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Russia, the Council of Europe, and the Rule of Law

Building and Dismantling "Our Common European Home"

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In order to develop along the path of progress, the Russian authorities decided to join the Council of Europe. Russia has established the necessary organs and institutions of democratic governance. Perhaps they do not possess all the qualities attributable to truly democratic institutions. But this cannot be achieved in one day. It is only an illusion that Russia was liberal in the 1990s and is authoritarian today.

—Dmitry Dedov, Russian judge at the European Court of Human Rights, 2013–22[1]

On July 6, 1989, Mikhail Gorbachev spoke before the Parliamentary Assembly of the Council of Europe.[2] At the time, Gorbachev was president of the Supreme Soviet of the Union of Soviet Socialist Republics and secretary-general of the Communist Party of the Soviet Union; eight months later, he would be elected by a new legislative body, the Congress of People's Deputies, as the first (and last) president of the Soviet Union. The Soviet Union was not a member of this international organization, but the newly created status of "special guest" had been conferred on it less than a month before Gorbachev's arrival in Strasbourg.[3]

[1] Dmitry Dedov, *Foreword, in* Russia and the European Court of Human Rights: The Strasbourg Effect xvii, xix (Lauri Mälksoo & Wolfgang Benedek eds., 2018).

[2] Speech by Mr. Mikhail Gorbachev Before the Parliamentary Assembly of the Council of Europe (July 6, 1989), Council of Europe Information Department, D(89)36.

[3] In his memoirs, Gorbachev writes: "The Parliamentary Assembly of the Council of Europe (PACE) decided to give the Soviet Union the status of a 'specially invited state.' The invitation extended to me to speak at the PACE meeting in Strasbourg was the logical result of such a development of events." 2 Михаил Горбачев [Mikhail Gorbachev], Жизнь и реформы [Life and reforms] 194 (1995). (Unless otherwise noted, all

His speech built on the metaphor of constructing a "common European home" for his country with those to its west. Like his twin pursuits of *glasnost'* ("openness" of access to information and tolerance of public criticism) and *perestroika* ("restructuring" of Soviet economic and, later, political systems), both of which ultimately involved substantial legal reforms, this idea of a common European home was not a fully formed or static vision. "I do not claim to carry a finished blueprint of that home in my pocket," he said. "I just wish to tell you what I believe to be most important."[4]

Gorbachev stressed that this common European home should be built on "security issues," viz., nuclear disarmament and conventional force reductions. "The philosophy of the concept of a 'Common European Home' rules out the probability of an armed clash and the very possibility of the use or threat of force, above all military force, by an alliance against another alliance, inside alliances or wherever it may be."[5] But if security concerns were "the foundation of a Common European Home, then all-round cooperation is its bearing frame."[6] The load-bearing beams and lintels that he described spanned a range of economic and political issues across international and domestic lines. And just as reducing the threat of war would be accomplished by the use of international law, cooperation in these other areas implied reforms to core concepts of Soviet domestic law.

Gorbachev spoke of the "economic content" of this Common European Home and endorsed one focused on environmental protection. But he saved his final words for what he called its humanitarian

translations from Russian are by the author of this chapter.) But this gets the sequence backward. The invitation to Gorbachev was extended on June 30, 1988, out of anxiety that the European Parliament, with which the Council of Europe had an unspoken competition, was "also contemplating a similar invitation for the first months of 1989." *See* Report 5937 (1988) on the general policy of the Council of Europe – East-West relations, presented by the Political Affairs Committee, Explanatory memorandum ¶ 35 (Sept. 15, 1988). The resolution to create a special guest status passed on May 11, 1989. *See* Resolution 917 (1989) on Special Guest Status with the Parliamentary Assembly.

[4] Gorbachev, *supra* note 2, at 7.

[5] *Id.* at 8.

[6] *Id.* at 12 (emphasis in original). This all may sound very dreamy, but Gorbachev was quite pragmatic. "In view of the different social systems we are not likely to achieve a complete identity of views." *Id.* at 20. He had no interest in unilaterally adapting to some European norm: "The fact that the states of Europe belong to different social systems is a reality. The recognition of this historical fact and respect for the sovereign right of each people to choose their social system at their own descretion [*sic*] are the most important prerequisite [*sic*] for a normal European process." *Id.* at 3.

content: "A world where military arsenals would be reduced but where human rights would be violated, would not be a safe place."[7] Perhaps it was his legal training that led him to conclude: "We are convinced that the all-European process should rest on a solid legal ground. We are thinking of an all-European home as a community rooted in law." Referencing a resolution passed by the USSR Congress of People's Deputies (which, thanks to Gorbachev's reforms, was a new legislature constituted by the first competitive elections in Soviet history[8]), Gorbachev called for the creation of "an ad hoc working group or a kind of European institute for comparative humanitarian law" and imagined "the possibility of creating a European legal space."[9]

The Soviet Union (and Gorbachev's time in office) did not last long enough to build that space, but the project was taken up by the Russian Federation and its president, Boris Yeltsin. Merely a fortnight after the collapse of the Soviet Union, a letter from Russian Federation foreign minister Andrei Kozyrev was hand-delivered to the secretary-general of the Council of Europe, Catherine Lalumière: "The new Russia wholeheartedly shares the priority principles underlying the action of the Council of Europe – pluralistic democracy, human rights and the rule of law – and has been consistently applying them in its policy during recent years."[10] The

[7] *Id.* at 19.

[8] These were multicandidate, not multiparty, elections, although not all candidates were members of the Communist Party of the Soviet Union. The resolution of the XIX Party Conference that led to the creation of this body also called, inter alia, for "the establishment of a socialist state committed to the rule of law . . . as a matter of fundamental importance." *On Democratising Soviet Society and Reforming the Political System, in* 19TH ALL-UNION CONFERENCE OF THE CPSU: DOCUMENTS AND MATERIALS 130, 134 (1988).

[9] Gorbachev, *supra* note 2, at 20 (emphasis in original). The Congress's resolution, as noted by Gorbachev in his remarks, stated: "Guided by international rules and principles, including those in the Universal Declaration of Human Rights, the Helsinki accords and agreements, and bringing its domestic legislation in line with the above, the USSR will seek to contribute to the establishment of a world community of states rooted in law." *Id.*

[10] Secretariat Discussion Paper on the Former Soviet Union, Misc(92)9, app. I (Jan. 20, 1992) (letter from Andrei Kozyrev to Catherine Lalumière, Jan. 7, 1992). The letter also noted that the Russian Federation "has announced its firm intention to conform to all the international obligations of the former USSR, as well as its decision to be the successor State to the USSR in international affairs as a whole." On March 27, the Committee of Ministers agreed "that the Russian Federation is a Contracting Party to the seven Conventions of the Council of Europe to which the Soviet Union had acceded" and that the Secretariat would "continue, notably through contact groups set up on both sides at senior official level with the co-operation and assistance programmes which had been developed with the Soviet Union since 1989." Communication of the Activities of the Committee of Ministers (Jan.–Apr. 1992), Statutory Report, CM(92)96, Doc. 6602, at 3, § I.1.e (May 4, 1992).

empirical claim was a gross exaggeration, but Russia asserted a foreign policy goal that seemed genuine: "the aim of becoming a full member of the Council of Europe."[11] The letter was followed by a meeting in February with the president of the Supreme Soviet, Ruslan Khasbulatov, and a personal visit to Strasbourg by Kozyrev in May.[12] In between, the Constitutional Committee of the Supreme Soviet requested an examination of its draft constitution by the European Commission on Democracy through Law (the Venice Commission).[13]

Thus began a four-year process of assessment, negotiation, reform, and promises of future reform, all focused on joining an international organization established to promote democracy, human rights, and the rule of law.[14] To use the language of transnational legal order theory adopted by Shaffer and Sandholtz, this was nothing less than a concerted effort to apply "normative orders that implicate law and legal practice across and within multiple national boundaries," so as to adopt a "transnational framing and understanding of a social problem, which catalyzes actors to seek a resolution through law."[15] The decision to admit Russia as a member was reached in 1996; Russia ratified the European Convention on Human Rights in 1998. As the millennium drew to a close, there seemed cause for genuine hope for a successful, if gradual, transition from the authoritarianism that was a hallmark of Russian and Soviet history toward a more embedded respect for the rule of law.

Roughly a quarter century later, all such hope had vanished as Russia began its full-scale invasion of Ukraine, a fellow member state in the Council. Twenty-seven days after the Russian army began its advance on Kyiv, the Committee of Ministers (the Council's decision-making body composed of the foreign ministers of all member states) decided that Russia ceased to be a member.[16] In the words of the Statute of the Council

[11] Secretariat Discussion Paper Misc(92)9, *supra* note 10, app. I.

[12] Note for the File: Exchange of Views with the Minister for Foreign Affairs of the Russian Federation, Misc(92)35, § 2 (May 4, 1992); Minutes of the 90th Session of the Committee of Ministers, CM(92)PV1, PV2 & PV3 (May 7, 1992).

[13] Communication CM(92)96, *supra* note 10, § IV.7.

[14] Statute of the Council of Europe, pmbl., May 5, 1949, Eur. T.S. No. 1.

[15] *See* Chapter 1.

[16] The Council suspended Russia's rights to representation in the organization the day after the invasion began. *See* Decision, *Situation in Ukraine: Measures to Be Taken, Including under Article 8 of the Statute of the Council of Europe*, CM/Del/Dec(2022)1426ter/2.3 (Feb. 25, 2022). Russia was expelled three weeks later. *See* Resolution CM/Res (2022)2 on the Cessation of the Membership of the Russian Federation to the Council of Europe (Mar. 16, 2022). Sitting in plenary session, the European Court of Human Rights resolved that Russia would cease to be a High Contracting Party to the European

Europe, Russia had "seriously violated" the Council's core principles "of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms."[17] The idea of a common European home – at least one that included Russia – had gone up in flames. Russia's leaders were the arsonists.

Though this war of aggression had lit the match on Russia's relationship with the Council of Europe, Russia's incendiary actions had been threatening the organization's inner workings as well as its members for some time. Inside the organization, for example, Russia blocked efforts to pursue procedural reforms in the European Court of Human Rights for more than three years, the only holdout among forty-six other member states between 2006 and 2010.[18] These reforms were needed in no small part because of the huge volume of violations of the Convention coming from Russia – between 23.2 and 28.9 percent of all applications pending before a decision body of the Court during this same time period.[19] Meanwhile, Russia engaged in violent disputes with fellow member states. In 2008, Russia created statelets in Abkhazia and South Ossetia, recognized by virtually no one, following its war with Georgia. In 2014, Russia first occupied and then annexed Crimea. These actions repudiated the customary international law principle of *uti possidetis* and flagrantly disregarded Article 2(4) of the United Nations Charter.

As this volume notes, "international law is critical for advancing the rule of law in multiple direct and indirect ways that affect individuals and societies."[20] So it should not be surprising that, during roughly the same time period, Russia also weakened the load-bearing structures within the Council of Europe's key institutions, particularly its highly respected court of human rights. Increasingly resistant to the Strasbourg Court's

Convention on Human Rights in six months. *See* Resolution of the European Court of Human Rights on the Consequences of the Cessation of Membership of the Russian Federation to the Council of Europe in Light of Article 58 of the European Convention on Human Rights (Mar. 22, 2022).

[17] Statute, *supra* note 14, arts. 8, 3.

[18] By October 2006, forty-six member states had ratified Protocol 14, proposed in 2004. The Russian State Duma voted against ratification in December 2006. Bill Bowring, *The Russian Federation, Protocol No. 14 (and 14bis), and the Battle for the Soul of the ECHR*, 2 Goettingen J. Int'l L. 589, 605 (2010). Russia ratified it in January 2010. *See* Chart of Signature and Ratifications of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention (CETS No. 194), Council of Europe Treaty Office.

[19] *See* European Court of Human Rights Analysis of Statistics 17 (for 2006); *id.* at 7 (for 2007); *id.* at 8 (for 2008, 2009, and 2010).

[20] *See* Chapter 1.

jurisdiction over claims that Russian law or official conduct violated the European Convention on Human Rights, Russia challenged and then repudiated that jurisdiction.[21] Simultaneously, President Vladimir Putin abandoned legal reforms initiated by his predecessor, Boris Yeltsin, as he saw less and less value to membership in the organization.[22] Changes to Russian law occurring in this period, some subtle and some quite brazen, moved from "rule of law" to "rule by law" as the Russian state reverted to past Soviet and even imperial Russian practices.[23] This, too, fully bears out the observation made by Shaffer and Sandholtz that "[a]lthough political actors increasingly deploy rule-of-law discourse, they frequently abuse it to legitimate authoritarian rule, often in the name of law and order."[24] Notwithstanding continuing obligations under the European Convention on Human Rights, Russian officials turned the law and courts into weapons to assault regime opponents, silence dissenters, and privilege commercial interests valued by the state. This had repercussions for the international organization Russia had joined as much as it facilitated Russia's retrograde descent into authoritarianism.

Russia has now revised its history of past eagerness to join the Council of Europe and other international organizations, now claiming this all to have been chimerical and built on false premises. "To tell the truth," Foreign Minister Sergei Lavrov wrote in March 2023, "we no longer have any illusions about converging with Europe, being accepted as part of the 'common European home,' or creating a 'common space' with the EU. All these declarations made in European capitals have turned out to be a myth and a false-flag operation."[25] One by one, Russia abandoned security agreements central to Gorbachev's earlier vision.[26] The fact

[21] *See* Jeffrey Kahn, *The Relationship Between the European Court of Human Rights and the Constitutional Court of the Russian Federation: Conflicting Conceptions of Sovereignty in Strasbourg and St. Petersburg* 30 EUR. J. INT'L L. 933 (2019).

[22] Irina Busygina & Jeffrey Kahn, *Russia, the Council of Europe, and "Ruxit," or, Why Illiberal Regimes Join International Organizations*, 67 PROBS. POST-COMMUNISM 64 (2020).

[23] Jeffrey Kahn, *The Rule of Law Under Pressure: Russia and the European Human Rights System*, 44 REV. CENT. & E. EUR. L. 275 (2019).

[24] *See* Chapter 1.

[25] Сергей Лавров, *Российская дипломатия в меняющемся мире* [Russian diplomacy in a changing world], РАЗВЕДЧИК [Intelligence agent] 3, 5 (Mar. 2023) (translation corresponds to "Russian Government News," March 24, 2023, published by SeeNews).

[26] In December 2022, Russia suspended participation in the new Strategic Arms Reduction Treaty. *See* Ben Aris, *New START Missile Treaty Suspended as Tensions Escalate Between Russia and US*, BNE INTELLINEWS (Dec. 4, 2022), https://tinyurl.com/yeyw5863. In May 2023, President Putin signed an order to begin the process of denunciation of

that the metaphor of a common European home originated with the last Soviet leader was cast into a memory hole.[27] "There will be no 'business as usual' again," Lavrov announced. "We will not knock on the closed door, let alone make unilateral concessions."[28]

Thus, Russia's relationship with the Council of Europe now has a beginning, a middle, and an end. Through an examination of primary sources, and with a particular focus on the rule of law, this chapter explores how the dynamics of Russia's pursuit of membership in the Council of Europe affected both the Russian state and the international organization asked to admit it as a member. The chapter contributes a case study on how this international organization translated its rule-of-law values into measurable metrics for success and failure in seeking to establish the rule of law in Russia. And how, after roughly a decade of concrete advances, the effort foundered and then collapsed.

This study has more than academic or historical value. The policy questions that led to Russia's hasty application to, and inclusion in, the Council of Europe have not changed. They will be the same questions in need of answer when, to quote Gorbachev again, the opportunity reemerges to ask "about the architecture of our 'common home', on how it should be built and even on how it should be 'furnished.'"[29]

I Ambitions

Shaffer and Sandholtz note that "[u]ltimately, for the rule of law to become effective, it must be institutionalized as part of a culture of conduct."[30] Among those most influenced by Gorbachev's thinking, there was considerable ambition to build up legal institutions and establish that culture.

In June 1987, Gorbachev reported to the plenum of the Party Central Committee the basic principle behind his economic reforms: "The approach is simple," he announced. "One is allowed to do everything that is not prohibited by law."[31] (Considering his position as the leader of

Russia's commitments under the Treaty on Conventional Armed Forces in Europe. *See* Распоряжение Президента Российской Федерации, № 140-РП, 10 мая 2023 г. [Order of the president of the Russian Federation, No. 140-RP, May 10, 2023], http://publication.pravo.gov.ru/Document/View/0001202305100001.

[27] George Orwell, 1984, at 38 (Houghton Mifflin Harcourt 2008) (1949).

[28] Лавров, *supra* note 25, at 5.

[29] Gorbachev, *supra* note 2, at 7.

[30] *See* Chapter 1.

[31] "Разрешается делать все, что не запрещено законам." 5 М.С. Горбачев [M.S. Gorbachev], Избранные речи и статьи [Selected speeches and articles] 183 (1988).

a post-totalitarian authoritarian regime, such a view of law must count as apostasy.) At the XIX Party Conference held in 1988, a turning point for Gorbachev's reforms, it was resolved that:

> the forthcoming reform of the political system must tackle the following tasks: . . . to radically strengthen socialist legality and law and order so as to rule out usurpation or abuses of power, effectively combat bureaucratic and formalistic attitudes, and ensure reliable guarantees for the protection of the people's constitutional rights and freedoms and for the performance by citizens of their obligations before society and the state.[32]

Increasingly, Gorbachev referred to a rule-of-law state and law-governed civil society ("правовое государство" and "правовое гражданское общество") to describe what he insisted to be the key to his reforms, "a legal revolution."[33] This implied a state subordinated to law, a notion simply anathema to long-standing Soviet legal practice and the shifting influence of various Marxist-Leninist theories of law.[34]

This new thinking had practical implications. Soviet judges, long accustomed to "low status and few rewards," were given heightened protections through a new appointments process, longer terms of service, and expanded jurisdiction to review the legality of state action.[35] New laws on state enterprises and cooperatives expanded property and contracting rights of businesses, including an emerging class of entrepreneurs.[36] And a 1989 law, also for the first time, "provided a mechanism for the direct incorporation of various international rules in the Soviet domestic legal system."[37] By that

Gorbachev was repeating, with conviction, the idea published in *Pravda* by Vladimir Kudryavtsev, the director of the Institute of State and Law, six months before: "Of the two possible principles, 'You may do only what is permitted' and 'You may do everything that is not forbidden', priority should be given to the latter inasmuch as it unleashes the initiative and activism of people." ARCHIE BROWN, THE GORBACHEV FACTOR 145–46 (1996).

[32] *On Democratising Soviet Society and Reforming the Political System*, *supra* note 8, at 130.

[33] Интервью М.С. Горбачева журналу «Шпигел» (ФРГ), Правда (Москва), Окт. 24, 1988 г., стр. 1 [Interview of M.S. Gorbachev to the magazine "Spiegel" (FRG), *Pravda* (Moscow), Oct. 24, 1998, at 1]; *see also* BROWN, *supra* note 31, at 145–46, 176.

[34] W.E. BUTLER, RUSSIAN LAW 70–79 (2d ed. 2003).

[35] PETER H. SOLOMON, JR. & TODD S. FOGLESONG, COURTS AND TRANSITION IN RUSSIA: THE CHALLENGE OF JUDICIAL REFORM 6, 8–9 (2000).

[36] MARIA YEFREMOVA, SVETLANA YAKOVLEVA & JANE HENDERSON, CONTRACT LAW IN RUSSIA 11 (2014); WILLIAM POMERANZ, LAW AND THE RUSSIAN STATE: RUSSIA'S LEGAL EVOLUTION FROM PETER THE GREAT TO VLADIMIR PUTIN 108–09 (2019).

[37] Gennady M. Danilenko, *International Law and the Future of Rechtstaat in Russia*, in LAW AND DEMOCRACY IN THE NEW RUSSIA 96, 98 (Bruce L.R. Smith & Gennady M. Danilenko eds., 1993).

time, more than a third of the 1977 USSR Constitution – a document that had been amended just once before 1988 – had been subject to amendment.[38] And in 1990, the constitution was further amended to eliminate the Communist Party's monopoly and create the office of president of the Soviet Union. As Robert Sharlet notes, "In most Western constitutional systems, these systemic changes alone would represent an extraordinary development, nearly the equivalent of the constitutional transition from the Fourth to the Fifth French Republic under De Gaulle in 1958."[39] In the words of the late Bernard Rudden, "During the last years of its life the Soviet Union turned to law like a dying monarch to his withered God. . . . enact[ing] and amend[ing] statutes with the fervour of one who sees in legislation the path to paradise."[40]

But institutionalizing the rule of law "as part of a culture of conduct" must extend beyond the leadership circle, whose consensus on its value is necessary but not sufficient to establish it. Even beyond institutions such as the legislature, judiciary, police, and administrative bodies (which are fed by, as much as generating, that "culture of conduct"),

> the rule of law in a modern state also requires a variety of non-state institutions: organised legal education, a professional bar, and a myriad of supporting professions (accountants, investigators, etc.) and organisations (newspapers, public registries, credit bureaus, etc.). The rule of law affects the development of mass attitudes and commercial behaviour. It imbeds itself in a country's political culture and in its civil society. It entrenches expectations about the role and limits of a state bureaucracy, and the limits of commercial freedom and individual autonomy. Finally, but most importantly, the rule of law requires some level of shared expectations by political elites, lawyers, and laypersons about what *counts* as law, about what are the limits of judicial power, and about the spheres of life into which the law should *not* be permitted to intrude.[41]

The failure to entrench that culture can be seen as a fundamental factor in what can now be seen as the limited lasting effect of legal reforms attempted in the first decade after the collapse of the Soviet Union. No such rule-of-law institutions or culture had existed ever before in any

[38] Robert Sharlet , Soviet Constitutional Crisis: From De-Stalinization to Disintegration 86 (1992).

[39] *Id.*

[40] Bernard Rudden, *Civil Law, Civil Society, and the Russian Constitution*, 110 L.Q. Rev. 56 (1994).

[41] Jeffrey Kahn, *The Rule-of-Law Factor, in* Institutions, Ideas and Leadership in Russian Politics 163 (Julie Newton & William Tompson eds., 2010).

space governed from St. Petersburg or Moscow.[42] The Russian Empire had no tradition of "law-boundedness."[43] It was "the 'autocratic and unlimited' ruler (to borrow tsarist terminology) who [] consistently set both the tempo and the tone of Russian law."[44] The starting point of Soviet legal thinking was the initial Marxist–Leninist belief in the withering away of law and state in their entirety – an idea (coupled with the Red Terror) that extinguished the spark of judicial and legal reforms imposed by Alexander II and weak constitutional reform coerced out of Nicholas II.[45] And although the first Bolshevik decrees abolishing laws, courts, and lawyers were eventually found to be unworkable, the laws and legal institutions that built the Soviet system were conceived entirely in the service of the state – ironically, a theme of Russian history dating to the first Romanovs.[46] No one put their purpose better than the first Soviet commissar of justice, Nikolai Krylenko:

> The court is, and still remains, the only thing it can be by its nature as an organ of the government power – a weapon for the safeguarding of the interests of a given ruling class . . . A club is a primitive weapon, a rifle is a more efficient one, the most efficient is the court . . . The court is an organ of state administration and as such does not differ in its nature from any other organs of administration which are designed, as the court is, to carry out one and the same governmental policy . . . .[47]

Through multiple constitutions and shifting approaches to governance, ranging from the nihilistic vision of the early Bolsheviks to the ossification of a massive, centralized bureaucracy, Soviet law never withered away.

[42] For more detailed discussions of legal history, see BUTLER, *supra* note 34; F.J.M. FELDBRUGGE, RUSSIAN LAW: THE END OF THE SOVIET SYSTEM AND THE ROLE OF LAW (1993) JOHN N. HAZARD, WILLIAM E. BUTLER & PETER B. MAGGS, THE SOVIET LEGAL SYSTEM (3d ed. 1977); Jeffrey Kahn, *The Search for the Rule of Law in Russia*, 37 GEO. J. INT'L L. 353 (2006); Jeffrey Kahn, *Vladimir Putin and the Rule of Law in Russia*, 36 GEORGIA J. INT'L & COMP. L. 511 (2008); POMERANZ, *supra* note 36.

[43] 3 S.E. FINER, THE HISTORY OF GOVERNMENT: EMPIRES, MONARCHIES, AND THE MODERN STATE 1407 (1999) ("In effect, until as late as the mid-nineteenth century, Russia did without systematized laws, a legal profession, and the law-boundedness that was the essential characteristic of the western state tradition.").

[44] POMERANZ, *supra* note 36, at 4.

[45] In the words of Pyotr Stuchka, first president of the USSR Supreme Court, "Communism means not the victory of socialist law, but the victory of socialism over any law, since with the abolition of classes with their antagonistic interests, law will die out altogether." HAROLD J. BERMAN, JUSTICE IN THE USSR: AN INTERPRETATION OF SOVIET LAW 26 (1966).

[46] POMERANZ, *supra* note 36, at 4–7.

[47] 1 VLADIMIR GSOVSKI, SOVIET CIVIL LAW 241 (1948).

Nor, at least until Gorbachev's preliminary efforts, was there ever any sustained interest in the rule-of-law goal of opposing arbitrary power. In that context, Gorbachev's efforts both stood out from this history and faced substantial obstacles to overcome it. For, as Alexander Lukin observed, "while arguing for the rule of law or a law-based state, 'democrats' saw law as a means of toppling the regime, as a tool that should have been directed mainly against their Communist opponents, while they themselves did not feel bound by what they considered to be outdated and unjust Communist laws."[48]

Nevertheless, Gorbachev's ambitious reforms seized the attention of Strasbourg, which had its own institutional ambitions. The Soviet Union had been an obstacle to the Council of Europe's efforts to build democracy and the rule of law in a unified Europe since the Council's founding in 1949.[49] But Gorbachev increasingly appeared to open an opportunity: he was younger than his immediate predecessors (aged fifty-four in 1985, compared to Brezhnev (dead at seventy-five), Andropov (sixty-nine), and Chernenko (seventy-three)), comparatively much better traveled, and trained in law (the first such leader since Lenin).[50] As his reforms began, though ever evolving throughout his leadership, there was significant debate among Western observers over whether this amounted to cosmetic repairs to the system or more systematic change.[51]

Sharp-eyed observers in the top echelons of the Council of Europe perceived in his early efforts an opportunity to promote the core, unifying mission of the Council: human rights, democracy, and the rule of law. Among those observers was Catherine Lalumière, a deputy in the

[48] Alexander Lukin, Democratic Groups in Soviet Russia (1985–1991): A Study in Political Culture 323 (1997) (D.Phil. thesis, University of Oxford). For a critical examination of the use of metaphors concerning the rule of law in Russia, see Jeffrey Kahn, *The Law Is a Causeway: Metaphor and the Rule of Law in Russia*, *in* THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE (RECHTSSTAAT), IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE 38, 229 (J.R. Silkenat et al. eds., 2014).

[49] *See, e.g.*, Parliamentary Assembly Resolution 22 (1952), *Reaffirming Once More the Assembly's Faith in the Unity of the Whole of Europe* (Sept. 29, 1952); Report of the Committee on Political Affairs and Democracy, *Common European Policy at Future East-West Conferences*, Doc. 419 (1955), ¶¶ 7, 26–27 (Oct. 14, 1955); Parliamentary Assembly Resolution 588 (1975), *Security and Co-operation in Europe (General Policy of the Council of Europe)* (Jan. 28, 1975); Declaration CM(89) on the Future Role of the Council of Europe in European Construction (May 5, 1989).

[50] BROWN, *supra* note 31, at 29.

[51] ARCHIE BROWN, SEVEN YEARS THAT CHANGED THE WORLD: PERESTROIKA IN PERSPECTIVE xv (2007).

Parliamentary Assembly, rapporteur for its influential Political Affairs Committee, and the soon-to-be head of the organization. As will be seen, after having catalyzed Gorbachev's invitation as rapporteur in 1988, she would preside as secretary-general at his speech in July 1989. Lalumière recognized the nineteenth Party conference as "an historic event."[52]

She was right. Lalumière also recognized that this opportunity came at a time when her institution felt the need to reinvigorate itself. The Council confronted the accelerating success of competing international organizations. The European Community that would shortly become the European Union was one of them. It was clear that the EU – pursuing a single monetary union and open trade across national borders – would outpace the Council of Europe in economic (and therefore political) power. Another was the Conference on Security and Co-operation in Europe, which concluded the Helsinki Final Act of 1975. Principle VII and the "Third Basket" of the Final Act subjected a bevy of human rights issues to monitoring and rounds of follow-up meetings, overlapping with much of the Council's *raison d'être*. Lalumière's predecessor as rapporteur, Harold Lied, put the matter bluntly: "The crucial question for us is: who is to take the initiative in this European process?"[53] As one high-ranking Council of Europe insider described his sense of the priorities at a time when the European Community "was starting to move into the Council's own spheres of excellence":

> [T]he most important and pressing need was to explore ways in which the Council might open up towards eastern Europe through relations with those countries involved in implementing the Helsinki Accords which seemed willing to co-operate with our Organisation. In our view this was the best way of opening up new avenues of development for the Council and ensuring that it remained in control of its destiny, at a time when the European Community was growing in influence, following the Fontainebleau Summit of June 1984. But arguments were needed in support of our position, which was not yet widely shared within the Organisation.[54]

Lalumière made those arguments, keen to thread a needle between "the two pitfalls of over-enthusiasm and frosty caution."[55] On the one hand, she urged her colleagues against "displaying excessive caution" in responding

[52] Report 5937 (1988), *supra* note 3, Explanatory Memorandum ¶ 7 (Sept. 15, 1988).
[53] Parliamentary Assembly, Official Report of Debates, Sept. 27, 1985, at 386.
[54] Bruno Haller, *"Ostpolitik" Makes Its Appearance, in* EUROPE: A HUMAN ENTERPRISE 53 (Denis Huber ed., 2019). From 1984 to 1989, Bruno Haller was director of the private office of Secretary-General Marcelino Oreja.
[55] Report 5937 (1988), *supra* note 3, Explanatory Memorandum ¶¶ 3, 34.

to Gorbachev's reforms, all the more so since, "[i]f we are to believe another resolution [of the 1988 Party Conference,] the Soviet Union is aspiring to become a state based on the rule of law . . . ."[56] On the other hand, she recognized the need for the Council of Europe to stay true to its own principles: hastily engaging with countries unable to meet its high standards would be self-defeating and risk being "suspected of betraying the principles of democracy and human rights which our organization defends."[57] Still, one can sense her look-over-the-shoulder awareness that the rival European Parliament had already begun to contemplate inviting Gorbachev to visit in early 1989 and her concern that "the Committee of Ministers would be displaying excessive caution" if it waited for the CSCE's Vienna follow-up meeting to conclude before inviting an aspiring Eastern European country to engage with the Council.[58]

These aspirations, as will be seen, could cloud judgment on both sides. This had an impact on Russia's negotiated path to membership and, consequently, the strength of its legal reforms.[59] Russian promises of various reforms – made to reassure the Council that its criteria for membership would be satisfied – sometimes were disconnected from practical realities. And decision-makers at the Council of Europe began to see Russia's difficulties in satisfying those membership criteria as all the more reason to admit Russia into an organization that could help it achieve its professed goals. The most prominent critic of this approach referred to it as the policy of "therapeutic admission."[60]

As Part II suggests, institutional pressures on the Council to renew its mission affected how the Council's decision-makers perceived the strength of its applicants' cases for membership, particularly the Russian case. That

[56] *Id.* ¶ 8.
[57] *Id.* ¶ 33.
[58] *Id.* ¶¶ 35, 32.
[59] Not everyone shared Lalumière's eagerness. The rapporteur for the Committee on Relations with European Non-Member Countries, Loyola de Palacio Vallelersundi, countered: "If we are not to be the protagonists of an 'overly enthusiastic attitude or frosty caution,' as our Rapporteur said, it seems essential for us to keep past experience in mind and contemplate the development of Soviet society cautiously, which does not boil down to transmitting public speeches but also to observe the profound behaviour of a nation which, according to some sources, is probably not strictly unanimous in backing up the Gorbachev reforms." Opinion on the General Policy of the Council of Europe – East-West Relations Presented by the Committee on Relations with European Non-Member Countries, Doc. 5958, ¶ 7 (Oct. 5, 1988).
[60] Peter Leuprecht, *Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 313, 332 (1998).

fact was not lost on the Russian side, which took advantage of those pressures as it pursued spirited negotiations for a place in the organization whose criteria for membership it struggled to meet.

II Negotiation

By the time of Russia's application, the Council of Europe had an established process for admitting new members.[61] Article 4 of the Statute provided that "[a]ny European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers." Article 3, in turn, required that every member "must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively" to pursue the Council's aim to realize those ideals and principles.

By composition and institutional position, the Committee of Ministers is a political body. And Article 4 makes clear that a decision to admit a new member state requires a subjective political judgment, viz., that the applicant be "deemed to be able and willing" to comply with rule-of-law and other criteria. That these criteria are capable of more objective measurement, as well as the accretion of precedent about what "counts" to satisfy them, generates some constraints on decision-making but does not remove policy considerations from the final decision. This mix of law and politics in the decision-making process would emerge as particularly important in the Russian case.

Although the Committee of Ministers had the legal authority, an important consultative role had devolved on the Parliamentary Assembly, from which the Committee always requested an opinion in advance of its decision. This injected politics into the mix, too, but it also offered the opportunity for careful appraisal of an application by distinguished legal experts and rapporteurs for the Assembly's committees:

> They have the opportunity to discuss matters relevant to the admission to the CoE with all leading personalities, including representatives of opposition groups, national minorities, trade unions, religious groups, etc., so as

[61] Eckart Klein, *Membership and Observer Status*, *in* THE COUNCIL OF EUROPE: ITS LAW AND POLICIES §§ 3.34, 3.37–3.38 (Stefanie Schmahl & Marten Breuer eds., 2017).

> to enable them to obtain a complete and objective picture of the country. . . . They have discharged their tasks with an objectivity and thoroughness that has earned them respect even from governments they severely criticized.[62]

Importantly, this work was not only an assessment of eligibility, but also a tool to leverage legal reforms satisfactory to the Council. As noted by Peter Leuprecht (who would rise to be deputy secretary-general of the Council before resigning in protest at the decision to admit Russia and Croatia as members): "Experience has shown that it is at the pre-accession stage that the Council's representatives have the most leverage and can press for the reforms needed to bring the applicant country into line with the Council's standards."[63]

Ironically, that statement exposed a certain schizophrenia that developed in the organization as the Iron Curtain began to fall. Its original ten members could credibly assert (in the words of the preamble to the Statute) their "common heritage" of shared principles and values as "like-minded countries of Europe."[64] But the Council also aspired to grow "to create an organisation which will bring European States into closer association."[65] Growing eastward, that like-mindedness was more difficult to perceive and those values (especially concerning the rule of law) less firmly in place. What to do? This was the dilemma of "therapeutic admission": Why should like-minded states sharing such a common heritage need to be leveraged and pressed for such reforms in the first place?

In Russia's case, the Committee of Ministers invited the Parliamentary Assembly to express its opinion but put a heavy thumb on the scales right from the start:

> First of all, the Committee of Ministers wishes to inform the Assembly that there is consensus among its members in favour of the Russian Federation's joining the Organisation as soon as the conditions laid down in the Statute, that is implementation of the principles of pluralist parliamentary democracy, respect for human rights and the rule of law, have been satisfied. This implies that the legislative and judicial systems of the Federation as well as its component entities would have to conform to the principles of the rule of law.[66]

[62] Hans Winkler, *Democracy and Human Rights in Europe: A Survey of the Admission Practice of the Council of Europe*, 47 AUSTRIAN J. PUB. INT'L L. 47, 160–61 (1995).
[63] Leuprecht, *supra* note 60, at 328.
[64] Statute, *supra* note 14.
[65] *Id.*
[66] Resolution (92) 27 on the Russian Federation (June 25, 1992).

Lest there remain doubt that this was a case of therapeutic admission, the Committee took note of Russia's size and "the diversity of its cultural and administrative traditions" to acknowledge that "it will take time to translate theoretical freedoms into actual practice, and more especially to improve conditions for their respect in Russian administration and society."[67] Whether that translation from theory to practice and the improvement of conditions was a *sine qua non* for admission, or a desired consequence of it, was left diplomatically vague.

As in the past, the Assembly sought guidance from its Committee on Political Affairs, which in turn was informed by opinions from the Committee on Legal Affairs and Human Rights and the Committee on Relations with European Non-Member Countries.[68] In addition, the Assembly requested a report from six "eminent lawyers," three chosen from the then-existing European Commission on Human Rights and three from the European Court of Human Rights (all serving in their personal capacities).[69] Each group wrote reports generated through visits to Russia, spot inspections, interviews, and meetings.[70] This slightly confusing procedure is depicted in graphic form in Figure 8.1.

Russia's admission to the Council of Europe did not occur in a vacuum. After the fall of the Berlin Wall, the states once behind the Iron Curtain all began to seek membership. Hungary (November 1990), Poland (November 1991), and Bulgaria (May 1992) were followed by a rapid expansion in 1993: Estonia and Lithuania (May), the Czech and Slovak republics

[67] *Id.*

[68] The committees' chairmen were Ernst Mühlemann (Political Affairs), Ole Espersen followed by Rudolf Bindig (Legal Affairs), and David Atkinson (Non-Member Countries).

[69] Six jurists were selected, three each from the then existing European Commission of Human Rights and the European Court of Human Rights: Rudolf Bernhardt (vice president of the Court), Stefan Trechsel (Commission chamber president), Albert Weitzel (Commission chamber president), Felix Ermacora (Commission member), Franz Matscher (Austrian judge at the Court), and Luzius Wildhaber (Swiss judge at the Court). Matscher and Wildhaber, for personal reasons, did not participate. Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards, Doc. AS/Bur/Russia (1994), at 7 (Sept. 28, 1994), *reprinted in* 15 HUMAN RIGHTS LAW JOURNAL 249 (1994) (hereafter Eminent Lawyers Report). *See also Present State of Relations with the Russian Federation*, Secretariat Information Paper SG/INF(94) 12, at 2 (May 6, 1994). Ordinarily, two "eminent lawyers," – one from the Commission and one from the Court – were thought sufficient. *See* Winkler, *supra* note 62, at 160; Klein, *supra* note 61, § 3.37.

[70] Simultaneously, numerous contact groups, delegations, and other joint activities took Russian officials to Strasbourg and Council of Europe officials to (almost exclusively) Moscow.

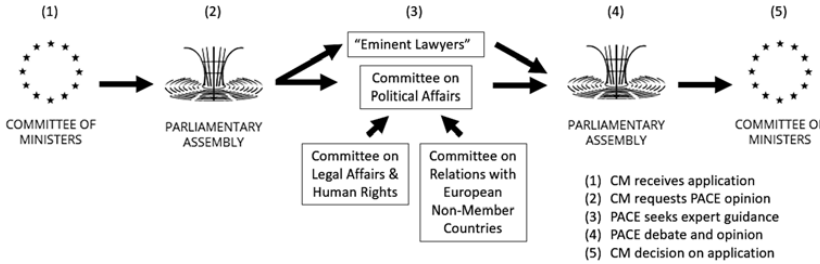

Figure 8.1 Council of Europe deliberative process on Russia's application for membership.

(readmitted separately in June following Czechoslovakia's dissolution), and then, most controversially, Romania (October). Pressure built to allow accession despite deficiencies identified in committee reports. Thus, for example, Poland was granted conditional admission contingent on holding free and fair elections, which occurred more than a year later.[71] Estonia only partially fulfilled a commitment to protect the political rights of national minorities.[72] Romania, which rapporteurs concluded did not satisfy numerous membership requirements concerning the rule of law (including, for example, an independent judiciary), was admitted with a new monitoring procedure soon to be entrenched for all new members.[73] Each change was precedent for more flexibility for the next applicant because, as was argued in the Romanian debates, "to close the door would deprive us of a means of exerting pressure on Romania to introduce democracy."[74]

The Committee of Ministers adopted the resolution to admit Romania on October 4, 1993.[75] This was the day before an important summit in Vienna of the heads of state and government of member states of the Council of Europe, at which the organization declared itself to be "the pre-eminent European political institution capable of welcoming, on an

[71] *See* Winkler, *supra* note 62, at 156, n.13.

[72] Opinion 170 (1993) of the Parliamentary Assembly on the Application of the Republic of Estonia for Membership of the Council of Europe, ¶ 5 (May 13, 1993); Winkler, *supra* note 62, at 158–59.

[73] Opinion 176 (1993) of the Parliamentary Assembly on the Application by Romania for Membership of the Council of Europe (Sept. 28, 1993); *see also* Winkler, *supra* note 62, at 164; Philip Leach, *The Parliamentary Assembly of the Council of Europe*, *in* THE COUNCIL OF EUROPE: ITS LAW AND POLICIES, *supra* note 61, § 7.38. The new mechanism, the "Halonen Order," is Order 488 (1993), *Honouring of Commitments Entered into by New Member States* (June 29, 1993).

[74] Leach, *supra* note 73, § 7.39.

[75] Resolution (93) 37, *Invitation to Romania to Become a Member of the Council of Europe*.

equal footing and in permanent structures, the democracies of Europe freed from communist oppression."[76] But it also coincided with the violent culmination of a constitutional crisis in Russia as President Yeltsin ordered tanks to shell the parliament building. Among his opponents there sat the chairman of the legislature, Ruslan Khasbulatov, who had met with Council of Europe officials in February 1992 as Russia began its application. European leaders gathered in Vienna expressed their "deep concern" and commitment to support "the message from the President of the Russian Federation reaffirming the irreversible policy of reforms and democratic transformation, conducive to the approachment of Russia with the Council of Europe."[77]

Despite Yeltsin's clear support for reforms to prevent a return to the Soviet past, and his rivals' opposition to those efforts, this crisis and its aftermath were not a ringing endorsement of the rule of law in Russia. Yeltsin had ordered the legislature disbanded at the start of the crisis and, by its conclusion, had also suspended the operation of the Constitutional Court (which had held that dissolution order unconstitutional). Vice President Alexander Rutskoi (who sided with the opposition), Khasbulatov, and many of their supporters were imprisoned for months. Yeltsin removed from office the Constitutional Court's chairman, Valery Zorkin, though neither he nor his fellow judges lost their liberty. A new, strongly presidential constitution and a weaker legislature were established through elections in December. Russia's application was not off to a good start.

The report of the eminent lawyers was submitted in late September 1994.[78] This could be said to have set the baseline for assessing how much must change in Russia for membership to become a reality. The report was the product of visits by four experts to Russia over twelve days in May and June for a tightly structured program of high-level meetings with executive, legislative, and judicial officials, journalists, lawyers, and civil society leaders, and inspection visits to jails and penal colonies in Moscow, Petersburg, and Krasnoyarsk.[79]

Rudolf Bernhardt, vice president of the Strasbourg Court, provided a general introduction to the report. He concluded that the detailed list

[76] Vienna Declaration, Oct. 9, 1993.
[77] Declaration on Russia, Vienna, Oct. 8, 1993.
[78] *See* Eminent Lawyers Report, *supra* note 69.
[79] This program is at Appendix I. Although most meetings were arranged long in advance, several surprise visits to detention facilities were accommodated. *Id.* at 266. A March meeting in Moscow occurred between two of the experts and Russian government officials. *Id.* app. II.

of human rights in the new Russian constitution, like the institutional mechanisms for their enforcement, remained parchment promises: "[T]his seems to be more theory than practice. Nearly all officials and private individuals we have met concede and confirm that the implementation of the human rights guarantees in actual State practice has many deficiencies or is even non-existent."[80] This was not to discount significant advances, especially concerning a free press and media space, but in many more subject areas there was no recognizable advance from Soviet times. A new code of criminal procedure, for example, was held essential to "eliminate practices which are incompatible with several provisions in the European Convention on Human Rights."[81] A particular concern was a culture of executive impunity: "the old ways of authoritarian thinking are still dominant in public administration. This seems to be a wide-spread 'disease' which might be understandable after so many decades of an authoritarian regime which led to deep-rooted patterns of behaviour."[82]

The eminent lawyers also focused on discrete issues, many of which are foundational to a rule-of-law system. The preliminary conclusions (repeatedly acknowledging the limits of experts to gain firm understandings while working under such tight time and space constraints) were not optimistic:

> The practical implementation of human rights by the authorities cannot but be affected by the state of the legislation which does not encourage a favourable perception of the principle of the rule of law. Even where the practice is relatively liberal, such as seems to be the case in the fields of freedom of expression, freedom of association, freedom of assembly and freedom of religion, such a liberal approach is not ensured by the law itself and the population may even have the feeling that the more restrictive laws in force are being twisted.[83]

This general view was shared by the expert charged with assessing conditions of confinement and respect for fundamental human rights in pretrial and postconviction detention facilities, Stefan Trechsel, chamber president of the then existing European Commission of Human Rights:

> Finally, it cannot be said that, at the present time, the Russian Federation presents the features of a State based upon the rule of law. The activities of public authorities are mainly decided upon according to general policy

[80] Eminent Lawyers Report, *supra* note 69, at 250.
[81] *Id.* at 251.
[82] *Id.*
[83] *Id.* at 266. The rights of national minorities and rights concerning detention (pretrial and postconviction) were also significant sections of the report.

> choices, personal allegiance and the effective power structure. In the areas I have examined it cannot, therefore, be said that the Russian Federation fulfils the requirements for membership of the Council of Europe.[84]

The findings by individual experts were reflected and emphasized in the conclusions of the four experts as a group. Keeping firmly in mind their charge ("whether the Russian Federation fulfils the prerequisite of being a genuine democracy showing respect for the rule of law and human rights"), they could identify discrete avenues of improvement in all three areas but concluded that Russia did not meet Council of Europe standards in any of them.[85] Their conclusion concerning the mentality of officialdom was Cassandra-like: "The traditional authoritarian thinking still seems to be dominant in the field of public administration. . . . The courts can now be considered structurally independent from the executive, but the concept that it should in the first place be for the judiciary to protect the individuals has not yet become a reality in Russia."[86]

The work of the Parliamentary Assembly's committees, which had begun undertaking their own visits to Russia, was derailed almost before it began, when Yeltsin launched a full-scale air and ground assault on the non-Russian ethnic republic of Chechnya in December 1994. The horror that followed constituted "a grave violation of the Council of Europe's most elementary human rights principles, which Russia, by requesting membership in the Organisation, pledged to uphold", and the Assembly suspended indefinitely procedures concerning its opinion on Russia's request for membership.[87] As with the October 1993 constitutional crisis, the war in Chechnya exposed deep pathologies stemming from Russia's Soviet and imperial pasts. Many of these were described in subsequent reports by the Legal Affairs and Human Rights Committee in late June 1995, which detailed humanitarian and human rights violations in Chechnya, and the disintegration of the rule of law there in a word picture worthy of Hieronymous Bosch's imagination of Hell.[88]

[84] *Id.* at 287.
[85] *Id.*
[86] *Id.*
[87] Resolution 1055 (1995), *Russia's Request for Membership in the Light of the Situation in Chechnya* (Feb. 2, 1995). The Legal Affairs and Human Rights Committee was instructed to send its subcommittee on human rights to Chechnya after cessation of hostilities. Order 506 (1995), *Russia's Request for Membership in Light of the Situation in Chechnya* (Feb. 2, 1995).
[88] Committee on Legal Affairs and Human Rights, *Report on the Human Rights Situation in Chechnya*, AS/Jur (1995)22 (June 29, 1995).

As 1995 began, the Assembly's president and its three committee rapporteurs received a letter signed by President Yeltsin, Prime Minister Chernomyrdin, and the chairs of both houses of the Russian legislature, Shumeyko and Rybkin. With the leveling of Grozny still underway, its assertions seemed incongruous: "Our desire to gain full membership of the Council of Europe is a logical consequence of our current policy aimed at establishing the rule of law, strengthening democracy and genuinely securing human rights in Russia." Perhaps more encouraging was their admission that "we are aware that we still have a long way to go," their promise to accede to the European Convention on Human Rights, and an attached list of concrete plans to improve the Russian legal system.[89] This was followed in August by an updated list of legislative accomplishments and further reforms planned for the future.[90]

Bindig and Atkinson, at least, both mention this letter as crucially important to the process.[91] And there is no gainsaying the substantial and high-quality legislative efforts by which many of the promises in that letter were kept, including new codes of civil law (1994), criminal law (1996), and a law regulating the procuracy.[92] Others were promised for the near future, including new codes of criminal procedure (2001), civil procedure (2002), laws creating a commissioner of human rights (1997) and a professional bar (2002), and laws further protecting the rights of religious (1997) and ethnic (1999) minorities – all these came to fruition.[93] These efforts often involved the assistance of experts from the Council of Europe, the US Department of Justice, and states with robust rule-of-law traditions. To take just one example, the new 2001 Criminal Procedure Code (a body of law identified by the eminent lawyers as needing substantial reform) was likened by many participants in its drafting to the "legendary" 1864 legal reforms of Alexander II.[94] The

[89] Report, *Russia's Request for Membership of the Council of Europe*, Doc. 7443, app. III, at 26–27 (Jan. 2, 1996).

[90] *Id.* app. VI.

[91] Rudolf Bindig, *Russia's Accession to the Council of Europe and the Fulfilment of Its Obligations and Commitments*, *in* RUSSIA AND THE COUNCIL OF EUROPE: TEN YEARS AFTER 36–37 (Katlijn Malfliet & Stephan Parmentiereds., 2010); David Atkinson, *20 Years on the Council of Europe: A Personal Retrospective*, *in* LAW IN GREATER EUROPE: TOWARDS A COMMON LEGAL AREA 281 (Bruno Haller, Hans Krüger & Herbert Pezold eds., 2000).

[92] Kahn, *supra* note 23, at 284.

[93] *Id.*

[94] *See* Christopher Lehman, *Introduction*, *in* THE RUSSIAN FEDERATION CODE OF CRIMINAL PROCEDURE ii (U.S. Department of Justice trans., 2004).

Code shifted responsibility for pretrial detention from prosecutors to judges, strengthening core rule-of-law issues concerning the separation of powers and opportunities for the arbitrary use of power.[95]

The Parliamentary Assembly restarted its consideration of Russia's application in September 1995, two months after what it called a "fragile" peace agreement in Chechnya under which "violations may continue."[96] A split had emerged between the Assembly's committees. The Legal Affairs and Human Rights Committee, chaired at the relevant time by Rudolf Bindig, accepted that the peace agreement might allow the process to continue, but was quite pessimistic about outcomes: "development in the area of protection of human rights and the rule of law seems to have gone backwards, if anything."[97] The Political Affairs Committee, chaired by Ernst Mühlemann, on the other hand, resignedly accepted that future conflicts within Russia were possible ("Such is the heritage of dictatorships," he wrote) but asserted that "[r]eform in Russia appears to be irreversible."[98] The Assembly resolution resuming the process reflected more the thinking of this latter committee:

> Russia is in a state of radical transition. The timescale of this transition is in quinquennia, even decades. Its pace will vary. Policies of the state authorities will fluctuate. This is because of immense social and economic difficulties, including the fight against organised crime. Tragic errors of policy in dealing with the Chechnya conflict have been recognised. Accordingly, the Assembly has no wish to throw in doubt the long-term direction of this transition: towards democracy, the rule of law, and human (including social) rights and freedoms.[99]

But this perspective turned the membership process upside down. The reason to extend membership – a decision, as it turned out, just months away – now sharply discounted Russia's present inability to satisfy the membership requirements. More important seemed to be the prospect of continuing dialogue, using the process to bring attainment of those goals within reach in the future. The reference to the "long-term direction" of transition made this sound predetermined and impliedly unidirectional.

[95] *See* William Burnham & Jeffrey Kahn, *Russia's Criminal Procedure Code Five Years Out*, 33 REV. CENT. & E. EUR. L. 1, 11–12 (2008).

[96] Resolution 1065 (1995), *Procedure for an Opinion on Russia's Request for Membership of the Council of Europe*, ¶ 4 (Sept. 26, 1995).

[97] Opinion, *Procedure for an Opinion on Russia's Request for Membership of the Council of Europe*, Doc. 7384, ¶ 8 (Sept. 15, 1995).

[98] Report, *Procedure for an Opinion on Russia's Request for Membership of the Council of Europe*, Doc. 7372, ¶ 16 and Conclusion ix (Sept. 11, 1995).

[99] Resolution 1065, *supra* note 96, ¶ 8.

As Mühlemann would conclude in his report for the influential Political Affairs Committee, it was clear that "Russia does not yet meet all Council of Europe standards. However, integration is better than isolation; co-operation is better than confrontation."[100]

This was the full-blown process and effects of "therapeutic admission" expanding eastward that so concerned Deputy Secretary-General Peter Leuprecht, leading to an overreliance on the goodwill of leaders and bureaucracies barely distanced from decades of repressive rule: "Some of the countries concerned suffer from serious evils and will have to go through a long healing process, but success in therapy presupposes the consent of the 'patient.'"[101] The rapid admission of these states was seen as part of the "new purpose" of the Council of Europe traceable to Gorbachev's "common European home" speech. Among those holding this view was David Atkinson, the chair of the Committee for Relations with European Non-Member Countries, the third PACE committee involved in the process.[102] The shift in purpose that worried Leuprecht was of far less concern to Atkinson:

> It was always clear that Russia, given its seventy years of Communist denial of freedom and democracy, its chronic economic problems as well as its size and ethnic composition, would not fully satisfy our standards of membership for a great many years, perhaps a generation. However, given its importance it was vital to encourage and assist the forces of reform by the earliest possible accession without ridiculing our standards. This had a particular urgency in view of the forthcoming presidential elections.[103]

Atkinson's reference to the Russian presidential elections (which occurred in June 1996) points to an important factor in this process: the Russian side's awareness of the Council's institutional anxieties and flexibility over previously firm requirements. Fear of undercutting an ally like Yeltsin pervaded the debates on Russian admission because in January 1996, when the PACE vote occurred, "few analysts or politicians predicted that Boris Yeltsin would win reelection as Russia's President."[104] It was lost on no one that the alternative to progressive-minded reformers could be communists, nationalists, or worse, who had met startling success in the December 1995 parliamentary elections.

[100] Report 7443, *supra* note 89, § II.6.103.xii.
[101] Leuprecht, *supra* note 60, at 332.
[102] Atkinson, *supra* note 91, at 277.
[103] *Id.* at 281.
[104] Michael McFaul, Russia's 1996 Presidential Election: The End of Polarized Politics ix (1997).

Another source of empowerment for Russian negotiators – without concrete evidence, it is hard to conclusively call it a negotiating tactic – were rumors circulated about the creation of a regional human rights convention for states of the former Soviet Union. In such a body the Council of Europe perceived many perils. It was very unlikely to be as effective as the Strasbourg system, thus diminishing the likelihood of lasting rule-of-law and human rights reforms. Its very existence would threaten the ability of the Council of Europe to satisfy its unifying ambitions. These twin anxieties were fed from the beginning. When the eminent lawyers asked "during a meeting in the Institute of State and Law of the Russian Academy of Science, for information on the relationship between such new Euro-Asian organs and the organs under the European Convention on Human Rights, we were told that an individual complaint should at first be submitted to the new system and only thereafter, if necessary, to the institution(s) in Strasbourg."[105] The prospect of conflicting positions by different regional human rights bodies with jurisdiction over the same space was chilling enough that renunciation of this plan was explicitly included in the list of commitments Russia promised to undertake in exchange for membership.[106]

By the time of the Assembly's vote, two conclusions seemed inescapable. First, the shift to therapeutic admission (replacing benchmark prerequisites) was complete. The Political Affairs Committee, by a vote of 24–4–6, recommended Russia be invited to join the Council because "Russia is making progress towards becoming a state based on the rule of law."[107] (Put more bluntly by the Legal Affairs Committee, "the Russian Federation cannot be regarded as a State based on the rule of law."[108]) Second, the Council of Europe took this action fully aware of the most threatening of Russia's rule-of-law problems:

> [T]he mentality towards the law has not 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

[105] Eminent Lawyers Report, *supra* note 69, at 252 (recounting "obvious" dangers beyond multiple institutions creating "more confusion than protection," and warning that the Strasbourg system would "necessarily lose its unifying effect and force" and become "of secondary importance").

[106] Opinion 193 (1996), *Russia's Request for Membership of the Council of Europe*, § 10.16 (Jan. 25, 1996).

[107] Report 7443, *supra* note 89, § II.6.103.i.

[108] Committee Opinion, *Russia's Application for Membership of the Council of Europe*, Doc. 7463, at VIII (Committee on Legal Affairs and Human Rights, Jan. 18, 1996).

> 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 . . . .[109]

Thus, the Assembly debate opened with the unchallenged admission of the "first, primordial concern" of arbitrariness that Shaffer and Sandholtz identify with the absence of the rule of law: "where the wielder of power is not subject, in practice, to the law, its controls and limits."[110]

On January 25, 1996, the Parliamentary Assembly voted 164–35 to recommend membership.[111] It identified twenty-five concrete commitments to be undertaken by the Russian Federation in exchange. These needed to be done to satisfy the interpretive gloss the Assembly gave to the admission requirements stated categorically in Articles 3 and 4 of the Statute but expressed now in a future conditional, noting "the Assembly believes that Russia – in the sense of Article 4 of the Statute – is clearly willing and will be able in the near future to fulfil the provisions for membership of the Council of Europe as set forth in Article 3 . . . ."[112] The Committee of Ministers extended this invitation a fortnight later, declaring that "the Russian Federation complies with the conditions" for membership.[113]

III Participation

At least for a while, the decision to admit Russia continued to produce positive results: modernized codes of law, increased procedural regularity in a judiciary with greater insulation from political forces, and the gradual, concomitant development of stability and predictability in relations between state and citizen that are hallmarks of the rule of law. Nor did accession end the process of legal reform, although Leuprecht proved to be right that the Council had the most leverage at the pre-accession stage. In significant ways, the Council of Europe's institutions kept a close eye and a guiding hand on Russian developments.[114]

But as time passed, Russian officials cared less and less about this relationship. With the resignation of President Boris Yeltsin, a sharp

[109] *Id.* at II.
[110] *See* Chapter 1.
[111] Caroline Southey, *Council of Europe Votes Russia In*, FINANCIAL TIMES (UK) (Jan. 26, 1996).
[112] Opinion 193 (1996), ¶ 7.
[113] CM Resolution (96) 2, *Invitation to the Russian Federation to Become a Member of the Council of Europe* (Feb. 8, 1996).
[114] Bindig, *supra* note 91, at 34.

break was created in Russia's relationship with the Council of Europe. Vladimir Putin was appointed to the office of prime minister in August 1999 as a wave of terrorist attacks swept Russia. He had not participated in any part of the accession process or presided over Russia's first years as a member. Yet it would fall to him to bring the idea of a common European home and the promises of the lengthy accession process to reality.

Putin responded to those attacks by launching a second, brutal war in Chechnya. Council of Europe observers condemned widespread violations of human rights and humanitarian law.[115] In 2005, Atkinson and Bindig, serving as monitors of Russia's past promises, used variations on the phrase "climate of impunity" more than ten times in their report, mostly about violations of human rights in Chechnya.[116] This was the third such report, following those in June 1998 and April 2002. Even the rapporteurs acknowledged that the ordinary biennial reporting requirement for a monitored country had proven impossible in Russia. It was becoming clear that Russia was in little hurry to make good on many of its commitments, even as it struggled to abide by others.

One commitment kept, however, was ratification of the European Convention on Human Rights. Russia ceded jurisdiction to the European Court to interpret and apply the Convention and agreed "to abide by the final judgment of the Court in any case" in which it was a party.[117] This provides useful metrics to measure both the Court's effects on the development of the rule of law in Russia and Russia's effect on the operation of the Court.

The first data point worth considering is the rapid rise of merits judgments found against Russia. These are tabulated in Figure 8.2.[118]

The number of judgments finding no violation of Convention obligations remains consistently small, while findings of violations rise precipitously over time (depressed only slightly by reforms Russia itself stalled). Judgments

[115] For a review of these reports, see Kahn, *Vladimir Putin and the Rule of Law*, *supra* note 42, at 528 n.69.

[116] Report, *Honouring of Obligations and Commitments by the Russian Federation*, Doc. 10568 (June 3, 2005).

[117] Федеральний закон № 54-ФЗ "О ратификации Конвенции о защите прав человека и основных свобод и Протоколов к ней," [Federal Law No. 54-FZ "On the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols to it"], Собр. Законод. РФ [Collected Legislation of the Russian Federation], 1998, No. 14, Art. No. 1514, at 2939–40.

[118] Data from the Court's *Annual Report*, 2001 through 2022. There are small discrepancies among the Court's reports for total judgments in 2001–2006. *Annual Report 2016* is used here.

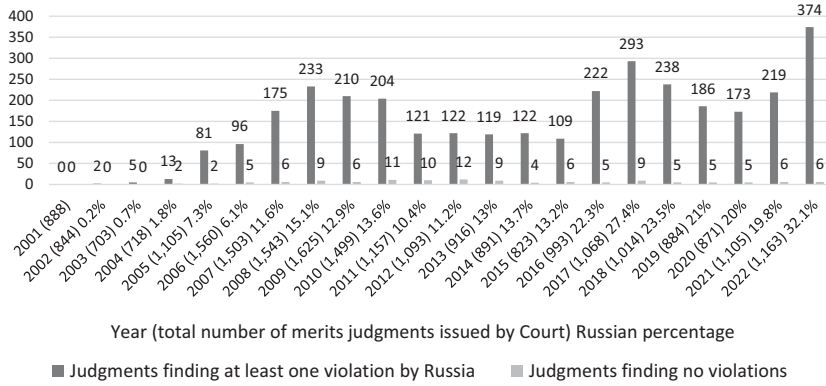

Figure 8.2 Judgments on the merits by the ECtHR concerning Russia, 2001–22.

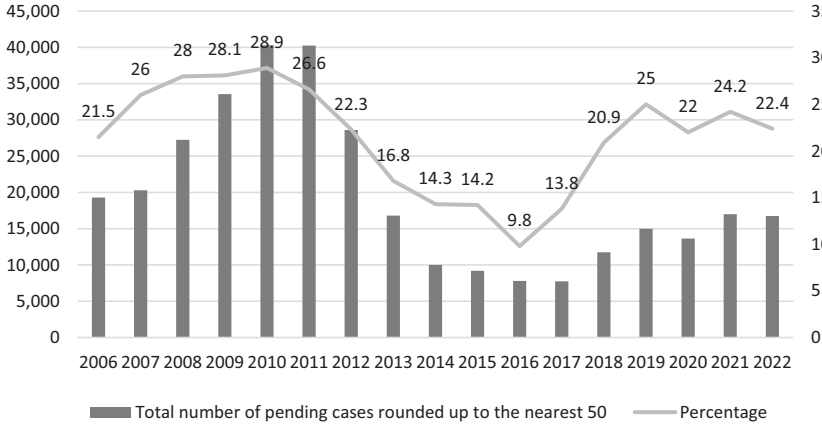

Figure 8.3 Pending Russian cases allocated to judicial formations of the ECtHR, 2006–22.

against Russia as a percentage of all merits judgments across member states also rises, from single digits to an astonishing 32.1 percent in 2022. After 2016, Russia accounted for nearly a fifth of all judgments every year.

These statistics correlate with a consistently large and disproportionate share of pending cases awaiting the Court's assessment. Figure 8.3 shows this effect in absolute and percentage terms.[119] Only during a short period in which the Court's procedural reforms helped dispense with many cases

[119] *Id.*

(again catalyzed in no small part by Russia's volume) did Russia account for less than a fifth of all pending cases. Many have commented on the effects on the entire Strasbourg system of such a backlog clogging the Court's docket.

Most telling of all, however, are the nature of violations. Figure 8.4 identifies Russia's four most numerous types of violations each year.[120] Every single year, Russia violated the Article 5 right to liberty and security, which protects various fundamental interests during arrest, pre- and post-trial detention, and other forms of deprivation of physical freedom. For fourteen of twenty years, this was the leading violation. Russia violated the Article 6 right to a fair trial in all but two reporting years. Similar violations for the excessive length of judicial proceedings or for the absence of effective state investigation into loss of life, torture, or inhuman treatment are ubiquitous, as is the substantive violation of the prohibition in Article 3 against torture and inhuman or degrading treatment or punishment.

The steadily rising number of cases concerning these various rights suggests the dismantling of the Council's therapeutic efforts in Russia. The very first case concerning Russia was brought by pensioner Burdov seeking payment due for work at the Chernobyl nuclear disaster. Despite repeatedly suing the state, Burdov could not enforce his favorable judgments. A unanimous court held that Russia violated both Burdov's property rights and his Article 6 right to a fair trial since "that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party."[121]

The emergence of increasingly effective courts able to enforce property rights within a reasonable time would seem a strong indicator of the strengthening of the rule of law in a state. But not only does this chart show Russia's regression from that very first judgment, seven years later, the same Burdov succeeded with the same claims in *Burdov v. Russia (No. 2)*, in which the Court *sua sponte* also found a violation of the Article 13 right to an effective remedy.[122] Likewise, the second case decided against Russia concerned egregiously inhuman and degrading (and lengthy) conditions of pretrial confinement.[123] As Figure 8.4 shows, these violations increased over the duration of Russia's membership.

[120] *Id.*

[121] Burdov v. Russia, App. No. 59498/00 (May 7, 2002), https://hudoc.echr.coe.int/eng?i=002-5350.

[122] Burdov v. Russia No. 2, App. No. 33509/04 (Jan. 15, 2009), https://hudoc.echr.coe.int/eng?i=001-90671.

[123] Kalashnikov v. Russia, App. No. 47095/99 (July 15, 2002), https://hudoc.echr.coe.int/?i=001-60606.

YEAR	SUBJECT OF VIOLATION (NUMBER OF VIOLATIONS)
2003	Liberty (4); Fair Trial (3); Length of proceedings (1); Respect priv'y/fam'y (1); Property (1)
2004	Liberty (7); Length of proceedings (6); TORTURE (4); INHUMAN TREATMENT (4); ***Effective Remedy*** (4)
2005	Property (48); Fair Trial (45); Length of proceedings (21); Liberty (11)
2006	Fair Trial (64); Property (49); Liberty (19); Length of proceedings (18)
2007	Fair Trial (127); Property (114); Liberty (47); INHUMAN TREATMENT (25)
2008	Fair Trial (159); Property (122); Liberty (67); INHUMAN TREATMENT (63)
2009	Liberty (109); INHUMAN TREATMENT (84); Fair Trial (74); ***Effective Remedy*** (73)
2010	INHUMAN TREATMENT (102); Liberty (89); Fair Trial (55); ***Effective Remedy*** (55)
2011	Liberty (68); INHUMAN TREATMENT (62); Lack eff. inv. A-2 (58); ***Effective Remedy*** (58)
2012	Liberty (64); INHUMAN TREATMENT (48); Fair Trial (36); Lack eff. inv. A-3 (25)
2013	Liberty (63); INHUMAN TREATMENT (49); ***Effective Remedy*** (30); Fair trial (25)
2014	Liberty (56); INHUMAN TREATMENT (50); ***Effective Remedy*** (30); Fair trial (24)
2015	Liberty (58); INHUMAN TREATMENT (44); ***Effective Remedy*** (22); Lack eff. inv. A-2 (20); Lack eff. inv. A-3 (20)
2016	Liberty (153); INHUMAN TREATMENT (64); ***Effective Remedy*** (50); Fair trial (41)
2017	Liberty (116); INHUMAN TREATMENT (107); ***Effective Remedy*** (83); Fair trial (59)
2018	Liberty (99); INHUMAN TREATMENT (99); ***Effective Remedy*** (67); Fair trail (46)
2019	Liberty (90); Fair trial (61); INHUMAN TREATMENT (57); ***Effective Remedy*** (43)
2020	Liberty (82); Fair trail (54); INHUMAN TREATMENT (41); ***Effective Remedy*** (27); Lack eff. inv. A-2 (27)
2021	Liberty (96); INHUMAN TREATMENT (76); Fair trial (53); Respect Priv'y/Fam'y (53)
2022	Inhuman treatment (198); Liberty (195); ***Effective Remedy*** (119); Respect Priv'y/Fam'y (98)

Key:

Liberty	Article 5 Right to liberty and security
Fair Trial	Article 6 Right to a fair trial
INHUMAN TREATMENT	Article 3 Prohibition of inhuman or degrading treatment or punishment
Effective Remedy	Article 13 Right to an effective remedy for violation of Convention rights
TORTURE	Article 3 Prohibition of torture, inhuman or degrading treatment/punishment
Property	Protocol 1, Article 1 Right to the peaceful enjoyment of property
Length of proceedings	Article 6 Right to a fair and public hearing within a reasonable time
Respect Priv'y/Fam'y	Article 8 Right to respect for private and family life
Lack eff. inv. A-2	Article 2 State's positive obligation to effectively investigate fatal incidents
Lack eff. inv. A-3	Article 3 State's positive obligation to effectively investigate torture, etc.

Figure 8.4 Leading violations of the Convention by Russia by year, 2003–22.

Starting in 2009, violation of the right to an effective remedy was a leading (and increasingly frequent) violation every year save two. Violations of the prohibition against torture, inhuman and degrading treatment or punishment, and lack of effective investigation of such matters remained prominent and increased. Such cases of mistreatment, ineffective mechanisms of judicial control, and indifference to holding state officials accountable strongly suggest the "five sources of arbitrariness to which different rule-of-law prescriptions respond."[124]

With hindsight, discrete cases now seem akin to canaries in a coal mine. Vladimir Gusinskiy was detained at the notorious Butyrka prison and compelled by an acting minister for press and mass communications to sell his media holdings to a state company (at that company's price) in exchange for his freedom – an abuse of power in which the Strasbourg Court had little difficulty finding a pretextual use of law.[125] With remarkable understatement, the Court noted that "it is not the purpose of such public-law matters as criminal proceedings and detention on remand to be used as part of commercial bargaining strategies."[126]

The arrest and separate convictions of another oligarch, Mikhail Khodorkovsky, and the nationalization of his Yukos Oil Company led to the Court's largest-ever award of damages (€1.8 billion).[127] Khodorkovsky's second conviction prompted analysis by experts selected by the Russian Presidential Council on the Development of Civil Society and Human Rights.[128] The experts' reports led the Council to recommend, inter alia, review of the verdict with a view to its repeal due to fundamental errors and violations of law at trial.[129] These reports and recommendations were submitted to President Medvedev shortly before Vladimir Putin's return to the presidency, following which there began a criminal investigation and harassment of the Russian experts.[130]

[124] *See* Chapter 1.

[125] Gusinskiy v. Russia, App. No. 70276/01 (May 19, 2004), https://hudoc.echr.coe.int/fre?i=001-61767.

[126] *Id.* ¶ 76.

[127] OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04 (July 31, 2014), https://hudoc.echr.coe.int/fre?i=001-145730.

[128] The author was one of those experts. *See* Jeffrey Kahn, *Introduction to the Report*, 4 J. EURASIAN L. 321, 327–28 (2011).

[129] *Id.*

[130] Jeffrey Kahn, *The Richelieu Effect: The Khodorkovsky Case and Political Interference with Justice, in* A SOCIOLOGY OF JUSTICE IN RUSSIA 231 (Marina Kurkchiyan & Agnieszka Kubal eds., 2018); Jeffrey Kahn, *In Putin's Russia, Shooting the Messenger*, N.Y. TIMES (Feb. 25, 2013), www.nytimes.com/2013/02/26/opinion/in-putins-russia-shooting-the-messenger.html.

A short time later, the Yukos case was the second of only two cases selected by the Russian Constitutional Court to employ a 2015 law that gave the Court responsibility (not the mere discretion) to prohibit compliance with ECtHR judgments found contrary to the Russian Federation's constitution. There is reason to think the law was promulgated with this arbitrary purpose in mind.[131] The Russian Court applied this law to hold that Russia could not pay the Strasbourg Court's massive award.[132] For the first time, a member state's highest court had directly challenged the authority of the European Court and flatly refused to permit execution of its judgment.[133]

One can add other names now also recalling abuses of power that could reach individuals both abroad and within Russia: Alexander Litvinenko, assassinated with polonium-210 in London in 2006; Boris Nemtsov, assassinated outside the Kremlin in 2015; Vladimir Kara-Murza, twice poisoned, in 2015 and 2017, and imprisoned; Alexei Navalnyy, poisoned with novichok in 2020 and imprisoned (where he died in 2024 under suspicious circumstances). More could also be said about the deconstruction of legal protections that meant little without the institutionalization of a mindset that had been recognized as missing from the start. Unlike a statute, such an ethos could not simply be promulgated.

IV Conclusion

Russia presented the Council of Europe with a devilish problem of practical definition: How much rule-of-law reform was enough to join an international organization for which the rule of law is a prerequisite? This question arrived when the organization, uncertain about its future, was presented with opportunities to aid in legal and democratic reforms sought by states emerging from behind the Iron Curtain. The momentum

[131] Kahn, *supra* note 21, at 934.

[132] Постановление № 1-П/2017 от 19 января 2017 г. по делу о разрешении вопроса о возможности исполнения в соответствии с Конституцией Российской Федерации постановления Европейского Суда по правам человека от 31 июля 2014 года по делу «ОАО «Нефтяная компания «ЮКОС» против России» в связи с запросом Министерства юстиции Российской Федерации [Judgment No. 1-P/2017 (Jan. 19, 2017) in the case on the resolution of the issue of the possibility of executing, in conformity with the Constitution of the Russian Federation, the judgment of the European Court of Human Rights of July 31, 2014 in the case of "OAO Oil Company 'Yukos' against Russia" in connection with the request of the Ministry of Justice of the Russian Federation].

[133] Kahn, *supra* note 21, at 958.

that built in the Council's accession process enveloped nearly half of Europe in a well-intentioned effort to foster the rule of law and other values in countries with histories revealing varying levels of experience with them. This led to a process the deputy secretary-general of the organization called therapeutic admission that was full of risk, Russia's admission especially so.

Russian leaders who took no part in imagining or attempting to build a common European home presided over the dismantling of its limited success. In that destruction, what was a liability for reformers like Gorbachev and Yeltsin served as a means of control for Putin. Amending slightly the words of the Committee on Legal Affairs and Human Rights, the mentality toward law had not changed, at least not enough.[134] No amount of legislating or adjudicating could speed up that change in time. "Such is the heritage of dictatorships," Mühlemann acknowledged, and Russia had been one for centuries.

It can only be hoped that the experience of nearly thirty years that spanned this relationship from start to finish offers a better start to the next opportunity Russians and Europeans may have to attempt to build that home again.

[134] *See* Opinion 7463, *supra* at note 108, at II.