked. The Court does not always insist on uniform and rigid standards for compliance with Convention rights in all member states and has already shown the Russian Federation some leeway as regards the admissibility of claims of violations. Kahn, *supra* note 35.

observe how far such international court judgments can influence the rule of law in Russia.<sup>76</sup>

### G. Conclusion

The Russian experience with the rule of law may be seen as a test case from a region that has been described as an “exciting laboratory of constitutional reform”.<sup>77</sup> Although the Russian Federation is now formally a state under the rule of law on the international legal model, it is not yet certain that Russia is also able - and more willing - to live up to its undertaking. Its experience with the rule of law to date affirms the thesis that social attitudes toward the law and legal institutions, a fundamental component of any legal system, change only gradually. Indeed, it appears doubtful that such attitudes of a country’s population and politicians can be changed through constitutional and legal reforms alone, however far-reaching they may be. Progress in establishing the rule of law generally and advancing human rights in particular should accordingly be expected to be “agonizingly slow”<sup>78</sup> at best.

Support for this conclusion may be readily found in the broader context of the integration of Russia and Europe. As the head of the Russian Foreign Ministry’s department for European relations stated recently, his government distinguishes between integration ‘with’ and ‘into’ Europe: the Russian Federation expects in political and economic matters to be treated as a partner and not as a part of Europe.<sup>79</sup> As

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<sup>75</sup> Janis notes that there is an additional obstacle to ensuring compliance in the case of Russia: the same political considerations that led the Council to accept the Russian Federation as a member may “make it difficult for Strasbourg to force the Russian government to comply with adverse findings.” Mark Janis, *Russia and the ‘Legality’ of Strasbourg Law*, 8(1) EUROPEAN JOURNAL OF INTERNATIONAL LAW 98 (1997).

<sup>76</sup> It will also be interesting to see how Russia’s membership influences the development of European human rights law and institutions. As regards the difficulties and dangers for the authority of the ECHR and the Council of Europe should Russia fail to obey its law and to comply with its decisions, see Janis, *supra* note 75, at 93ff.

<sup>77</sup> Danilenko, *supra* note 18, at 51. For a survey of international law in the domestic legal systems of other CIS states, see *Id.*, at 59ff.

<sup>78</sup> Kahn, *Russian Compliance*, p. 641. Comparisons might be usefully drawn to the experience in this regard of contemporary Turkey. The government in Ankara has passed many democratic and human rights reforms in recent years with an eye to joining the EU. The new laws have yet to work their way down to the lower bureaucratic levels, however. Widespread violations (e.g. torture, restrictions on free expression, abuse of women) continue to occur. “Progress has undoubtedly been made, but concerns remain over the follow through of that progress”, said Peter Baehr, human rights expert and member of Dutch advisory body considering whether EU negotiations with Turkey should be begun. *EU hopes are raised for Turkey*, INTERNATIONAL HERALD TRIBUNE, 26.08.04, at 3.

<sup>79</sup> Sergei Sokolov, *quoted in Myers, supra* note 1.

regards the rule of law, however, one can hardly speak of a new partnership or, put in terms of our *leitmotiv*, of a common home that is to be built together. A house already exists, and the rules of this house are not up for negotiation but are set. It is a west European house in which Russia has been welcomed, and equally clearly, they are western rules that must be observed. Future legal cooperation between the two jurisdictions will have to be based on these premises.

Russia will – and evidently wants to – write its own legal history.<sup>80</sup> It will be instructive to see whether the so-called *normative* force of the real or whether the *real* force of the normative prevails in the country. Alignment of the legal reality to the legal norms – and thereby success in establishing the rule of law – rather than maintenance of the *status quo* should not be considered inevitable. The direction that developments take will ultimately determine whether Russia finds a place in the common European home.

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<sup>80</sup> Sharlet, *supra* note 7, at 64.