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# Can the Constitutional Court of the Russian Federation Lead the Way to the Creation of a True Democratic Society in the New Russian in the 21st Century?

Cover Page Footnote

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# **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?**

Shawn S. Cullinane, Esq.<sup>1</sup>

## **I. INTRODUCTION - A CONSTITUTIONAL FORM OF GOVERNMENT AND THE RULE OF LAW**

The legitimacy of a nation is largely dependent on its citizenry's respect for the rule of law. To what degree citizens embrace or engage their national legal system is an important measurement one may use to judge that nation. Is the legal system accessible to all citizens? Is justice dispensed in an equitable manner? Are there citizens who have more rights than others? Are there citizens who are above the law or beyond its reach? Are there safeguards to protect the powerless, the defenseless, and/or the minority from domination by the majority? Is the judicial system sufficiently independent from the government? Is it resistant to the shifting currents of political and popular expedience? The answers lie within the foundation of the nation, its constitution or primary law, which grants the authority to govern and the parameters by which that authority may be exercised by those empowered to do so. Respect for individual freedoms and rights must be incorporated in that authority and the use of it, for only then will the individual respect the rule of law. Without it, the people have no use for the law, consequently no respect for it and ultimately no desire to embrace or defend it.

From these constitutional foundations have sprung the Supreme Court of the United States of America and the Constitutional Court of the Russian Federation as the institutions created to, or intended to, promote and protect the rule of law and

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to “establish [j]ustice”<sup>2</sup> and ensure that “rights and freedoms shall be the supreme value”<sup>3</sup> in their respective nations.

The divergent histories of the United States and Russia provide dynamic backgrounds to compare and contrast the two courts and their corresponding legal systems. The U.S. Supreme Court has been in existence for more than two centuries.<sup>4</sup> The Russian Constitutional Court has been in existence less than ten years.<sup>5</sup> This creates two distinct models by which to examine and explore questions regarding the importance and development of each Court in relationship to that of democracy. To what extent the experience of the Supreme Court is applicable to the Constitutional Court may enable us to formulate prospects about the future of Russia as it struggles to reform itself into a modern democracy.

Under democracy, Americans have relied on the rule of law to protect them from excessive and illegal government intrusion into their lives. The rule of law ensures that due process,<sup>6</sup> the right to be heard,<sup>7</sup> to present one’s grievances or defenses in a fair and

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<sup>2</sup> U.S. CONST. pmb.: “We the people of the United States, in order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.” *Id.*

<sup>3</sup> RUSS. CONST. art. 2: “Man, his rights and freedoms shall be the supreme value. It shall be the duty of the state to recognize, respect and protect the rights and liberties of man and citizen.” *Id.*

<sup>4</sup> U.S. CONST. art. III, §1, ratified in 1788 and providing in part: “The judicial Power of the United States, shall be vested in one supreme Court, and in such Inferior Courts as the Congress may from time to time ordain and establish.”

<sup>5</sup> YU, KUDRIAVTEV, *FEDERAL CONSTITUTIONAL LAW: ON THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION*, preface (1996).

<sup>6</sup> U.S. CONST. amend. XIV, §1, providing in part: “...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .” *Id.*

<sup>7</sup> U.S. CONST. amend. VI, providing in part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.” *Id.*

open forum,<sup>8</sup> to be judged by one's peers,<sup>9</sup> to be represented by counsel if necessary,<sup>10</sup> to be considered innocent unless proven guilty,<sup>11</sup> is guaranteed under the Constitution.<sup>12</sup> The protection of the people, not the state, has been the promise of the Constitution to American citizens since its adoption in 1788, as well as the legacy of the United States Supreme Court since its inception the next year.<sup>13</sup> It is that promise and that legacy that ensures the continuation of America's democratic tradition in the 21<sup>st</sup> century.

Under the Romanov dynasties, and then communism, the Russian people were never equal partners in the organization or control of their society. Both forms of government, one an imperial monarchy and the other a totalitarian and socialist dictatorship, were centralized, authoritarian, and dominated by a self-made, top-down hierarchy that repressed the individual for the sake of the crown or the state.<sup>14</sup> Both denied their citizens basic human rights, protection against government abuses, access to a legitimate and impartial justice system, as well as an effective means by which they could present their grievances to appropriate authorities and seek redress of them.<sup>15</sup> Neither government promoted constitutional guarantees to safeguard the rights of individuals. To the contrary, oppression was the law of the land in both tsarist and communist Russia.

Though authoritarian rule was the hallmark of the monarchies, some limited legal reforms were nevertheless gradually introduced over a number of years. Far from the purpose of fostering democracy, however, these relatively minor changes were adopted solely to appease the wealthy and merchant classes who expressed occasional discontent with the autocratic dispensation of justice by the Tsars. The primary intent was to maintain the status quo, the rule of the Romanovs, not to alter it. In the 1770's, Empress Catherine instituted a system of separate

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> U.S. CONST. pmbl., *supra* note 2.

<sup>13</sup> *Id.*; see *supra* text accompanying note 4.

<sup>14</sup> MICHAEL KORT, NATIONS IN TRANSITION: RUSSIA, Introduction (Facts on File, Inc. 1998).

<sup>15</sup> *Id.*

courts for different classes of people, such as the gentry, merchants and free peasants to adjudicate local criminal and civil matters.<sup>16</sup> Jury trials, expanded legal education, a greater use of lawyers, elected rural governments called zemstvos, and city or district assemblies, were implemented in the latter half of the 19<sup>th</sup> century by Tsar Alexander II.<sup>17</sup> Under Tsar Nicholas II, the October Manifesto of 1905 was issued creating the Duma, Russia's first elected parliament, and its first Constitution.<sup>18</sup>

These sporadic social and political changes, however revolutionary they were to Russia, effected very few people and did little to encourage the development of a society based on the rule of law. The vast majority of Russians, most notably the serfs living in abject poverty, felt no discernable difference in their daily lives. The continual denial of basic human rights and individual freedoms to all citizens, as opposed to the liberties enjoyed by a select few, is a fundamental reason why the Russian people revolted against the Romanovs at the beginning of the 20<sup>th</sup> century and the Communists at the end of it.<sup>19</sup>

The abdication of Nicholas II in March of 1917 ended the three hundred and four year rule of the Romanovs. The rise to power of the Bolsheviks in November of that same year, and the subsequent murder of the Tsar and his family the following spring, removed the last remaining vestiges of the Imperial Russia era and began the Soviet Russia era. In many ways, the Bolsheviks ruled Russia in the same manner as did the Tsars, particularly in regards to the rule of law.<sup>20</sup> The Romanovs and the Communist Party both considered themselves immune from the law. They felt the law and the courts were merely arbitrary tools used to serve the needs

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<sup>16</sup> GORDON B. SMITH, *REFORMING THE RUSSIAN LEGAL SYSTEM* (Cambridge University Press 1996).

<sup>17</sup> *Id.* at 14, 24. See also KORT, *supra* note 14, at 19. In 1861, Tsar Alexander II abolished serfdom, two years before President Lincoln issued the Emancipation Proclamation. Though 20 million Russians were legally freed from the bondage of serfdom, they were not liberated from the grinding poverty they were living under. This interestingly parallels the current plight of the average Russian today. The populace may be free from communism, but Russia's pervasive social and economic troubles continue to burden most of its citizens. *Id.*

<sup>18</sup> KORT, *supra* note 14, at 25.

<sup>19</sup> *Id.*, at 21-22.

<sup>20</sup> *Id.*, at 24-26.

of the regime, not the people.<sup>21</sup> "Tsar or General Secretary stood above the laws as an instrument of rule."<sup>22</sup> The Tsars created different courts, not to serve justice, but to mollify the fledging democratic instincts of people while continuing the separation of the classes from one another and to maintain their centuries old dynasty.<sup>23</sup>

Ironically, after overthrowing a monarchy and creating two revolutionary governments<sup>24</sup> in the space of one year, the Russian people were left with less freedom than they had before. The dictatorship of the Tsar was now replaced by the even more repressive totalitarian dictatorship of the Bolsheviks. Once firmly entrenched, the Bolsheviks "turned the clock back,"<sup>25</sup> discarding most of the reforms implemented by the Tsars, and replaced them with "revolutionary justice, and the dictatorial trend, which advocated the use of the law and legal institutions to suppress all opposition."<sup>26</sup> They replaced most of the courts with 'informal tribunals' and 'comrade courts', again not for the primary purpose of promoting justice or protecting the individual from abuse by the state, but to promote the policies of the Communist Party and suppress any opposition to it.<sup>27</sup> All judges were now appointed directly by the party. Instead of being courts of justice, they became forums for propaganda and a means by which enemies of the state could be 'legally' disposed or severely punished. This often meant a death sentence or a long prison term in a Siberian labor camp, known as a gulag. Though judges did have some discretion in decisions regarding ordinary people involved in common criminal or civil matters, the social order as dictated by

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<sup>21</sup> PETER H. SOLOMON, JR., *REFORMING JUSTICE IN RUSSIA, 1864-1996: POWER, CULTURE AND THE LIMITS OF LEGAL ORDER*, 4 (M.E. Sharpe, Inc. 1997).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*, at 10-11. A provisional government ruled Russia from March to November 1917, between the abdication of Nicholas II and the Bolshevik revolution. *Id.*

<sup>25</sup> *Id.*, at 3. The Bolsheviks reversed the progress made in the Russian government created by the Tsars. *Id.*

<sup>26</sup> SMITH, *supra* note 16, at 31.

<sup>27</sup> *Id.*, at 59-60.

the Communist Party was always the primary purpose of Soviet 'courts'.<sup>28</sup>

'Telephone justice' became a common and notorious practice within the Soviet legal system. For example, if a particular case was too politically sensitive or involved an important issue or individual, it was not uncommon for the court to receive a phone call from a government or party official in the Kremlin, KGB,<sup>29</sup> or Communist Party headquarters, to 'advise' the judge in charge as to what the preferred outcome of the case should be.<sup>30</sup> 'Telephone justice' demonstrated the complete lack of independence the judiciary had from either the government or the political establishment and the blatant disregard those in power had for the rule of law.

The Communist Party enjoyed special privileges to keep itself and its members free from most legal entanglements, again outside the rule of law.<sup>31</sup> Often criminal charges against party members were simply dropped at the insistence of party officials. In fact, until 1962, prosecution of a party member without local party permission was illegal. If that became impossible to accept due to the nature of the crime, the defendant would first be expelled from the Party and then turned over to the local courts for the disposition they deemed proper. Expulsion became a *de facto* guilty verdict, as there would be no reason to remove someone from the Party if it was not already predetermined that they were going to be found guilty by the court. It could therefore be officially said that members of the Communist Party, who were of course 'model citizens', were never involved in criminal activity or stood trial for an offense against society.<sup>32</sup> The image of the Party as the moral and social leader of the nation, incapable of doing wrong, remained intact and untarnished.

Whatever legal progressiveness and growth, as slight as it may have been, that began to evolve in Tsarist Russia was eradicated in Soviet Russia. Instead of the rule of law, it was

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<sup>28</sup> *Id.*, at 60- 61.

<sup>29</sup> *Id.*, at 68. KGB defined is: Komitet Gosudarstvennoye Bezopastnosti (the Committee of State Security). *Id.*

<sup>30</sup> *Id.*, at 69.

<sup>31</sup> SMITH, *supra* note 16, at 109.

<sup>32</sup> *Id.*, at 110.



clearly rule by law, the law of the Communist Party. This would be the legal legacy of Russia for the next 74 years.<sup>33</sup>

The fall of the Soviet Union and creation of the Russian Federation in 1991, and adoption of a new Constitution in 1993, ended the dominance of the Communist Party over Russia and resulted in the formation of its current democratic government.<sup>34</sup> It appears that for the first time in their history, the Russian people and not the government itself or a political party are the primary reason for the existence of their government. This is what the Constitution of the Russian Federation pledges: "the state protection of human and civil rights and freedoms in the Russian Federation shall be guaranteed,"<sup>35</sup> but whether those words can be fully delivered upon is yet to be determined.

As the Russian experience with democracy and an independent judicial system is too nascent, it is difficult to render a fair judgment on its success or failure based on the limited history available today. What role the Constitutional Court will ultimately play in the development of democracy in Russia will only be determined when the Court compiles a generation's worth of jurisprudence for future scholars to examine and critique. We are nevertheless able to study the structure and history of the United States Supreme Court as a long established institution, and compare that with the Russian Constitutional Court, a new institution, and its promise for the future of a national legal system based on the rule of law. The results of this research and comparison may help us determine whether the Constitutional Court of the Russian Federation can lead the way to the creation of a true democratic society in the new Russia in the 21<sup>st</sup> Century.

## II. AMERICA AND RUSSIA IN THE 21<sup>ST</sup> CENTURY

There is little argument that the two most important nations of the 20<sup>th</sup> century were the United States of America and the former Union of Soviet Socialist Republics, the remnants of which is now the Rossiyskaya Federatsiya, the Russian Federation. Many other nations also commanded the world stage or influenced the

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<sup>33</sup> *Id.*, at 73-74.

<sup>34</sup> *Id.*, at 161-62.

<sup>35</sup> RUSS. CONST. art. 45, §1.

course of history for specific periods throughout the century. Most notably among them were Germany during World War I, Japan and Germany during World War II, Israel and Egypt during years of middle east conflict, and Great Britain and France during the demise of their colonial empires in Asia and Africa. Only America and Russia, however, have continuously effected the social, humanitarian, political, cultural, economic, scientific, and legal development and progress, or lack thereof, of mankind so consistently for the last 100 years. When future historians seek to describe opposite spectrums of the 20<sup>th</sup> century – east verses west, freedom verses slavery, progress verses regression – the models will be America and Russia.

Though significant issues have troubled America over the course of the 20<sup>th</sup> century, particularly the unfulfilled promise of true equal rights for all its citizens, she has nevertheless enjoyed a history of progressive growth and achievement to undoubtedly become the pre-eminent nation of the world today. During this period, the core of American society has remained relatively intact and its foundation firm. As we begin the next millennium, America's status as a stable and dominant nation is unlikely to change.

While having a considerable impact on world history, Russia has experienced tremendous internal turmoil and challenges to its very existence during the past century. The basic fabric of Russian society has undergone seismic changes; from a feudal monarchy, to a totalitarian dictatorship, and again to its present incarnation as a fragile democracy.<sup>36</sup> In contrast to America, Russia did not experience relative stability or consistent social development during the 20<sup>th</sup> century because of the multiple transformations it endured. Only the resilience of its people, not the governments that ruled them, have enabled a Russian identity to survive throughout the century.

Even as it struggled within, Russia, as the Soviet Union, grew to be powerful enough to seriously challenge the United States for the mantel of world leader at certain times during the century. The Cold War, the arms race, particularly the development of nuclear weapons, and the space race all

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<sup>36</sup> See *supra* notes 17-20, 24-26, 33-34.

demonstrated Russia's ability to match the United States in philosophical debate, military might, and technological development. Today that challenge is no more. America has become the world's only super power, while Russia has been relegated to second rate status, reluctantly realizing that it would never dominate the United States or subvert its strong tradition of freedom and democracy through the advocacy of totalitarianism and socialism.

As we begin the 21st century, America and Russia are two nations on two entirely different paths of progress with two separate sets of challenges to pursue. For America, the challenge in the coming century will be whether it can retain its super power status while remaining committed to the principles of democracy, constitutionally protected freedoms, and a legal system that operates under the rule of law for the benefit of the people. For Russia, the primary challenge will be simply to survive as a nation. If it does, will its fledgling independent legal system, with the Constitutional Court as the guardian of the Russian Constitution, be able to establish and promulgate, for Russian citizens, a semblance of the rights and protections we in America have been fortunate to enjoy for more than two centuries? Today, Russia finds itself in the throes of another cathartic rejection of its past, hoping to once again find a new role for itself in the world order as it did at the beginning of the 20<sup>th</sup> century. To achieve that objective, Russia must rise above its past and create a society it has never known or embraced, a society based on the rule of law.

### **III. CONSTITUTIONAL AUTHORITY FOR THE SUPREME COURT AND THE CONSTITUTIONAL COURT**

For a society based on democratic principles to flourish, three primary components must exist and be accepted by the society: a written Constitution that guarantees individual liberties, an independent judiciary to protect those liberties, and the fostering of a "legal consciousness"<sup>37</sup> wherein the citizenry embraces the rule of law, making it an integral part of their society. While Russia

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<sup>37</sup> ROBERT B. AHDIEH, *RUSSIA'S CONSTITUTIONAL REVOLUTION, LEGAL CONSCIOUSNESS AND THE TRANSITION TO DEMOCRACY, 1985-1996*, 3 (The Pennsylvania State University Press, University Park, Pennsylvania 1997).

has created a new Constitution and established a Constitutional Court, as well as an independent national judiciary, whether it has embraced the rule of law remains to be determined. At first impression, the answer may appear to be simple, but it is complicated by the problems burdening modern Russia, thus preventing an accurate assessment from being formulated. Clearly, democracy has not taken full root in Russia to date. Whether that is the result of a rejection of democracy or a temporary inability to embrace it due to massive economic difficulties and social instability must be examined.

Many in Russia have long believed that creation of a democracy based on constitutional law was the course Russia had to pursue to create a modern nation. The late Andrei Sakharov, renowned physicist and Nobel Peace Prize winner, was an early proponent of drafting a new Soviet Constitution emphasizing human rights and a limited government responsive to the people.<sup>38</sup> His proposals "instilled in [the] public consciousness a sense of constitutionalism's relevance to their own lives. With it, interest in the law, if not respect for or understanding of it, spread."<sup>39</sup> During the August 1991 attempted coup against then President Mikhail Gorbachev,<sup>40</sup> Boris Yeltsin<sup>41</sup> stated, "We appeal to the citizens of Russia to give an appropriate rebuff to the putschists (coup leaders) and demand a return of the country to normal constitutional development."<sup>42</sup> The Preamble to the 1993 Constitution of the Russian Federation pledges that "human rights and liberties, civil peace . . . equality and self-determination of peoples, . . . the unshakeable nature of [Russia's] democratic foundations" are the priorities of Russia.<sup>43</sup> Valery Zorkin, the former and first

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<sup>38</sup> *Id.*, at 25.

<sup>39</sup> *Id.*

<sup>40</sup> General Secretary of the Soviet Communist Party from March 11, 1985 to August 24, 1991. He also served as President of the Soviet Union until December 25, 1991.

<sup>41</sup> President of the Russian Federation, 1991-1999. Vladimir Putin is the current President of the Russian Federation.

<sup>42</sup> How ironic that a speech defending the importance of constitutional government led to the reinstatement of the communist leader of the Soviet Union.

<sup>43</sup> AHDIEH, *supra* note 37, at 1 (citing RUSS. CONST. pmbl. 1993).

Chairman of the Constitutional Court stated, "The constitution must show us how we ought to live."<sup>44</sup>

For the reformers, history had demonstrated that totalitarianism and the lack of a national legal consciousness had brought Russia to the brink of economic, political, and social collapse. To preserve its status as an independent nation state, and improve the lives of the long suffering Russian people, a constitutional democracy was the only recourse. With a democracy, the people, through freely elected representatives, fair and impartial referendums, open and public debate, participation in the decision making process of the country, equal and justified application of the law, and not the self-anointed leaders, would command the path Russia needs to follow and ultimately make the choices necessary to save her.

With the elevation of Mikhail Gorbachev to the leadership of the Communist Party in 1985, the turn to democracy began with a series of reforms that allowed for greater participation in the process of governance by the public at large. The creation of the Congress of People's Deputies was one of the more significant reforms under Gorbachev. It was the first publicly elected legislative body in the history of the Soviet Union to have non-communists among its members.<sup>45</sup> The advent of glasnost,<sup>46</sup> perestroika,<sup>47</sup> and demokratizatsiya<sup>48</sup> as official policies of the Party opened the door to frank and honest debates about the true state of the Soviet Union, as opposed to the propaganda previously being promoted to hide the reality of a nation in serious trouble. Gorbachev initially sought to spark only economic reform, but the new openness led to eventual discussion of the wide range of chronic problems in Soviet society. Reluctantly, even the most ardent foes of change and defenders of the Communist state, came to realize that something had to be done, not only to save Russia,

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<sup>44</sup> *Id.*, at 1.

<sup>45</sup> *Id.*, at 25-27.

<sup>46</sup> Instituted to reduce censorship and allow more truthful information to be made available to the Russian people about their country and the world around them.

<sup>47</sup> It means restructuring. Originally meant for the economy, it soon extended to Russian life in general.

<sup>48</sup> To allow for greater public participation in the creation of government policies.

but themselves as well. The first major initiative was the rejection of the old Soviet Constitution and creation of a new democratic based document.

Russia's current Constitution, adopted in 1993, is the fifth Constitution it has had since 1917. The significant differences between all the previous documents and the current one are three-fold. The 1993 Constitution was the only proposal freely debated throughout the nation, the only one adopted by public referendum, and the only one not to recognize the Communist Party as "the leading and directing force of Soviet society and the nucleus of its political system."<sup>49</sup> The 1918, 1924, 1936, and 1977 Constitutions were products of the Communist Party and only marginally different from each other. The only discussions regarding these documents were those held by the Supreme Soviet<sup>50</sup> (in the case of the 1918 Constitution, it was the Bolsheviks) and focused on insuring and promoting the objectives of the Party. In approving these Constitutions, only the Bolsheviks or members of the Supreme Soviet were permitted to vote and not a single vote in opposition was ever recorded. With removal of Article 6<sup>51</sup> and the advent of open and democratic debate, the Russian people had their first genuine opportunity to participate directly in the creation of a national Constitution. The subsequent adoption of the Constitution of the Russian Federation by public referendum in December of 1993 completed the first major step necessary for the creation of a flourishing democratic society, a written Constitution created by the people on behalf of themselves.<sup>52</sup>

The path to democracy has been undermined, however, by the burdensome social upheaval that resulted from the reforms implemented by perestroika and constitutional reform. Virtually every Russian alive today, over the age of ten, has known no other way of life other than one under communism. With the demise of the Soviet Union, the social infrastructure they had been

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<sup>49</sup> SSSR. CONST. art. 6 (1977).

<sup>50</sup> Deputies of the Communist Party who in effect made all the decisions for the government.

<sup>51</sup> RUSS. CONST. chap. 1, art. 13 (1993) states in pertinent part: "No ideology shall be established as a state or compulsory ideology" is a simple but powerful rebuff to the legacy of the now infamous former Article 6. *Id.*

<sup>52</sup> SMITH, *supra* note 16, at 102-03.

indoctrinated to rely on was disassembled. State run industries, which virtually guaranteed a job for life, have been converted into market orientated, privately owned industries resulting in a near 50% reduction in Russia's GNP<sup>53</sup> and wide spread unemployment. The government confiscation of old ruble notes, and the numerous devaluations of it, have shattered public confidence in the merits of a floating currency. Devaluation has also decimated the already meager savings and pensions of millions of citizens, particularly older persons. Public and critical dissent against the government is now permitted without fear of official retribution. Freedom of speech and the press openly question the very core elements of Russian society. The Soviet Union itself has been dissolved into 15 independent nations, which has spawned similar separatist movements, based on religion and ethnicity, within the Russian Federation, particularly in the Muslim dominated regions of Chechnya and Dagestan. The Communist Party has been removed as the central and all-encompassing focus of life and replaced with the vague unfulfilled promises of democracy and a multitude of political parties all pledging to be the salvation of Russia. For the average Russian citizen, the confusion and turmoil brought by reform has been overwhelming and bewildering.

Despite these severe hardships, democracy and a society based on the rule of law, continue to be viewed as the only possible way to save Russia from itself.

In the eyes of many, the law is not among the critical concerns facing Russia at this juncture in its history. Even less so, constitutionalism. Such matters do not share the limelight with crime, inflation, and political conflict, in either mass or elite psychology. Yet constitutionalism is among the first principles of both democracy and the free market. It lies at the heart of Russia's future development. Absent legal stability and constitutional order, no political or economic reform will survive, let alone succeed. The development of constitutionalism is thus a matter of urgent public policy.<sup>54</sup>

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<sup>53</sup> Gross National Production.

<sup>54</sup> AHDIEH, *supra* note 37, at 1-2.

As significant as the adoption of the 1993 Constitution itself was, what the contents of the Constitution are, and what they represent, is even more important. With the removal of Article 6, which was the cornerstone of the Communist philosophy in each of the previous documents, the principal focus of the current Constitution became the rights of citizens as opposed to the rights of the state. The Constitution is divided into 2 parts, 9 chapters,<sup>55</sup> and 137 individual articles. Chapter 2 contains 48 articles specifying the "Human and civil rights and freedoms" guaranteed to every Russian citizen. They include the right to privacy (Article 23), the right to freedom of movement within the nation (Article 27), freedom of religion (Article 28), freedom of speech (Article 29), and the right of free association (Article 30) and peaceful assembly (Article 31). These rights are further protected by guarantees of access to the judicial system and to specific legal protections and procedures should any citizen become involved with the judicial system. "[T]he right to freedom and personal inviolability," and "[a]rrest . . . and holding in custody shall only be authorized by a judicial decision" are protected by Article 22, sections one and two. Article 33 provides that citizens "shall have the right to appeal personally" or to send representatives before bodies of the federal and local governments to appear on their behalf. Article 45 provides that the state will "guarantee protection of human and civil rights and freedoms in the Russian Federation." Article 48 affirms that "Each person shall be guaranteed the right to receive qualified legal assistance." "Each person accused of committing a crime shall be presumed innocent" is a right under Article 49. Article 50 provides that "[n]o person may be tried twice for the same crime."

The clear intent of Chapter 2 is to establish, in permanent written form, that the private actions of the individual, not in conflict with any criminal prohibitions, cannot be interfered with

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<sup>55</sup> RUSS. CONST., pt. 1, ch. 1. States: The principles of the constitutional system. ch. 2. Human and civil right and freedoms. ch. 3. The organization of the Federation. ch. 4. The President of the Russian Federation. ch. 5. The Federal Assembly. ch. 6. The Government of the Russian Federation. ch. 7. Judicial power. ch. 8. Local self-government. ch. 9. Constitutional amendments and revision of the Constitution. pt. 2. Concluding and transnational provisions.



by the government.<sup>56</sup> Where a citizen is brought before the courts of Russia, by constitutional right, they are entitled to certain and specific legal protections. Chapter 2 is a comprehensive legal 'umbrella' providing due process of law protection for all Russian citizens.

Chapter 7 of the Constitution is entitled 'Judicial power' and specifies that "Justice in the Russian Federation shall be administered by the courts of law *only*."<sup>57</sup> In addition, "Judges shall be independent and subject only to the Constitution of the Russian Federation and federal law."<sup>58</sup> The judiciary of the Russian Federation is constitutionally guaranteed and mandated to be an independent branch of the government, beholden to no one but the Russian people for the purpose of the administration of justice under the law. In addition, no other agency, such as the legislative or executive branches of government, or any political organization, can independently administer justice or interfere with the courts. Most notable in Chapter 7 is Article 125, authorizing the establishment of the Constitutional Court of the Russian Federation, the procedures by which it may operate, its relationship to the other courts in the federal judiciary, the jurisdiction of the Court, and the manner in which issues may be brought before the Court, and by whom.<sup>59</sup>

In establishing the Supreme Court and the Constitutional Court, America and Russia took the same general approach. Though the Russian Constitution is more specific about the Constitutional Court, each Constitution contains a broad declaration regarding the conceptual nature of their court and limited details regarding how it should function. Each court is the highest court of the land in their respective countries and represents the final forum where the law is decided upon and from which there is no legal appeal. Each court is also empowered with the authority of constitutional review of the laws of their legislatures and the actions of their executive branches in relation to the law. Both courts were created with the ideal that an independent judiciary, free from domination by other branches of

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<sup>56</sup> RUSS. CONST. chap. 2, art. 17.

<sup>57</sup> RUSS. CONST. chap. 7, art. 118, sec. 1. (Emphasis added).

<sup>58</sup> RUSS. CONST. chap. 7, art. 120, sec. 1.

<sup>59</sup> RUSS. CONST. chap. 7, art. 125.

the government, was necessary to protect the people from the government. Both countries have incorporated these declarations as separate articles within their Constitutions.<sup>60</sup>

"Of all the experiments in government sketched by the United States Constitution, the Supreme Court was perhaps the least well defined."<sup>61</sup> The brevity of the Constitution's mandate on the Court however masked the magnitude of change that occurred from the Articles of Confederation. "The judicial power of the United States, shall be vested in one Supreme Court . . . ."<sup>62</sup> With those few words, the United States Supreme Court, a single federal judicial forum, superior to any court which operated under the Articles of Confederation, came into conceptual existence on March 4, 1789.<sup>63</sup>

The intention of the Constitutional Convention was to be more than just brief. It specifically sought to establish only the broad skeletal outline of federal judicial power and leave the development of the specifics to future Congresses. The First Congress quickly undertook that task with the adoption of the Judiciary Act of 1789, authorizing the inaugural Supreme Court to consist of a Chief Justice and five Associate Justices, as well as establishing three Circuit Courts of Appeal and a district court in each of the 13 states.<sup>64</sup> The new nation now had the beginnings of a single federal judiciary to replace the independent court systems in each state. Subsequent Congresses have continued to modify and expand the structure of the federal judiciary over the past two centuries. This has included the establishment of special courts, including the United States Courts of Federal Claims, Tax Court, Court of International Trade, Court of Appeals for the Armed

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<sup>60</sup> U.S. CONST. art. III., RUSS. CONST. chap. 7, art. 125.

<sup>61</sup> Paul M. Barrett, *Introduction to LISA PADDOCK, FACTS ABOUT THE SUPREME COURT OF THE UNITED STATES* xvii (H. W. Wilson Co. 1996).

<sup>62</sup> U.S. CONST. art. III, § 1.

<sup>63</sup> U.S. CONST. art. XII. The Constitution of the United States was adopted on July 2, 1788 after New Hampshire became the ninth state to ratify it several weeks prior. The Articles of Confederation governed the thirteen American colonies from March 1, 1781 until March 4, 1789. The Constitution went into effect on March 4, 1789.

<sup>64</sup> See *supra* note 4 and accompanying text.

Forces, Court of Veterans Appeals, and Administrative Law Judges with various jurisdictions.<sup>65</sup>

In developing a new Constitution, the Russians looked to the west, particularly Europe with whom they share a civil law tradition, for concepts regarding a court system, a constitutional court, and a new civil code. Russia's 'return' to Europe is a historical reminder of Tsar Peter the Great<sup>66</sup> and his efforts to create closer cultural and social ties between his nation and its European neighbors. The founding of St. Petersburg in 1703 was intended to establish a 'window to the west' for Russia. The vast canal system and the homes and government buildings constructed throughout the city were a purposeful attempt to replicate the best in architectural and cultural style of Italy and France and create a 'Venice of the north'. Ironically, Russia is again imitating other successful nations in its struggle to create a western style democracy.

A constitutional court is a long established tradition in many countries, such as, Switzerland, Holland, Austria, Italy, France, and Germany, but new to Russia. Using the German Federal Constitutional Court<sup>67</sup> as its model, the Russians determined that their court would also be independent from any other judicial forum, as well as from the government, and have the power of constitutional review of the law, both pre- and post-enactment.<sup>68</sup> The pre-enactment provision in essence allows the Court to issue advisory opinions about pending legislation or possible actions of the executive branch.<sup>69</sup> There is no corresponding authority in American federal courts to issue similar advisory opinions. All matters brought before the courts must be a current and active controversy. In addition, under common law tradition, particularly in America, a separate constitutional court also does not normally exist. The jurisdiction of such a court is instead integrated with that of the 'regular' federal judicial system.

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<sup>65</sup> *Id.*

<sup>66</sup> The reign of Tsar Peter the Great lasted from 1694-1725.

<sup>67</sup> Das Bundesverfassungsgericht.

<sup>68</sup> RUSS. CONST. chap. 7, art. 125.

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

The precursor of the Constitutional Court was the Committee for Constitutional Supervision,<sup>70</sup> established in December of 1989 by the Congress of People's Deputies. Part of the judicial reforms instituted by Gorbachev, the intention of forming the Committee was to enhance the independence of the judiciary and remove it from the control of the Communist Party. The Committee had limited powers to 'recommend' that laws be declared unconstitutional and to suspend laws that they determined had violated a citizen's rights in some manner.<sup>71</sup> For the first time however, judicial appointments were not being made directly by the Communist Party, but by the Congress of Deputies. A semantic change to some critics, as the Congress was dominated by Communists, it still represented a shift from the Party being "the leading and directing force of Soviet society and the nucleus of its political system."<sup>72</sup>

The Committee for Constitutional Supervision lasted only one year. Through further reforms, it was replaced by the first Constitutional Court in December of 1990 under the auspices of the Soviet Union's 1977 Constitution. Though the initial appointments to the Court were highly criticized as lacking any prior judicial experience, and for being blatantly partisan choices, its establishment was another important milestone in the creation of a democracy based on the rule of law. It marked the first time in Russia that an independent court was created for the purpose of constitutional review.<sup>73</sup> That in and of itself was a revolutionary change and reflected the successful efforts of democratic reformers to break from the past.

The Constitutional Court was reorganized into its current format in December of 1993, when the new Constitution of the Russian Federation<sup>74</sup> was adopted by public referendum. As is the case with the United States Constitution, the 1993 Constitution contains relatively few words directly related to the establishment

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<sup>70</sup> АНДИЕВ, *supra* note 37, at 28.

<sup>71</sup> *Id.*, at 28-29

<sup>72</sup> СССР. CONST. art. 6 (1977).

<sup>73</sup> See *supra* note 59 and accompanying text.

<sup>74</sup> RUSS. CONST. (1993). The Constitutional Court was created under chapter 7, article 125 of the Constitution of the Russian Federation.

of the Court and the subjects of its jurisdiction.<sup>75</sup> Enabling legislation specifying the rules and regulations on how the Court would function, and under what legal conditions, was signed into law by President Yeltsin on July 21, 1994.<sup>76</sup> The law, entitled "The Federal Constitutional Law On the Constitutional Court of the Russian Federation", contains more than 17,000 words and details the organization of the Court,<sup>77</sup> the requirements, responsibilities, and rights of Judges,<sup>78</sup> the rules and regulations by which the Court must operate,<sup>79</sup> the designation of Russian as the official language of the Court,<sup>80</sup> the reasons and grounds by which a case may be brought before the Court,<sup>81</sup> rules regarding the presentation of records, documents, pleadings, and witnesses,<sup>82</sup> and procedures regarding charging the President with High Treason or other grave offense.<sup>83</sup> The all-encompassing nature of the federal constitutional law leaves little room for the Court to exercise any authority beyond that specifically permitted.

The establishment of the Constitutional Court and the independent national judiciary marks the second major component necessary for Russia to become a flourishing democracy. The Court's ability to act independently, free from the direct dictates of the ruling body, permits it to consider the law, and the controversies at issue with the law, on its own merits. The law now becomes the focus of the applicable issue, not the issue itself, which previously contorted the law to conform to the needs and dictates of the ruling class. Providing the Constitutional Court

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<sup>75</sup> See *supra* note 59 and accompanying text.

<sup>76</sup> *Id.*

<sup>77</sup> FEDERAL LAW "ON THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION", ch. I. General Provisions.

<sup>78</sup> *Id.*, ch. II. Status of Judges of the Constitutional Court of the Russian Federation. *Id.*

<sup>79</sup> *Id.*, ch. III. Structure and Organization of Activity of the Constitutional Court of the Russian Federation. *Id.*

<sup>80</sup> *Id.*, ch. IV. Principles of the Constitutional Judicial Proceedings. *Id.*

<sup>81</sup> *Id.*, ch. V. Petition to the Constitutional Court of the Russian Federation. *Id.*

<sup>82</sup> FEDERAL LAW "ON THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION," ch. VII. General Procedural Provisions of Consideration of Cases in the Constitutional Court of the Russian Federation. *Id.*

<sup>83</sup> *Id.*, ch. XV. Consideration of cases on Delivery of Advisory Opinion on Observance of Prescribed Procedure for Charging the President of the Russian Federation with High Treason or with commission of Other Grave Offense. *Id.*

remains an independent body, and its decisions adhered to by the government as well as the people, the Court will be respected and remembered as the protector of the new Russian democracy.

#### IV. UNCERTAIN BEGINNINGS

Both the United States Supreme Court and the Constitutional Court of the Russian Federation struggled in their early years to establish themselves as legitimate and viable legal entities. Each had to navigate minefields of political debate and partisan adversity to maintain their independent status while demonstrating their importance and relevancy to their countrymen. The American judicial system, however, developed in a much more orderly manner than did the Russian system, which was created in a highly volatile political atmosphere. As distinct as their developmental paths have been, the early history of each court reflects interesting parallel achievements.

Though the common law tradition of England was adopted as the legal jurisprudence of America as well, the court structure that would apply the law was new.<sup>84</sup> Under the Articles of Confederation, there existed no federal court system.<sup>85</sup> Each state employed its own independent system of courts to adjudicate all matters, local and national.<sup>86</sup> This resulted in significantly different standards of justice from state to state.<sup>87</sup> A criminal offense in one state may not have been one in another. Civil disputes between citizens of different states often went unresolved as a litigant would simply ignore the jurisdiction of the other litigant's home state. Judgments rendered in one state were rarely enforced in other states and no superior or final tribunal existed to adjudicate differences between courts of different states. These weaknesses created little respect for the rule of law, certainly on a national level. The new federal judiciary sought to standardize the application and enforcement of the law, as to federal matters, for all citizens. Regardless of the state one resided or worked in, the

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<sup>84</sup> 15A AM. JUR. 2D *Common Law* §1 (2000).

<sup>85</sup> WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW CASES AND MATERIALS 16 (The Foundation Press, Inc.) (9<sup>th</sup> ed. 1993).

<sup>86</sup> 16 AM. JUR. 2D *Constitutional Law* § 8 (2000).

<sup>87</sup> *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 74 (1938).

intention was to apply the law in the same equitable manner before all federal courts of similar jurisdictions.

The Supreme Court was clearly the weakest branch of the new government when first created as it had no dedicated facilities, no precedent to rely upon, and no enforcement mechanism. The initial activities of the Court did not do much to enhance its stature. On the first day of the Court's first session, February 1, 1790, no official action could be undertaken due to the lack of a quorum. Its second session, in the fall of that year, lasted only two days for lack of any cases to review. In fact, no cases were presented to the Court until 1793. Justice John Rutledge originally served on the Court for thirteen months before resigning, never having attended a single session.<sup>88</sup> The Court's first Chief Justice, John Jay, resigned after five years and later proclaimed that the Court lacked "energy, weight and dignity."<sup>89</sup>

Despite these early tribulations, the Supreme Court has remained intact as it was first created and has never been seriously threatened or compromised as an institution, absent some saber rattling by an occasional politician. The creation of a singular federal judicial system had been a major unifying force in the new nation and the holdings of the Court kept the judiciary itself unified in form and function. Case by case, the Court began to build its reputation of being a defender of the Constitution and the rights of the people under it. The advent of strong Chief Justices, such as John Marshall,<sup>90</sup> also enhanced the Court's image as being independent and determinate.

Unquestionably, over the past two centuries, the United States Supreme Court has been the single most influential force in shaping American society. Today, the Supreme Court stands as not only the world's most powerful and longest serving Court, but more importantly, its most influential Court as well.

Though less than ten years old, the Constitutional Court of the Russian Federation has experienced a "short but dramatic

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<sup>88</sup> Rutledge served again on the Court as Chief Justice for one month in 1795.

<sup>89</sup> PADDOCK at 19.

<sup>90</sup> John Marshall served as Chief Justice from 1801-1835.

history,”<sup>91</sup> according to Justice Nikolai Vedernikov.<sup>92</sup> Just two years after its creation, the Court became embroiled in the political struggle between President Yeltsin and the then-existing Congress of People’s Deputies.<sup>93</sup> The President and the Congress had serious disagreements over the substance of a new Constitution and the process by which it would be created, causing gridlock in the government.<sup>94</sup> On September 21, 1993, President Yeltsin issued a presidential decree<sup>95</sup> abolishing the Congress of People’s Deputies.<sup>96</sup> The Deputies refused to relinquish their offices and subsequently barricaded themselves in the White House.<sup>97</sup> On October 4, 1993, the conflict culminated in a military assault ordered by Yeltsin against the defiant Deputies.<sup>98</sup> Within hours, after the death of hundreds of people, the Deputies surrendered.<sup>99</sup>

Yeltsin had decided to end the conflict quickly because he believed the Deputies, who had stored considerable heavy weaponry in the White House, were seeking to incite armed revolt against the government and remove him from office.<sup>100</sup> An open revolt, or full-fledged civil war, would have ended Russia’s lethargic but steady path towards democracy. Though the government had become deadlocked over the course to follow, they were at least debating constitutional change in a democratic manner. Yeltsin perhaps feared that the actions of the rebellious Deputies would end the democratic movement and return Russia to being a soviet style society.<sup>101</sup> One could argue that in removing

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<sup>91</sup> Justice Nikolai T. Vedernikov, Justice of the Constitutional Court 1991-1999, Remarks at a meeting with the Touro Law School Summer Program in Moscow (June 1999).

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

<sup>93</sup> AHDIEH, *supra* note 37. The Congress of People’s Deputies was the legislative body of the Soviet Union, then Russia from 1989 to 1994. *Id.*

<sup>94</sup> *Id.*, at 52.

<sup>95</sup> Presidential Decree No. 1400, “On the Step-by-Step Constitutional Reform of the Russian Federation”.

<sup>96</sup> AHDIEH, *supra* note 37, at 66.

<sup>97</sup> *Id.* at 67. The White House was the seat of the Congress of People’s Deputies. *Id.*

<sup>98</sup> AHDIEH, *supra* note 37, at 68.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 69.

<sup>101</sup> *Id.* at 70.



the obstacle of the Congress of Deputies, Yeltsin was seeking to preserve the constitutional movement.<sup>102</sup>

On October 17, 1993, Yeltsin suspended the operation of the Constitutional Court, accusing the Court of acting beyond its constitutional boundaries by becoming involved in the partisan dispute between the legislative and executive branches.<sup>103</sup> The Court had compromised its 'neutral status' when, on his own initiative, Chairman Valery Zorkin called an emergency session to have Yeltsin's decree declared unconstitutional as well as calling for the Congress to impeach the President.<sup>104</sup> Zorkin also attempted to mediate the conflict just prior to the armed assault.<sup>105</sup> Though Zorkin was viewed by many as merely acting as a patriot seeking to end the conflict, it was clearly a role not suited for the Chairman of the supposedly neutral Constitutional Court.<sup>106</sup> Prior to the October 1993 crisis, Zorkin had also been regularly issuing public comments on cases pending before the Court or publicly denouncing presidential decrees issued by Boris Yeltsin.<sup>107</sup>

Ultimately this crisis led to a referendum on a new Constitution, the creation of the State Duma<sup>108</sup> and Federation Council,<sup>109</sup> new legislative bodies of the Russian Federation to replace the Congress of Deputies, and a reorganization of the Constitutional Court.<sup>110</sup> Prominent among the new Constitution's mandates is that the Court is prohibited from any future involvement in political questions on its own initiative. Provisions that the Court may only adjudicate, "cases about compliance with the Constitution of the Russian Federation,"<sup>111</sup> investigate "complaints about violation of constitutional rights and freedoms of citizens,"<sup>112</sup> "interpret the Constitution of the Russian

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<sup>102</sup> *Id.* at 67-71.

<sup>103</sup> SMITH, *supra* note 16, at 138.

<sup>104</sup> *Id.* at 137. See also AHDIEH, *supra* note 37, at 66.

<sup>105</sup> AHDIEH, *supra* note 37, at 86.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 87. See also SMITH, *supra* note 16, at 136-37.

<sup>108</sup> AHDIEH, *supra* note 37, at 87.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 77.

<sup>111</sup> RUSS. CONST. art. 125, §2.

<sup>112</sup> *Id.* at §4.

Federation,”<sup>113</sup> and issue a ruling regarding “compliance with established procedures when charging the President of the Russian Federation with state treason or other grave crime,”<sup>114</sup> were carefully articulated in the new Constitution.<sup>115</sup> In return, a guarantee of power to “autonomously and independently exercis[e] judicial authority”<sup>116</sup> regarding constitutional issues brought before the Court were also written into law.<sup>117</sup>

Prior to the establishment of democratic reforms, the judicial system in the former Soviet Union was controlled by the political system. The 1993 Constitution outlawed all interference with the judicial process.<sup>118</sup> Under Chapter 7 of the Constitution of the Russian Federation, “[j]udges shall be independent and shall obey only the Constitution of the Russian Federation and the federal law.”<sup>119</sup> Protecting the independence of the Constitutional Court, as well as that of the entire judicial system, was of primary and vital interest to the reformers as they knew democracy could not succeed without an independent judiciary. By removing the Court from the center of any political conflict, its independence was greatly enhanced. The image of the Court as a neutral forum, badly tarnished by its direct involvement in the partisan battle of the October 1993 crisis, was being restored.

The reformation of the Constitutional Court has been hailed as one of the most significant and potentially lasting contributions of President Yeltsin.<sup>120</sup> Though his use of armed force whenever necessary is reminiscent of the brutality of the former Tsars and Communist leaders, Boris Yeltsin will likely be remembered more for his direct hand in advancing democracy in Russia, should it ultimately survive.

## V. STRUCTURE OF THE COURTS

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<sup>113</sup> *Id.* at §5.

<sup>114</sup> *Id.* at §7.

<sup>115</sup> RUSS. CONST. art. 125.

<sup>116</sup> FEDERAL CONSTITUTIONAL LAW “ON THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION” OF JULY 21, 1994, Sec. One, ch. I, art. 1.

<sup>117</sup> *Id.*

<sup>118</sup> RUSS. CONST. art. 125

<sup>119</sup> RUSS. CONST. art. 120, §1.

<sup>120</sup> SMITH, *supra* note 16, at 133.

The American federal court system is a single integrated vertical structure with the Supreme Court at the apex, the circuit courts of appeal as the second tier, and district courts as the lower tier. All disputes, civil and criminal, generally begin in the district courts as the courts of first impression. Unless a subject of original jurisdiction, all matters before the Supreme Court are presented by appeal only, through a writ of *certiorari*, including issues regarding the constitutionality of any law.

The Russian judicial system consists of three parallel court structures operating independent of each other.<sup>121</sup> The Courts of General Jurisdiction handle all civil and criminal matters and the Arbitrazh Courts all commercial disputes.<sup>122</sup> Each has its own structure of local district courts (courts of first instance), intermediate courts and a Supreme Court.<sup>123</sup> The third court is the Constitutional Court, which considers only questions regarding the constitutionality of federal laws and decrees.<sup>124</sup> In some cases the decisions of the Court of General Jurisdiction or the Arbitrazh Court are presented to the Constitutional Court for review and, in such circumstances, only to determine whether or not their decisions are in compliance with the Constitution of the Russian Federation.<sup>125</sup> Requests for constitutional review may be presented to the Court by the Russian Federation President, the Federation Council or State Duma,<sup>126</sup> one-fifth of the members of either house, the General Jurisdiction or Arbitrazh Supreme Courts, or the governments or legislatures of the subjects.<sup>127</sup> The Court reserves the right to choose the cases it wishes to review.

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<sup>121</sup> *Id.* at 132. See also Vasily A. Vlasihin, *Toward a Rule of Law and a Bill of Rights for Russia*, in *LAW AND DEMOCRACY IN THE NEW RUSSIA* 50 (Bruce L.R. Smith & Gennady M. Danilenko eds., The Brookings Institution 1993).

<sup>122</sup> *Id.*

<sup>123</sup> Vasily A. Vlasihin, *Toward a Rule of Law and a Bill of Rights for Russia*, in *LAW AND DEMOCRACY IN THE NEW RUSSIA* 50 (Bruce L.R. Smith & Gennady M. Danilenko eds., The Brookings Institution 1993).

<sup>124</sup> RUSS. CONST. art. 125, §2. See also SMITH, *supra* note 16, at 134.

<sup>125</sup> SMITH, *supra* note 16, at 134. The Russian Federation consists of 89 subjects (states).

<sup>126</sup> The Federation Council and the State Duma are the upper and lower houses of the Russian Federation legislature.

<sup>127</sup> RUSS. CONST. art. 125, §2.

The American judicial system is bifurcated, with separate federal and state court systems. In general, the structure of the state courts mirror that of the federal system, vertical in nature with district courts superceded by appellate courts of review and a single Supreme Court<sup>128</sup> as the court of last resort. The distinction is that the state courts adjudicate only state matters under the laws of that individual state, while the federal courts may address issues under federal law irrespective of the state where the issue arises.

The Russian judicial system is a federal system with no corresponding 'state' courts though several Russian subjects have their own Constitutional Courts.<sup>129</sup> These courts have no jurisdiction other than to review the constitutionality of their 'state' constitutions.<sup>130</sup> All criminal and civil matters are adjudicated in the federal courts. This reflects the historical nature of Russian society, heavily centralized with limited power given to regional or local authorities. According to Mikhail Marchenko, Director of the Moscow State University Department of Law and Political Science, the Russian legal system "is a reflection of the Russian desire for bolshoi [big] bureaucracies. It is our nature, our culture to embrace bureaucracy and difficult to abandon."<sup>131</sup> It continues to be a pervasive problem in Russian society today.

The system may be bureaucratic, but the fact that it exists at all is revolutionary. Russia has never had an independent court system. The success of the courts is integral to that of democracy in Russia. Without the courts as independent entities to promote the rule of law, the rights of the people cannot be protected. If the rights of the people cannot be protected, they have no need or respect for the nation, nor will they support it. By establishing an independent judiciary and a Constitutional Court empowered to freely decide the constitutionality of the nation's law and the

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<sup>128</sup> In New York State, the highest court is the Court of Appeals. The Court was established by adoption of the 1846 New York State Constitution and replaced the Court for the Trial of Impeachments and Correction of Errors. The Supreme Courts are trial level courts.

<sup>129</sup> RUSS. CONST. Art. 125, §2.

<sup>130</sup> *Id.*

<sup>131</sup> Mikhail Marchenko, Director of the Moscow State University Department of Law and Political Science, Remarks at a meeting with the Touro Law School Summer Program in Moscow (June 1999).

actions of its leaders, Russia has chosen to emulate America as the way to achieve national longevity and stability.

The Supreme Court and the Constitutional Court are in theory and general practice independent entities within their respective governmental structures. Nevertheless, they are dependent on their executive and legislative branches for such matters as appointments, tenure, composition of the Court, and funding to operate them, as well as pay for the Justices and their staffs.<sup>132</sup>

The United States Supreme Court has nine members: a Chief Justice and eight Associate Justices.<sup>133</sup> The Court sits *en banc* in review of all matters brought before the Court, except grants of *certiorari*, which require only a minimum of four Justices to approve.<sup>134</sup> Only 1% to 2% of the thousands of cases presented to the Supreme Court each year are approved for oral argument and a subsequent written opinion.<sup>135</sup> If a case is denied a writ of *certiorari*, the holding of the lower court is upheld as final. Justices are appointed for life and require nomination by the President and confirmation by a majority of the Senate for ascension to the high Court.<sup>136</sup> There are no age restrictions for Supreme Court Justices.<sup>137</sup> With lifetime appointments, many Justices have served on the Court well past twenty years. Justice William O. Douglas, appointed by President Franklin Roosevelt in 1939, sat on the Court for a record 36 years, retiring in 1975.

The Constitutional Court has 19 justices including a Chairman, Deputy Chairman, and Judge-Secretary of the Court. There are two separate chambers of nine and ten justices, which

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<sup>132</sup> RUSS. CONST. art. 128, §§ 1 & 2.

<sup>133</sup> U.S. CONST. art. III §1. "The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behavior, and shall at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

the Court utilizes to separate the caseload presented to them.<sup>138</sup> The Chairman and Deputy Chairman must sit in separate chambers and each presides over their respective chamber.<sup>139</sup> Much the same as the Supreme Court, the Constitutional Court annually receives thousands of petitions for review, with only approximately 1% accepted for adjudication.<sup>140</sup> Fifteen Justices is the minimum number required for *en banc* sessions.<sup>141</sup> Each member of the Court must be at least forty years old and a lawyer by training for a minimum of fifteen years.<sup>142</sup> Each Justice can only serve one term of twelve years and must retire by seventy years of age.<sup>143</sup> All Constitutional Court Justices are nominated by the President and must be appointed by the Federation Council.<sup>144</sup>

The term and age limitations that Constitutional Court Justices must comply with, as compared to the lifetime tenure enjoyed by Supreme Court Justices, gives a distinct advantage to the Russian President over his American counterpart regarding appointments to their respective courts. With these limitations, a Russian president has a greater opportunity to nominate members of the Court on a more regular basis and thereby influence the philosophical disposition of the Court. As an example, between 1999 and 2002, the Russian president will have the opportunity to make at least six new appointments to the Constitutional Court, nearly one-third of the entire Court.<sup>145</sup> With lifetime tenure for United States Supreme Court Justices, an American president may never have an opportunity to make an appointment to the Supreme Court.<sup>146</sup> In terms of a court's ability to be shielded from political

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<sup>138</sup> YU KUDRIAVTSEV, *Preface to FEDERAL CONSTITUTIONAL LAW "ON THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION"* OF JULY 21, 1994, at 67. See also CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION pamphlet at 6.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 68.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 67.

<sup>143</sup> *Id.*

<sup>144</sup> RUSS. CONST. art. 128, § 1.

<sup>145</sup> CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION pamphlet at 21.

<sup>146</sup> COHEN & VARAT, *supra* note 85, at 1701. This was the case for President Jimmy Carter. William Harrison, who served as President for only one month, was the only other President never to have a Supreme Court appointment. All other Presidents had at least one. *Id.*

interjection as much as possible, there is a distinct advantage to the concept of lifetime appointments over set terms.

While a Russian president may have more power regarding appointments to the Constitutional Court, Congress may change the number of Justices that sit on the Supreme Court in a manner the Russian legislature can not. Though not utilized since 1869, it is a power that Congress can still exercise at its discretion. Under the Russian Constitution, Article 125, Section 1, there is no debate. "The Constitutional Court of the Russian Federation shall consist of 19 justices."<sup>147</sup> This clearly leaves the State Duma with absolutely no authority, absent amending the Constitution, to change the number of Justices on the Court.

The United States Constitution simply states that "the judicial power of the United States, shall be vested in one supreme Court"<sup>148</sup> leaving unwritten any mention of the specific number of justices to serve on it. Without constitutional predetermination on the issue, the number of justices on the Supreme Court remains a political determination for Congress to make and an opening in the wall of independence between the judiciary and the other branches of government as compared to the Constitutional Court. The most dramatic example of this was the 1937 'court-packing plan' of President Franklin Roosevelt.<sup>149</sup> The President was upset with the Supreme Court's numerous holdings against the constitutionality of many of his "New Deal" programs.<sup>150</sup> In an effort to "reorganize the judicial branch," Roosevelt proposed legislation to increase the number of Justices to as many as fifteen in a blatant attempt to shift the judicial philosophy of the court to one more aligned with his own.<sup>151</sup> Congress wisely saw the plan as "a needless, futile, and utterly dangerous abandonment of constitutional principle,"<sup>152</sup> and eventually rejected the plan.<sup>153</sup> As politically motivated as it may have been, the President acted within his authority in proposing the plan and Congress, under the Constitution, would have been within

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<sup>147</sup> RUSS. CONST. art. 125, § 1.

<sup>148</sup> U.S. CONST. art. III, §1.

<sup>149</sup> COHEN & VARAT, *supra* note 85, at 204.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> H.R. REP. NO. 711, 75th Cong., 1st Sess. (1937). *See also* COHEN & VARAT, *supra* note 85, at 204-05.

<sup>153</sup> COHEN & VARAT, *supra* note 85, at 204-05.

its authority to adopt it, if it chose to do so. The court-packing plan was defeated by public objection, not constitutional prohibition.<sup>154</sup>

In fact, Congress has changed the number of Supreme Court Justices on several occasions.<sup>155</sup> In 1807, a seventh Justice was added,<sup>156</sup> an eighth and ninth Justice in 1837,<sup>157</sup> and a tenth Justice in 1863.<sup>158</sup> This may have been the genesis to President Roosevelt's 'court-packing' plan. President Lincoln wanted a tenth Justice to ensure support for his Civil War policies. Only one time in American history did Congress reduce the number of Justices on the Supreme Court. This occurred in 1866 when the number was changed back to nine, when the tenth post was abolished by an Act of Congress on July 23, 1866.<sup>159</sup>

The principle reason for changing the number of Supreme Court justices was to reflect the creation of new Circuit Courts of Appeal as new states joined the union. However, the relative ease with which Congress can change the number underscores the concern that it represents a power Congress could exercise to undermine the Court's independence. The declaration of an exact number of Justices required by the Russian Constitution clearly provides greater protection to the integrity of the Constitutional Court. It cannot be arbitrarily reorganized by virtue of the prevailing political climate at any given time or by the whim of a lawmaker with an agenda. The Supreme Court does not share this same protection.

## VI. STATUTORY REVIEW

Statutory review is the primary function of both the Supreme Court<sup>160</sup> and the Constitutional Court.<sup>161</sup> Each Court may

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<sup>154</sup> *Id.* at 204-05.

<sup>155</sup> *Id.* at 1694-1702.

<sup>156</sup> *Id.* at 1694. In 1807, Justice Thomas Todd was appointed by President Jefferson. *Id.*

<sup>157</sup> *Id.* at 1695. In 1837, Justices John Catron and John McKinley were appointed by President Van Buren. *Id.*

<sup>158</sup> *Id.* at 1696. In 1863, Justice Stephen Johnson Field was appointed by President Lincoln. *Id.*

<sup>159</sup> COHEN & VARAT, *supra* note 85, at 1696. This post was vacant at the time due to the resignation of Justice John Catron in 1865.

<sup>160</sup> *Id.*



examine a specific law and make the determination whether or not that law is in conformity with their nation's Constitution.<sup>162</sup> If it is not, it is ruled unconstitutional and considered null and void.<sup>163</sup> In America, review of a law's constitutionality is brought before the Supreme Court in the vast majority of cases by writ of *certiorari*, issued at the discretion of the Court. In rare instances, issues are also brought before the Court on direct appeal or by certification of special questions involving the public welfare. Issues are brought before the Constitutional Court by one of three primary methods as well: case or controversy, referral by an appropriate authority, and a request for an advisory opinion.<sup>164</sup> Referral by an appropriate authority is permitted under Article 125 of the Constitution of the Russian Federation.<sup>165</sup>

The Supreme Court strictly adheres to the principle of 'ripeness' while the Constitutional Court does not.<sup>166</sup> An issue is ripe when the law in question is in effect and directly affronts the constitutional rights of the petitioner at the present time.<sup>167</sup> This is referred to as a current case or controversy.<sup>168</sup> Issues that are not ripe or become moot "cannot, consist[ent] with the limitations of Article III of the Constitution,"<sup>169</sup> be heard by the Supreme Court.<sup>170</sup> The Constitutional Court is empowered to review issues that are 'ripe' as well as 'not ripe,' such as a pending legislative act.<sup>171</sup> This is known as an 'advisory review.'<sup>172</sup> In effect, the

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<sup>161</sup> RUSS. CONST. art. 125, §2a. See also Vasily A. Vlasihin, *Toward a Rule of Law and a Bill of Rights for Russia*, in LAW AND DEMOCRACY IN THE NEW RUSSIA 49 (Bruce L.R. Smith & Gennady M. Danilenko eds., The Brookings Institution 1993).

<sup>162</sup> *Id.*

<sup>163</sup> RUSS. CONST. art. 125, §6.

<sup>164</sup> FEDERAL CONSTITUTIONAL LAW "ON THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION" OF JULY 21, 1994, Chapter III, Article 2 at 82-83.

<sup>165</sup> RUSS. CONST. art. 125, §2. See discussion on pages 25-26.

<sup>166</sup> Vasily A. Vlasihin, *Toward a Rule of Law and a Bill of Rights for Russia*, in LAW AND DEMOCRACY IN THE NEW RUSSIA 49-50 (Bruce L.R. Smith & Gennady M. Danilenko eds., The Brookings Institution 1993).

<sup>167</sup> *Id.* at 49.

<sup>168</sup> *Id.*

<sup>169</sup> *DeFunis v. Odegaard*, 416 U.S. 312, (1974).

<sup>170</sup> *Id.* See also *Roe v. Wade*, 410 U.S. 113, 125 (1973).

<sup>171</sup> RUSS. CONST. art. 125, §2a. See also Vasily A. Vlasihin, *Toward a Rule of Law and a Bill of Rights for Russia*, in LAW AND DEMOCRACY IN THE NEW

Court will advise the Duma or Federation Council, when asked to, whether it believes a law will or will not be constitutional before it is enacted. If the Court finds the proposed law unconstitutional, it is immediately considered void.<sup>173</sup> In contrast, there are no provisions by which the Supreme Court can issue advisory opinions on pending legislation. All issues before the Supreme Court must be current cases or controversies.<sup>174</sup> This is one of the most significant distinctions between the civil and common law traditions of the two Courts.

The Supreme Court has original jurisdiction in all cases involving ambassadors, other public ministers and consuls, and where a state is a party, and appellate jurisdiction in all other cases, except where regulated by Congress.<sup>175</sup> In nearly all cases, a district and or appellate court will have adjudicated an issue, including constitutional issues, prior to it reaching the Supreme Court. If the Supreme Court chooses not to accept the case for review, the ruling of the lower court on the issue stands. In Russia, if a constitutional issue arises during a proceeding before any court, such as a Court of General Jurisdiction or an Arbitrazh Court,<sup>176</sup> the issue will be forwarded directly to the Constitutional Court. No intermediate court may review the issue or issue an opinion on it. Upon review, if accepted, the answer is sent back to the court from where it came for application to the matter before it. If not accepted, the lower court must adjudicate the matter based on the information it has at its disposal.

During its first two years of operation, not a single case was presented to the Supreme Court for review. At that time, the

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RUSSIA 49-50 (Bruce L.R. Smith & Gennady M. Danilenko eds., The Brookings Institution 1993).

<sup>172</sup> RUSS. CONST. art.125, §2a.

<sup>173</sup> *Id.*

<sup>174</sup> *Flast v. Cohen*, 392 U.S. 83, 94-97 (1968).

<sup>175</sup> U.S. CONST., art. III, § 2. This section provides in pertinent part: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all Cases before mentioned, the supreme Court shall have appellate Jurisdiction, and under such Regulations as the Congress shall make."

*Id.*

<sup>176</sup> An Arbitrazh Court primarily has jurisdiction to hear cases involving economic issues.

1790's, America's focus was on building a new nation, not restructuring an old one. The demand for a national judiciary was limited. Only after the government was sufficiently established and began to become involved in controversies did the Supreme Court begin to find and create its place in the American legal process. In its first two years, the Constitutional Court received over 30,000 petitions seeking review of constitutional issues.<sup>177</sup> Only twenty-seven petitions were eventually accepted for review.<sup>178</sup> The majority of these petitions involved issues regarding government actions, however, several were grievances of ordinary citizens who believed they had been illegally terminated from their places of employment or were being denied duly earned pension rights.<sup>179</sup> That average citizens could have an opportunity to petition the Court, as well as the powerful, quickly earned the Court "the reputation as the defender of citizens' rights."<sup>180</sup>

The constantly changing political landscape of Russia at the time, in the beginning of the 1990's, had much to do with the Court being so active in its infancy. Russia was a country with a one thousand year old history, the recent Soviet legacy was in the midst of being shed, a new Constitution was being debated, and new government as well as judicial institutions, such as the Constitutional Court, were being created and altered at regular intervals. The new judicial forum could not sit idly by for long. The turmoil of the times demanded the Court's active involvement. The immediate and overwhelming embrace of the Court by the populace was a clear demonstration of the country's desire and need for it. The Russian people were hungry for the rule of law.

## VII. ESTABLISHING LEGITIMACY AND MAINTAINING INDEPENDENCE

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<sup>177</sup> AHDIEH, *supra* note 37, at 79. "While usually outside the court's jurisdiction and lacking merit, each of these applications was responded to by the court and its staff." *Id.*

<sup>181</sup> *Id.*

<sup>179</sup> SMITH, *supra* note 16, at 135.

<sup>180</sup> *Id.*

The status of the Supreme Court as an independent court, free from control of the executive or legislative branches of the government, though intended by the Constitutional Convention of 1787, was not firmly established until the decision in *Marbury v. Madison*<sup>181</sup> was handed down by the Court. The primary issues in *Marbury* regarded Marbury's rights in the appointment to the position of Justice of the Peace by then former President Adams.<sup>182</sup> The seminal constitutional question became whether the Supreme Court had the authority to review acts of Congress and, if necessary, declare them unconstitutional.<sup>183</sup> The explicit language of the Constitution limits the cases in which the Court shall have original jurisdiction. The Judiciary Act of 1789 created new original jurisdiction for the Supreme Court beyond that which the Constitution allowed, in effect circumventing the Constitution.<sup>184</sup> In its decision, written by Chief Justice Marshall, the Court struck down that portion of the Act as unconstitutional,<sup>185</sup> affirming the principle that statutory law cannot contradict constitutional law and that Congress cannot change the original jurisdiction of the Supreme Court without compliance with the amendment process of the Constitution.<sup>186</sup> Furthermore, the Court established the precedent that the judiciary had the authority to review the law of the land.

For the Supreme Court this was *sui generis*. For the first time in its short fourteen-year history, the Court struck down an act of Congress. The question was whether Congress, as well as the rest of the nation, would abide by the Court's action or simply ignore it. The Supreme Court is the only branch of American government without the power to enforce its actions. The President as Commander-in-Chief, can use the military for enforcement, as can Congress enforce through control of the

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<sup>181</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> See *Madison*, 5 U.S. (1 Cranch) at 176.

<sup>185</sup> *Madison*, 5 U.S. (1 Cranch) at 176. "[C]onsequently the theory of every government must be, that an act of the legislature, repugnant to the constitution is void." *Id.* at 177.

<sup>186</sup> U.S. CONST., art. V. This section provides in pertinent part: "The Congress whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution . . . ." *Id.*

budget. The Court must rely strictly on the people to abide by their rulings, therefore effecting enforcement of them. This is the essence of the rule of law. Without the rule of law, the Court is meaningless. With it, the Court is legitimate. By virtue of *Marbury v. Madison*, the Supreme Court established itself as the final arbiter of the constitutionality of any law in the land.

In the first sixty-four years of its existence, only three acts of Congress were held to be unconstitutional by the Supreme Court as a result of the decisions in *Marbury v. Madison*, *Hodgson v. Bowerbank*,<sup>187</sup> and *Dred Scott v. Sanford*.<sup>188</sup> The Court's historic reluctance to take such action changed dramatically thereafter. Since the Civil War, on average, the Court has overturned one act of Congress per year. In the four-year period between 1995 and 1998, the Rehnquist Court<sup>189</sup> overturned sixteen acts of Congress, most notably the Line Item Veto Act.<sup>190</sup> The decision in *Fletcher v. Peck*<sup>191</sup> extended the Supreme Court's power of judicial review to the laws passed by state legislatures for the first time. The Court declared a Georgia land grant revocation act to be a violation of the Constitution under the Contract Clause.<sup>192</sup>

The Constitutional Court did not share this same initial reluctance. During its first term in 1992, of the Court's first nine decisions, seven were to strike down executive or legislative acts. By the end of its second year, the Court had struck down ten presidential acts and ten parliamentary acts as unconstitutional.<sup>193</sup> Most significant was one of the Court's first decisions in which it overturned a presidential decree Boris Yeltsin had issued reorganizing the internal security and police agencies into a single ministry under his command.<sup>194</sup> The Court held that to be a legislative prerogative, not an executive one.<sup>195</sup> For centuries,

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<sup>187</sup> *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809).

<sup>188</sup> *Dred Scott v. Sanford*, 60 U.S. (19 Howard) 393 (1857).

<sup>189</sup> William H. Rehnquist, Chief Justice of the Supreme Court, 1986 to Present.

<sup>190</sup> See *Clinton v. City of New York*, 523 U.S. 1071, 118 S. Ct. 1551, (1998).

<sup>191</sup> *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

<sup>192</sup> U.S. CONST., art. I, § 10. This section provides in pertinent part: "No State shall pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." *Id.*

<sup>193</sup> AHDIEH, *supra* note 37, at 79.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

Russians had lived with the absolute rule of the Czars and then the Communist Party. For the first time, a court had reviewed the actions of the state, compared that to what the law required, and held that the action violated the law. Never before in the history of Russia or the Soviet Union had the power of the executive been overruled in a legal forum. As Yeltsin complied with the ruling of the Court, he therefore acknowledged the right of the Court to so act.<sup>196</sup> In one dramatic action, the Constitutional Court established its legitimacy and authority to rule on the constitutionality of legislative and executive actions and that the law stood above both.

For the Constitutional Court, the Communist Party Property Case stands not only as “the biggest and most troublesome case” in the brief history of the Court, but one of its most important as well, according to Justice Vedernikov.<sup>197</sup> The immediate issue of the case was whether the property of the Communist Party could be confiscated by the state. The newly created Constitutional Court was also given the task of determining the fate of the very institution that had ruled the Soviet Union with an iron grip for the past seventy-four years.

The case evolved from the aftermath of the August 1991 attempted coup against then Soviet President Mikhail Gorbachev. Two days after the coup failed, Yeltsin, as Russian Republic President, signed several presidential decrees banning the Communist Party and confiscating their property.<sup>198</sup> The premise was that the Party was directly responsible for the coup and therefore, acted in violation of the law. Without the vast wealth of property to support it, the Party would lose what remained of its already vanishing monolithic hold of power over the Russian political landscape.

Members of the Communist Party began the case by submitting a petition to the Constitutional Court claiming that

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<sup>196</sup> *Id.* at 80. Ironically, it was later acknowledged that “the renowned decision of 14 January 1991 annulling Yeltsin’s merger, thus, was not even within the court’s jurisdiction.” *Id.* at 84.

<sup>197</sup> Justice Nikolai T. Vedernikov, Remarks at a Meeting with the Touro Law School Summer Program in Moscow (June 1999).

<sup>198</sup> See AHDIEH, *supra* note 37, at 80 (stating that the decrees in question are Russian presidential decrees no. 79, 90, and 169 of August 23, 24 and November 6, 1991).

Yeltsin had acted beyond his constitutional authority.<sup>199</sup> Supporters of Yeltsin cross-petitioned the Court to determine if the Communist Party even had legal standing as an institution to be before the Court.<sup>200</sup> Ultimately, three questions came before the Court: (1) whether the Communist Party took part in the August 1991 attempted coup against Gorbachev; (2) whether the party was a valid national organization; and (3) whether the property seized was state owned or Party owned since the Party was an interwoven part of the state for the past seventy-four years.<sup>201</sup> After a six-month trial, the Court ruled on November 30, 1992, that the Party was likely involved in the coup attempt, and that Yeltsin's decrees were valid only as applied to the National Communist Party, not the local units.<sup>202</sup> The Court held that local and regional branches of the Party had a right to exist and could petition the local courts to retrieve their property.<sup>203</sup> The question of the Party's status as a national organization became moot as it was virtually disbanded by then.<sup>204</sup>

The decision of the Constitutional Court was seen by many as more an effort to preserve its integrity and legitimacy as an institution and less to do with the requirements of the law, the merits of the case, and sound legal judgment. The result of the case was twofold. On the negative side, the Court had become involved in political questions that it should have avoided from the outset. In addition, it was considering the case with few procedural regulations or rules for the Court as well as the litigants to follow. On the positive side, the case was important to the effort of fostering a legal consciousness in the minds of the Russian people.<sup>205</sup> It demonstrated to the nation that the law could be utilized to remedy a serious problem, as opposed to the use of

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<sup>199</sup> See *id.* at 80-81. That the Communist Party was even partaking in the procedure of filing petitions to the Court was itself astounding. The Communists had ruled Russia for the past 74 years, never once concerning themselves with the rule of law. Now they were pleading with a court of law to protect it from government action.

<sup>200</sup> AHDIEH, *supra* note 37, at 81.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 82.

<sup>203</sup> *Id.* at 82-83.

<sup>204</sup> *Id.* at 83.

<sup>205</sup> *Id.* at 85.

force or the abuse of power, and that the Constitutional Court was an institution capable of independently rendering important decisions. Though the legal merits of the decision itself left much to be desired by jurisprudence purists, the concept of the rule of law was being widely exposed to the Russian people and beginning to take hold.

Just as important was the acceptance of the Court's ruling by the people. Had the opposite occurred, where the Russian people had chosen to ignore the Court, it would have become a useless entity without purpose. On its own, the Court can do nothing to enforce its rulings. Only its stature as the independent and final arbiter of the Russian Constitution, and the public's acceptance of its decisions, brings force and ultimately legitimacy to its rulings. Such legitimacy establishes the basis for the rule of law to become imbedded as the legal consciousness of a nation.

### VIII. CONCLUSION – WHAT WILL TOMORROW BRING?

“With its chaotic government, disheveled economy and anarchic society, Russia today is a deeply dysfunctional democracy.”<sup>206</sup> The image of the once mighty and menacing superpower has been radically transformed into that of a weak and hapless has-been.<sup>207</sup> Our fear of a military giant seeking to destroy western civilization has been replaced with the image of a toothless hungry bear seeking resources of the free world, under the guise of democracy, in order to keep itself alive. Much of what we see may be true, but who ten years ago would have used the word ‘democracy’ to describe Russia? From being the leader of the communist world to being part of the family of democratic nations, albeit a desperately struggling member, in less than a decade is an accomplishment of gargantuan proportions. It is an achievement that must be nurtured and encouraged, not only for the sake of the Russian people, but for the rest of the world as well.

It is of no benefit for America, or anyone else on planet Earth, to see Russia regress to its recent past. A neo-communist or totalitarian Russia, even a weakened one, could re-ignite the

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<sup>206</sup> Editorial Board, *Brother, Can You Spare A Ruble?*, *NEWSDAY*, Aug. 22, 1999, at B1.

<sup>207</sup> *Id.*



confrontations of the Cold War, restart the arms race, or create new conflicts that would devour the precious limited resources we have to promote human progress, and in turn terrorize the next generation of people in the new millennium.

The seeds of democratic reform have been planted in Russia and have borne some early notable results. Perhaps these results can generate greater and more lasting achievements in the years to come. The establishment of a constitutional form of government with an independent judiciary fulfills the first two structural requirements necessary for the development of a free and democratic society and is clearly viewed as a positive and concrete accomplishment. It is the lack of the third element, a pervasive legal consciousness, the "psychological underpinning,"<sup>208</sup> which continues to be missing from Russian society. Until the Russian people believe, as a matter of course in their daily lives, that their legal system can protect them and enforce their constitutional rights when they have been violated, democracy will not take permanent hold in Russia. Until they can confidently enter business contracts they know will be enforced by a court of law, an independent judiciary will have no meaning to them. Until they know that the average public official or police officer will address their concerns without the encouragement of a bribe, confidence and respect for the law will be missing. Until they know that the rule of law is there to serve them, not dominate them, a Constitution is but a paper without purpose or meaning.

As efforts continue to instill a lasting legal consciousness, the foundation that has been laid to date cannot be forgotten. In many respects, it is a very weak foundation. The judicial system, as well as other functions of the government, suffers from inadequate funding. At all levels, judges, court personnel, advocates and procurators,<sup>209</sup> and the police are woefully underpaid, and therefore, susceptible to corruption and bribery. Court facilities are few in number and in a serious state of disrepair. Judges and lawyers do not command the professional or public respect their counterparts in the west do. The legal profession is still being restrained by the traditional forms of

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<sup>208</sup> AHDIEH, *supra* note 37, at 3.

<sup>209</sup> Advocates are defense attorneys and procurators are government prosecutors.

compartmentalized civil law legal education<sup>210</sup> as well as the educational bureaucracy in Russia itself. Russian law still prohibits the establishment of a unified bar association for all lawyers that could fight for a stronger legal system. These basic elements of the legal system must continue to be nurtured and strengthened to encourage longevity.

Economic turmoil, however, looms as the greatest threat to Russia's fledgling democracy. Its political renaissance has failed to produce a sustainable economic rebirth. Today Russia is an example of "a flea market, not a free market."<sup>211</sup> In fact, much of the nation appears to be suffering greater economic hardship than it did under communism. An estimated one-third of the population today lives below the Russian government's definition of the poverty line. Until the benefits of a market economy reach the vast majority of Russians, not just the 'nouveaux Russki,'<sup>212</sup> the average citizen will have no incentive to embrace democratic reform.

Pervasive political instability since the fall of the Soviet Union also threatens Russia's democratic movement. When asked about the significance of Russia's newly created Independence Day<sup>213</sup> in mid-June, a Muscovite<sup>214</sup> dryly replied "Independence from what?" That simple answer speaks volumes of the problems facing modern Russia and reflects a dangerous undercurrent that could sweep away all the changes of the last decade. Unless democratic reform can provide national political stability, the lure to return to a totalitarian system will continue to draw the Russian people.

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<sup>210</sup> Students enter law school right out of high school. By their second year, they must choose a specific area of law they want practice, such as being a judge, a law professor, a notary public, an advocate, a procurator, a research fellow, a jurisconsult, or a legal counsellor. Once a field of law is chosen, one rarely is able to change to a different field. This contrasts with the American legal profession as being an 'integrated' bar.

<sup>211</sup> Professor Christopher Osakwe, Russian Legal System in Transition class, June 1998.

<sup>212</sup> This refers to Russians who have made themselves wealthy under the market economy. It also implies that many other Russians have suffered greatly under the market economy at the same time.

<sup>213</sup> A national holiday to commemorate the creation of the Russian Federation out of the former Soviet Union.

<sup>214</sup> A Muscovite is a resident of Moscow.

Change is never easy or simple. Change requires the removal of the old and replacement with the new. It further requires those that benefit from the status quo to relinquish the power or advantage they enjoy in order to accommodate the needs and desires of those seeking change. Invariably this creates civil strife and conflict, which often becomes bitter, highly confrontational, and unfortunately, many times, deadly.

Democracies seldom enjoy peaceful births, rather they more frequently emerge from revolutions, wars, and turmoil. Neither do legal systems spring up spontaneously in former communist societies. Notions of law, rights, due process, and constitutional governance develop gradually in the native soil of a society only as they come to be accepted by the people. The process of legal reform in Russia has been and will likely remain disjointed, marked by periods of progress and backlash. Similarly, the pace of legal reforms varies substantially from one region to another, reflecting differing regional and ethnic traditions and values, and the differing attitudes of local politicians. But regardless of these fluctuations, in every corner of the former USSR, a new legal system is being built and a new legal culture is being formed.<sup>215</sup>

The promise of opportunity and the opportunity to pursue that promise has driven America's growth and prosperity for two centuries. The desire for freedom and self-determination has also propelled Americans to build a future they envisioned for themselves. Democracy has been the central principle that has enabled Americans to pursue their ambitions. It is that sense of opportunity, desire, and determination that is needed in Russia today.

While the historical beginnings of the Supreme Court and the Constitutional Court are divergent, their similarities in purpose and philosophy are striking. American democracy has succeeded in great measure through the efforts of the Supreme Court. The establishment of the Constitutional Court and its promise of a

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<sup>215</sup> GORDON B. SMITH, *Preface to REFORMING THE RUSSIAN LEGAL SYSTEM*, (1996).

society based on the rule of law is a major accomplishment. It must continue to be supported by meaningful political and economic reform, so it may protect Russia's democratic movement. Only then 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.