

12-1-1993

The Death Penalty and the Crisis of Criminal Justice in Russia

Robert A. Kushen

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Robert A. Kushen, *The Death Penalty and the Crisis of Criminal Justice in Russia*, 19 *Brook. J. Int'l L.* 523 (1993).
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol19/iss2/4>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

THE DEATH PENALTY AND THE CRISIS OF CRIMINAL JUSTICE IN RUSSIA

*Robert A. Kushen**

As the Soviet Union and its successor states have lurched from crisis to crisis since the mid-1980s, the criminal justice system has also experienced upheaval, its ideological underpinnings revealed to be bankrupt—its “scientific basis” a fiction. The use of the death penalty, never comfortably explained under the old ideology, appears even more awkward today, reduced in scope but just as resistant to total abolition.

This article examines the use of the death penalty in the former Soviet Union and in the contemporary Russian Federation.¹ Part I examines the history of the death penalty in the Soviet Union and Russia and the divergence between the Marxist-Leninist ideology of criminal justice and its practice. In the Soviet Union, an abstract political philosophy that was

* Attorney Adviser, Department of State, Office of the Legal Adviser, Law Enforcement and Intelligence. J.D., Columbia Law School 1989. B.A., Russian and Soviet Studies, Harvard College, 1984. The views expressed in this article are those of the author and are not intended to reflect the views of the United States government.

1. I focus on Russia out of the fifteen successor states to the Soviet Union because, until the disintegration of the Soviet Union, it was Russia that dictated the development of the criminal justice system and the use of the death penalty. As the largest by far of the successor states, with a population of 146,500,000 out of 289,000,000 of the former Soviet Union, Russia will probably continue to hand down and carry out the largest number of death sentences. It is also in Russia that the abolitionist movement is the most vital, and where the debate over the abolition of the death penalty is the most visible.

Except where noted, the discussion on the history of the death penalty in the Soviet Union also focuses on the Russian Soviet Federated Socialist Republic (RSFSR). The RSFSR actually predates the Soviet Union. The Republic was proclaimed after the Bolshevik takeover in 1917; the Soviet Union, incorporating the RSFSR and other regions, in 1922. Although each republic nominally maintained its own criminal codes and justice system, with USSR law providing overall guidance, the codes and systems were largely the same, and the codes and practice in the RSFSR were also the norm elsewhere in the Soviet Union.

a bad fit to reality was manipulated by Soviet leaders to justify the execution of millions. These executions were carried out both extrajudicially and through a criminal justice system that was so corrupt that there was often little practical distinction between an extrajudicial execution and one that was the result of criminal processes. Throughout the Soviet period, Communist Party and government ideologues and criminal justice scholars struggled, at times sincerely and at times cynically, to make the use of the death penalty fit the official notion of the creation of a communist utopia.

The impossibility of this fit was evidenced by the shifting course of the legal treatment of the death penalty: it was abolished four times between 1917 and 1950, and prescribed at other times for a variety of crimes including robbery, murder, bribe-taking, and treason. Discomfort with the death penalty was also evidenced by its frequent characterization in the criminal statutes as a temporary and extraordinary form of punishment. Despite this ambivalence in the statutes, the death penalty was implemented with gusto.

Part II of this article examines the collapse of the ideological underpinnings of the Soviet criminal justice system in the Gorbachev and Yeltsin eras and the efforts to reform it. Revelations of past abuses in the criminal justice system, dating back to the origins of the Soviet state, created grave popular doubts about the fairness of the present system. Unlike the revelations of the Khrushchev era, however, these revelations were not limited to the crimes of Stalin, but reached back to the beginning of the Soviet state and forward to the present day. The criminal justice system was revealed to be in many cases a farce, with poorly trained judges manipulated by a powerful procuracy and subject to intervention by a Communist bureaucracy that dispensed "telephone justice."² Due process in this system was virtually nonexistent; the defense bar

2. Telephone justice (*telefonnoe pravo*) is the phrase given to the practice of Communist Party or government officials dictating the desired outcome in a particular case, frequently by telephoning the judge. See George P. Fletcher, *In Gorbachev's Courts*, N.Y. REV. BOOKS, May 18, 1989, at 13.

served as little more than a means to speed up the processing of criminal cases. The penal system was revealed as a thoroughly corrupt enterprise, created for the purpose of stoking the economic fires of the Soviet Union. The protection of prisoners' rights was entrusted to the procuracy, whose primary goal was to put those prisoners in the system in the first place.

The end of the Gorbachev era and the first two years of the Yeltsin government in Russia have seen some steps taken to reform the criminal justice system, to protect the rights of the accused and the incarcerated. Political prisoners in Russia have almost disappeared, some political crimes have been eliminated from the Russian criminal code, due process rights have been strengthened statutorily, and the conditions for incarcerated prisoners have improved.

Part III examines how the movement for criminal justice reform has affected the use of the death penalty, which is openly debated on the political level and in the popular and scholarly media. The number of capital crimes has decreased slightly, and in practice only intentional murder is today punished by death. Just as important, there has developed a vital lobby for the abolition of the death penalty.

Despite these gains, the criminal justice system remains plagued by incompetence, corruption, and a legal regime that does not afford adequate due process to defendants and that mistreats convicts. The death penalty remains as well, curtailed, but resistant to abolition, despite the lack of any evidence that it serves a deterrent effect. In the face of mounting social and economic problems and a rising crime rate, the debate over criminal justice reform and the abolition of the death penalty has become highly politicized, with reformers fighting to protect the few gains that have been achieved. The death penalty has become an important symbol of the political struggle. For this reason, while the use of the death penalty may continue to be tacitly circumscribed, statutory abolition is unlikely for the near future.

I. HISTORY OF THE DEATH PENALTY IN RUSSIA AND THE SOVIET UNION

The official ambivalence accorded the death penalty has a deep tradition in Russian history. The death penalty was not provided for in the *Russkaia Pravda of Kievan Rus*.³ Mikhail Romanov promised the Boyars immunity from the death penalty when he became Tsar,⁴ but the number of death penalty offenses began to mushroom soon after. Elizaveta Petrovna supposedly abolished the death penalty by decree in the middle of the eighteenth century,⁵ but did not succeed in ending its use. Catherine the Great, reared on French Enlightenment philosophers such as Montesquieu, Beccaria, and others,⁶ also sought to limit the death penalty and wrote in favor of its abolition in her *Instruction to the Legislative Commission of 1767*.⁷

3. 3 GEORGE VERNADSKY & MICHAEL KARPOVICH, A HISTORY OF RUSSIA: THE MONGOLS AND RUSSIA 355-56 (1943).

4. 3 V. KLIUCHEVSKII, KURS' RUSSKOI ISTORII 94 (1908), translated in 3 V. KLIUCHEVSKII, A HISTORY OF RUSSIA 74-75 (1913), cited in Will Adams, *Capital Punishment in Imperial and Soviet Criminal Law*, 18 AM. J. COMP. L. 575, 576 (1970).

5. *Id.* at 576; EKATERINA II, NAKAZ' KOMMISSII O SOSTAVLENI PROEKTA NOVAGO ULOZHENIIA, translated in 2 RUSSIA UNDER CATHERINE THE GREAT: CATHERINE THE GREAT'S INSTRUCTION (NAKAZ') TO THE LEGISLATIVE COMMISSION, 1767, at 70, art. 210 (Dr. Paul Dukes ed., 1977) [hereinafter NAKAZ']. In speaking of the ideal society where the death penalty is abolished, Catherine wrote that "Twenty Years Reign of the Empress Eliz. Petrovna present the Fathers of the People with an Example for Imitation more Illustrious than the brightest Conquests." *Id.*

6. HAROLD J. BERMAN, JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW 205 (rev. ed. 1963).

7. NAKAZ', *supra* note 5, at 50-51, 70, 72, arts. 79, 209-212, 223. In article 79, Catherine wrote that the death penalty is appropriate only in cases of murder and attempted murder, and suggested the retributive nature of the penalty: "A Citizen becomes worthy of Death when he has so far violated the Security of another as to have taken away or attempted to take away his life. The Punishment of Death is a kind of Medicine for a Sick Community." NAKAZ', *supra* note 5, at 50-51.

In article 210, she appeared to narrow the use of the death penalty still further (although, alternatively, it could be viewed as expanding the penalty) to those cases where, "When being deprived of liberty, [a criminal] still has Means

Historically, the Russian intelligentsia was also sympathetic to the abolition of the death penalty. Dostoevsky and Tolstoy, to name just a couple, were vocal opponents of the death penalty.⁸

Despite this history of abolitionist sentiment, the death penalty was used on and off throughout pre-revolutionary Russia.⁹ It appeared in Russian criminal codes at the end of the fourteenth century, introduced to Muscovy by the Mongols.¹⁰ The number of capital crimes peaked during the reign of Peter the Great.¹¹ After disappearing from the civilian (but not the military) criminal codes, the death penalty reappeared in the Speranskii code of 1833, and remained on the books until the 1917 revolution.¹²

In February 1917 the Provisional Government that replaced Tsar Nikolai II abolished the death penalty.¹³ Within

and force capable of disturbing the public Tranquillity." She concluded, however, that "during a peaceful Sovereignty of the Laws, under a form of Government established by the united Wishes of the People . . . Where the whole Power is in the hands of the Sovereign . . . there can be no Necessity to take away the life of a Citizen."

As a more effective alternative to the death penalty, and presaging the Soviet penal system of forced labor, Catherine recommended in article 212 "hard Labour during the whole duration of his Life, to make amends for the Injury he has done to the Public."

8. See, e.g., Count Lev N. Tolstoy, *Thou Shalt Not Kill*, in 23 THE COMPLETE WORKS OF COUNT TOLSTOY 167 (Leo Wiener ed. & trans., 1968).

Dostoevsky was himself ostensibly sentenced to death for political activity. As he and his compatriots stood before the firing squad, a messenger rushed in with news that the sentences had been commuted by the Tsar. In fact, the whole episode was staged to demonstrate the Tsar's humanity. See Letter from Fyodor Dostoevsky to Mikhail Dostoevsky (Dec. 22, 1849) in 28 POLNOE SOBRANIE SOCHINENII V TRIDTSATI TOMAKH 161, 161-62 (1985), translated in 1 FYODOR DOSTOEVSKY: COMPLETE LETTERS 178 (David Lowe & Ronald Meyer eds. & trans., 1988).

9. Adams, *supra* note 4, at 578.

10. VERNADSKY & KARPOVICH, *supra* note 3, at 355.

11. Adams, *supra* note 4, at 576; VERNADSKY & KARPOVICH, *supra* note 3, at 58, 63.

12. Adams, *supra* note 4, at 576-78.

13. See Postanovlenie ob' otmene smertnoi kazni [Resolution On the Abolition of the Death Penalty], Mar. 12, 1917, Sbornik ukazov' i postanovlenii vremennago pravitel'stva, 27 Fevralia—5 Maia 1917 g., Issue No. 16, at 37 [hereinafter

five months, however, it was restored at the military front, in a vain attempt to establish order in the crumbling Russian army.¹⁴ The death penalty was abolished again by the Second Congress of Soviets immediately after the October Revolution.¹⁵ This abolition was also short-lived, and the death penalty was quickly restored in an ad hoc fashion in the middle of 1918 at the height of the Civil War.¹⁶ In 1920 the death pen-

Sbornik], translated in 1 THE RUSSIAN PROVISIONAL GOVERNMENT 1917: DOCUMENTS 199-200 (Robert P. Browder & Alexander F. Kerensky eds., 1961) [hereinafter RUSSIAN PROVISIONAL GOVERNMENT].

A note on translating legal terms: The use in the Soviet and Russian legal system of various words to describe executive or legislative acts has changed over the years without consistency, wreaking havoc with translators, and reflects the ever-changing structure of the government. Thus "ukaz" was at one time used to describe an act of the Supreme Soviet, supposedly a legislative body, but in recent times has been used to describe an act of the President. In this article I have chosen to translate "postanovlenie" as "resolution," "ukaz" and "dekret" both as "decree," and "zakon" as "law," regardless of which governmental body was responsible for their promulgation.

14. See The Restoration of the Death Penalty in Wartime for Military Personnel and the Establishment of Military-Revolutionary Courts, *Sobranie zakononii i raspriazhenii vremennago pravitel'stva*, Issue No. 2, Item No. 974 (1917), translated in 2 RUSSIAN PROVISIONAL GOVERNMENT, *supra* note 13, at 982-84.

15. See *Postanovlenie Vtorogo Vserossiiskogo S'ezda Sovetov ob otmene smertnoi kazni* [Resolution of the Second All-Russian Congress of Soviets on the Abolition of the Death Penalty], I *Sobranie zakononii i raspriazhenii rabochago i krest'ianskago pravitel'stva RSFSR* [SU RSFSR], Issue No. 1, Item No. 10 (1917). See also RICHARD PIPES, *THE RUSSIAN REVOLUTION* 791 (1990).

16. Adams, *supra* note 4, at 580; PIPES, *supra* note 15, at 791, 798. Although Adams writes that no single decree restored the death penalty at this time, Pipes cites an oblique Resolution from the Commissar of Justice, P.I. Stuchka, freeing the Revolutionary Tribunals to impose any sentence they saw fit, regardless of any prior law, as long as the sentence was equal to or greater than the punishment prescribed by law. See also *Dekret Soveta Narodnykh Komissarov, sotsialisticheskoe otechestvo v opasnosti!* [Decree of the Council of People's Commissars, The Socialist Fatherland is in Danger!], I *Dekrety Sovetskoi Vlasti* [Decrees of the Soviet Government], 25 oktiabria 1917 g.-16 marta 1918 g., Item No. 314, at 490 (1957) (decreeing immediate execution by shooting of "unfriendly agents, speculators, burglars, hooligans, counter-revolutionary agitators and German spies") [hereinafter Socialist Fatherland Decree].

In August 1918 Lenin advocated execution as punishment for those who did not issue receipts for the compulsory requisition of grain and other products. Vladimir I. Lenin, *Tezisy po prodovol'stvennomu voprosu* [Theses on the Food Question], in 37 *POLNOE SOBRANIE SOCHINENII* 31, 32 (5th ed. 1969), translated in 28 *COLLECTED WORKS* 45, 46 (4th ed. 1980).

alty was again supposedly abolished,¹⁷ but this abolition was to last less than four months. The next and last abolition of the death penalty occurred in 1947, in honor of the Allied victory in World War II.¹⁸ This abolition lasted three years, with the death penalty reinstated in 1950.¹⁹

These frequent and unsuccessful attempts to abolish the death penalty reflect the weak pedigree of abolition in Marxist-

In September 1918 the Commissar of Justice Kurskii issued his famous resolution on the "Red Terror," which authorized the "shooting of those persons, connected to white guard organizations, conspiracies and sedition" and the publication of their names (presumably for deterrent effect). *Postanovlenie o krasnom terrore* [Resolution on the Red Terror], SU SSSR, Issue No. 65, Item No. 710 (1918), *translated in part in IDEAS AND FORCES IN SOVIET LEGAL HISTORY: A READER ON THE SOVIET STATE AND LAW* 103 (Zigurds L. Zile ed., 1992).

By 1919 the death penalty had reappeared in the first "Fundamentals" of Soviet criminal legislation. *See Rukovodiashchie nachala po ugovnomu pravu RSFSR* [Governing Principles of the Criminal Law of the RSFSR], Item No. 25, SU RSFSR, Issue No. 66, Item No. 590 (1919) (providing for death by shooting as one of the forms of punishment).

17. *See Postanovlenie Vserossiiskogo Tsentral'nogo Iсполnitel'nogo Komiteta Soveta Narodnykh Komissarov ob otmene premeneniia vysshei mery nakazaniia (rasstrely)* [Decree of the All-Russian Central Executive Committee of the Soviet of People's Commissars On the Abolition of the Use of the Highest Form of Punishment (Shooting)], SU RSFSR, Issue Nos. 4-5, Item No. 22 (1920). This decree explained that the reason for the abolition was that the successful "destruction of the most important secret organizations of counter-revolutionaries and bandits" and the resultant "strengthening of Soviet power" rendered the death penalty unnecessary in combatting threats to the country. One commentator suggests that the true reason was to encourage the desertion of enemy troops by lessening the penalties they faced if they surrendered. *See Adams, supra* note 4, at 580.

18. *See Ukaz Prezidiuma Verkhovnogo Soveta SSSR ob otmene smertnoi kazni* [Decree of the Presidium of the Supreme Soviet of the USSR on the Abolition of the Death Penalty], *Vedomosti Verkhovnogo Soveta SSSR* [Vedomosti SSSR], Issue No. 17 (1947), *reprinted in Sbornik zakonov SSSR i ukazov prezidiuma verkhovnogo soveta SSSR* (1938 g.—noiabr' 1958 g.) 543 (1959) [hereinafter *Sbornik zakonov*].

19. *See Ukaz Prezidiuma Verkhovnogo Soveta SSSR o premenenii smertnoi kazni k izmennikam rodiny, shpionam, podryvnikam-diversantam* [Decree of the Presidium of the USSR Supreme Soviet on Application of the Death Penalty to Traitors to the Motherland, Spies and Subversive Diversionists], *reprinted in Sbornik zakonov, supra* note 18, at 544, *translated in* 3 *CURRENT DIG. SOV. PRESS* 38 (1950) [hereinafter 1950 Restoration].

For an analysis of the different crimes for which the death penalty was imposed from 1917 to 1970, including sentencing discretion, see Adams, *supra* note 4, at 581-93.

Leninist doctrine. Marx embodied the dichotomy between the utopian socialist who opposed the death penalty and the practical revolutionary who endorsed terror for the purpose of securing the revolution.²⁰ Lenin also had no deep-seated opposition to the death penalty. Although he and other prominent Russian revolutionaries are on record as having opposed it at the 1910 Copenhagen Congress of the Second International,²¹ in retrospect this position seems to have been one of expediency. His true attitude is revealed in the following quote attributed to him by Trotskii, upon Lenin's learning of the second abolition of the death penalty in 1917: "Do you think you can settle with your enemies if you disarm? What repressive measures do you have then? Imprisonment? Who pays attention to that in a time of bourgeois war . . . ?"²²

The utopian socialist ideal, in which the state would wither away and the death penalty, like the criminal justice system as a whole, would become superfluous,²³ faded before a leadership determined to use any means to gain and retain power.

The frequent abolitions of the death penalty between 1917 and 1950 contrasted sharply with Soviet practice during this period. Through a combination of nominal judicial proceedings, extrajudicial executions, the subjection of prisoners to conditions that ensured their death in incarceration, and governmental policies causing death by famine, Lenin and Stalin

20. Adams, *supra* note 4, at 578 (citing Marx's opposition to capital punishment but endorsement of terror); see also 1 EDWARD H. CARR, A HISTORY OF SOVIET RUSSIA: THE BOLSHEVIK REVOLUTION, 1917-1923, at 155 (1950) (citing Marx's endorsement of terror).

21. CARR, *supra* note 20, at 154 n.4.

22. LEON TROTSKY, LENIN 133 (1925); I. N. STEINBERG, IN THE WORKSHOP OF THE REVOLUTION 144-45 (1953) (quoting same comment). See also Socialist Fatherland Decree, *supra* note 16, cited in PIPES, *supra* note 15, at 794.

23. See, e.g., Vladimir I. Lenin, *Gosudarstvo i revoliutsiia* [State and Revolution], in 33 POLNOE SOBRANIE SOCHINENII 1, 89 (5th ed. 1969), translated in 25 COLLECTED WORKS 387, 467 (4th ed. 1980) (advocating "use [of] merciless force toward the eventual goal of achieving a society in which there will be no need for coercion"). See generally Gordon B. Smith, *Development of "Socialist Legality" in the Soviet Union*, in 24 LAW IN EASTERN EUROPE: PERSPECTIVES ON SOVIET LAW FOR THE 1980S, at 77, 77-80 (F.J.M. Feldbrugge & William B. Simons eds., 1982).

presided over the largest extermination of people in history.²⁴ From its earliest days, the use of the death penalty in the Soviet Union reflected a dual use of the criminal justice system. On the one hand, the criminal justice system served commonly accepted goals of punishing and deterring acts that most societies would find unacceptable and worthy of serious sanction. On the other hand, the criminal justice system served a much broader purpose of political, economic, and social control.²⁵ The use of the death penalty to further the latter goal was a hallmark of the Soviet system.

These dual purposes are evident in the first Soviet criminal code of 1922, which contained features that were to endure in the Soviet criminal codes to come. The code was quite liberal in its treatment of many common crimes, reflecting the aspirations of reformist legal scholars. The sentencing provisions for incarceration, for example, were the most lenient in Soviet history.²⁶ Nevertheless, the code contained thirty-four offenses for which the death penalty was available.²⁷

24. See ROBERT CONQUEST, *THE GREAT TERROR: STALIN'S PURGE OF THE THIRTIES* 700-15 (rev. ed. 1973) (estimating 20 million deaths, including one million "legal" executions during Stalin's reign); ROBERT CONQUEST, *THE GREAT TERROR: A REASSESSMENT* 485-86 (1990) (describing estimate of executions in *The Great Terror* as likely an underestimate); Vera Tolz, *Ministry of Security Official Gives New Figures for Stalin's Victims*, RADIO FREE EUR./RADIO LIBERTY, INC. RES. REP., May 1, 1992, at 8, 9 (citing new Russian estimates, supposedly based on KGB archives, of 18 million "repressed" from 1935 to 1945, with 7 million of these executed); PIPES, *supra* note 15, at 791-840 (describing the red terror). The number of victims of the red terror have not been estimated with as much accuracy as the number of Stalin's victims. Pipes discredits the figure provided by Latsis, a Cheka official, of 12,733 executions between 1918 and 1920 as far too low, and cites estimates of scholars ranging from 50,000-140,000 victims. PIPES, *supra* note 15, at 838.

25. See Smith, *supra* note 23, at 82 (describing Vyshinskii's bifurcation of law and politics, in which separate spheres of law were applied to anti-state acts and all other acts).

26. The maximum sentence of incarceration under the code was 10 years. SU RSFSR, Issue No. 15, Item No. 153 (1922) (codified at Ugolovnyi Kodeks RSFSR [UK RSFSR], art. 33 (1922)). See Peter H. Solomon, *Soviet Penal Policy 1917-1934: A Reinterpretation*, 39 SLAVIC REV. 195, 204 (1980). Solomon persuasively argues that the 1920s were a period of attempted reform in Soviet penal policy, despite the influence of the secret police.

27. See UK RSFSR, arts. 58-66, 71, 75, 76, 81, 83, 86, 97, 106, 110-15, 131,

The types of crimes that carried the death penalty reflected political concerns more than criminal justice concerns, with crimes against the state being far more numerous than crimes against the person.²⁸ There were eleven capital "counter-revolutionary crimes," including: creating or participating in armed counter-revolutionary groups; having contacts with foreign governments for the purpose of armed interference in the Soviet Union; participating in organizations whose goal was to incite mass disorder in the population, the nonpayment of taxes or the nonfulfillment of other obligations to the state; interfering in the function of Soviet enterprises for counter-

180, 184, 202, 204, 206, 208, 210, 211, 213, 214 (1922).

The 1922 code was quickly amended to forbid the application of the death penalty to minors and pregnant women. See Dekret Vserossiiskogo TSentral'nogo Iсполnitel'nogo Komiteta o dopolnenii st. 33 obshchei chasti ugolovnogo kodeksa [Decree of the All-Russian Central Executive Committee on Additions to Article 33 of the General Part of the Criminal Code], SU RSFSR, Issue No. 47, Item No. 590 (1922) (minors); Postanovleniia IV sessii Vserossiiskogo TSentral'nogo Iсполnitel'nogo Komiteta IX Sozyva ob izmeneniiakh i dopolneniiakh ugolovnogo kodeksa RSFSR [Resolution of the IVth Session of the All-Russian Central Executive Committee, IXth Meeting on Amendments and Additions to the Criminal Code of the RSFSR], SU RSFSR, Issue Nos. 72-73, Item No. 906 (1922) (minors and pregnant women). The limitation as to pregnant women endured in Soviet legislation. The limitation as to minors endured only until Stalin's reign of terror. In 1935 a decree provided that children 12 and older would be punished as adults for crimes such as theft, which carried the death penalty. ALEXANDER ORLOV, *THE SECRET HISTORY OF STALIN'S CRIMES* 52 (1953). The limitation reappeared in the 1962 code. See UK RSFSR, art. 23 (1962).

28. There are curious exceptions for robbery, see UK RSFSR, art 184 (1922), and murder by military personnel. Postanovlenie TSentral'nogo Iсполnitel'nogo Komiteta i Soveta Narodnykh Komissarov ob izmenenii st.st. 2 i 12 polozheniia o voinskiikh prestupleniiakh [Resolution of the Central Executive Committee and the Council of People's Commissars on Amendments to Arts. 2 and 12 of the Statute on Military Crimes], SU RSFSR, Issue No. 43, Item No. 206 (1934), crimes against the person were not punishable by death under Soviet law until 1954, when murder committed by civilians became punishable by death. See Ukaz Prezidiuma Verkhovnogo Soveta SSSR ob usilenii ugolovnoi otvetstvennosti za umyshlennoe ubiistvo [Decree of the Presidium of the Supreme Soviet of the USSR On Strengthening Criminal Responsibility for Intentional Murder], Vedomosti SSSR, Issue No. 11, Item No. 221 (1954). This was followed by rape in 1962. See Ukaz Prezidiuma Verkhovnogo Soveta SSSR ob usilenii ugolovnoi otvetstvennosti za iznasilovanie [Decree of the Presidium of the Supreme Soviet of the USSR on Strengthening Criminal Responsibility for Rape], Vedomosti SSSR, Issue No. 8, Item No. 84 (1962).

revolutionary purposes; and terrorism.²⁹ Economic crimes also were punishable by death, for example, illegal trafficking in goods under aggravating circumstances.³⁰ There was a long list of capital crimes connected with the acts of government officials, such as: misusing power, bribe-taking or soliciting bribes, and handing down unjust sentences.³¹ Finally, a number of military crimes or crimes committed in wartime were also punishable by death.³² Crimes committed with the aid of or for the purpose of aiding foreign countries were considered particularly threatening to the young Soviet state, and were frequently punishable by death.³³ Even the act of crossing

29. See UK RSFSR, arts. 57, 59, 62, 63, 64 (1922) (respectively).

30. See UK RSFSR, art. 97 (1922).

31. See UK RSFSR, arts. 106, 111, 114, 115 (1922) (respectively).

32. See, e.g., UK RSFSR, arts. 202, 204, 206 (1922) (failure to obey orders in wartime, desertion during wartime, and avoiding service, respectively).

33. See, e.g., UK RSFSR, arts. 59, 61, 66 (1922); *Polozhenie o prestupleniakh gosudarstvennykh (kontrevoliutsionnykh i osobo dlia Soiuza SSR opasnykh prestupleniakh protiv poriadka upravleniia)* [Resolution on Crimes Against the State (Counter-revolutionary and Especially Dangerous Crimes Against the Government Order of the USSR)], Item No. 4, *Sobranie zakonov i rasporyazhenii rabochekrestianskogo pravitel'stva SSSR* [SZ SSSR], Issue No. 12, Item No. 123 (1927) [hereinafter 1927 Resolution] (codified at UK RSFSR, art. 58⁴ (1927)) (rendering assistance to the international bourgeoisie that is striving to overthrow the communist system); 1950 Restoration, *supra* note 19 (restoring death penalty for traitors and spies); UK RSFSR, art. 64 (1962) (treason, which included within its definition aiding a foreign country in undertaking unfriendly acts against the USSR).

The fear of foreign enemies has a long pedigree that predates the revolution and persists to this day, among respected intellectuals. See, e.g., ANDREI AMALRIK, *WILL THE SOVIET UNION SURVIVE UNTIL 1984?*, at 44-62 (1970) (positing Chinese invasion of Soviet Union in near future); ALEKSANDR SOLZHENITSYN, *LETTER TO THE SOVIET LEADERS* 13 (1974) (extending same Chinese invasion theory), and extremist nationalists, see Celestine Bohlen, *Rancor Grows in Russian Parliament*, N.Y. TIMES, Mar. 28, 1993, § 1, at 6; see also Harry Willets, *The Wages of Economic Sin*, PROBLEMS OF COMMUNISM, Sept.-Oct. 1962, at 26, 30 (citing Soviet officials who blame economic crime and other social ills on "pernicious foreign influences"). It was reflected in various parts of the criminal code, such as the old article 70, that increased the penalty for anti-Soviet agitation and propaganda if accomplished with the aid of foreign assistance. See Ukaz Prezidiuma Verkhovnogo Soveta RSFSR o vnesenii izmenenii i dopolnenii v Ugolovnyi i Ugolovno-protsessual'nyi kodeksy RSFSR [Decree of the Supreme Soviet of the RSFSR on the Introduction of Amendments and Additions to the Criminal and Criminal Procedure Codes of the RSFSR], *Vedomosti RSFSR*, Issue No. 5, Item No. 168 (1984).

borders could bring the death penalty.³⁴

The prominence of "state" crimes among capital offenses is explained by Marxist-Leninist ideology, which regarded the killing of enemies of the state as necessary for the victory of Communism and the perpetuation of the dictatorship of the proletariat (to say nothing of the personal dictatorship of Soviet leaders). Crimes against the person, in contrast, were an aberration caused by imperfect social conditions that would improve with time.³⁵ Such criminals were regarded as acting in response to social forces not within their control.

The definition of crimes against the state changed over time, but the seriousness with which these crimes were regarded remained the same. Their existence and the severity with which they were punished directly reflected the Soviet ideology of pervasive state control in all spheres of life. Lenin's red terror coincided with the civil war and his consolidation of power in its immediate aftermath. The relaxation of state control of the "NEP" period corresponded to a decrease in the use of execution as an element of terror.³⁶

34. UK RSFSR, art. 71 (1922) (returning into the RSFSR from exile); Postanovleniie Prezidiuma Tsentral'nogo Iсполnitel'nogo Komiteta ob ob'iaвлении vne zakona dolzhnostnykh lits-grazhdan Soiuz SSR za-granitsei, perebezhavshikh v lager' vragov rabocheho klassa i krest'ianstva i otkazyvaiushchikhsia vernut'sia v Soiuz SSR [Resolution of the Presidium of the Central Executive Committee on Declaring as Illegal Official Citizens of the USSR Abroad, Having Deserted to the Camp of the Enemies of the Working Class and Peasants and Having Refused to Return to the USSR], SZ SSSR, Issue No. 76, Item No. 732 (1929) (defection); Zakon RSFSR o vnesenii izmenenii i dopolnenii v Ugolovnyi kodeks RSFSR [Law of the RSFSR on the Introduction of Amendments and Additions to the Criminal Code of the RSFSR], Vedomosti RSFSR, Issue No. 29, Item No. 449 (1962) (treason, defined in part as "flight abroad or the refusal to return to the USSR") (codified at UK RSFSR, art. 64 (1962)).

35. Lenin, *supra* note 23, at 91, translated at 469 ("[T]he root social reason for excesses, which consist of violations of the rules of social life, is the exploitation of the masses, their want and their poverty. With the removal of this chief cause, excesses will inevitably begin to 'wither away'."); THE LAW OF THE SOVIET STATE 498 (Andrei Y. Vyshinsky ed. & Hugh W. Babb trans., 1948) (describing "pillagers, thieves and hooligans" as criminals "inherited from the capitalist social order").

36. The 1922 Criminal Code, with its numerous capital crimes, is a reflection of post-Civil War anxiety. The number of executions was in fact far fewer than

Stalin's absolutism was marked by an increase in the number of capital crimes, with the addition of defection,³⁷ some forms of theft of state property,³⁸ treason,³⁹ and various military crimes. The definition of counter-revolutionary crimes was also expanded under Stalin to include such vague offenses as "rendering any kind of assistance whatever to the international bourgeoisie," and "undermining government industry."⁴⁰ Stalin was also responsible for streamlining the execution process, with a 1934 resolution that put strict time limits on the investigation of "terrorist acts," mandated that such cases be heard without the participation of the accused in the process, forbade appeals, and mandated execution immediately upon judgment.⁴¹

during the terror.

37. See SZ SSSR, Issue No. 76, Item No. 732 (1929).

38. Postanovlenie TSentral'nogo Iсполnitel'nogo Komiteta i Soveta Narodnykh Komissarov ob okhrane imushchestva gosudarstvennykh predpriatii, kolkhozov i kooperatsii i ukreplenii obshchestvennoi (sotsialisticheskoi) sobstvennosti [Resolution of the Central Executive Committee and Council of People's Commissars on the Protection of the Property of Government Enterprises, Collective Farms and Cooperatives and the Strengthening of Society's (Socialist) Property], SZ SSSR, Issue No. 62, Item No. 360 (1932).

39. Postanovlenie TSentral'nogo Iсполnitel'nogo Komiteta o dopolnenii polozheniia o prestupleniakh gosudarstvennykh (kontrevoliutsionnykh i osobo dlia Soiuzna SSR opasnykh prestupleniakh protiv poriadka upravleniia) stat'iami ob izmene rodine [Resolution of the Central Executive Committee On Additions to the Statute on State Crimes (Counter-revolutionary and Especially Dangerous Crimes Against the Government Order of the USSR) Articles on Treason], SZ SSSR, Issue No. 33, Item No. 255 (1934).

40. See 1927 Resolution, *supra* note 33, Item Nos. 4, 7. While Adams, *supra* note 4, at 587, suggests that the 1927 laws were more lenient in their call for the death penalty, his analysis of the number of crimes and sentencing discretion does not take into account the broader definition of offenses in the 1927 laws compared to the 1922 laws. While he recognizes this limitation, he fails to acknowledge its gravity. See Adams, *supra* note 4, at 586.

Another resolution passed just five months later greatly expanded the number of military crimes punishable by death. See Postanovlenie TSentral'nogo Iсполnitel'nogo Komiteta i Soveta Narodnykh Komissarov o vvedenii v deistvie polozhenia o voinskikh prestupleniakh [Resolution of the Central Executive Committee and Council of People's Commissars, on the Entry into Force of the Regulations on Military Crimes], SZ SSSR, Issue No. 50, Item No. 505 (1927).

41. Postanovlenie TSentral'nogo Iсполnitel'nogo Komiteta o vnesenii

The existence of a broad category of "economic" crimes and its punishment by death was another example of the use of the criminal justice system in the Soviet Union for social engineering and political ends. The death penalty for economic crimes appeared in the 1922 Code,⁴² disappeared briefly between 1927 and 1932, reappeared during the height of the Stalin terror,⁴³ disappeared again after the post-War abolition, and reemerged between 1961 and 1962.⁴⁴

izmenenii v deistvuiushchie ugolovno-protsessual'nye kodeksy soiuzykh respublik [Resolution of the Central Executive Committee On the Introduction of Amendments to the Existing Criminal Procedure Code of the Union Republics], SZ SSSR, Issue No. 64, Item No. 459 (1934).

42. See UK RSFSR, arts. 97, 114, 115, 180(z) (1922) (violating import-export regulations, bribe-taking, provocation to bribe-taking, and large-scale theft of state property, respectively). The death penalty was also available under the 1922 Criminal Code for a variety of other non-violent crimes. See *supra* note 27.

43. Postanovlenie Tsentral'nogo Iсполnitel'nogo Komiteta i Soveta Narodnykh Komissarov ob okhrane imushchestva gosudarstvennykh predpriatii, kolkhozov i kooperatsii i ukreplenii obshchestvennoi (sotsialisticheskoi) sobstvennosti [Resolution of the Executive Committee and the Council of People's Commissars On the Preservation of the Property of Government Enterprises, Collective Farms and Cooperatives and the Strengthening of People's (Socialist) Property], SZ SSSR, Issue No. 62, Item No. 360 (1932) (death penalty for theft of vehicles of rail or water transport, collective farm and cooperative property). See also Leon Lipson, *Execution: Hallmark of Socialist Legality*, PROBLEMS OF COMMUNISM, Sept.-Oct. 1962, at 21, 22.

44. Ukaz Prezidiuma Verkhovnogo Soveta SSSR ob usilenii bor'by s osobo opasnymi prestupleniiami [Decree of the Presidium of the Supreme Soviet of the USSR On the Strengthening of the Fight Against Especially Dangerous Crimes], Vedomosti SSSR, Issue No. 19, Item No. 207 (1961) (counterfeiting, theft of government or society's property on an especially large scale) (codified at UK RSFSR, arts. 88, 93¹ (1962) (counterfeiting and large scale theft, respectively)); Ukaz Prezidiuma Verkhovnogo Soveta SSSR ob usilenii ugolovnoi otvetstvennosti za narushenie pravil o valiutnykh operatsiiakh [Decree of the Presidium of the Supreme Soviet of the USSR on Strengthening Criminal Responsibility for Violations of the Rules on Hard Currency Transactions], Vedomosti SSSR, Issue No. 27, Item No. 291 (1961) (foreign currency transactions) (codified at UK RSFSR, art. 88 (1962)); Ukaz Prezidiuma Verkhovnogo Soveta SSSR ob usilenii ugolovnoi otvetstvennosti za vziatochestvo [Decree of the Presidium of the Supreme Soviet of the USSR On the Strengthening of Criminal Responsibility for Bribe-taking], Vedomosti SSSR, Issue No. 8, Item No. 85 (1962) (bribe-taking) (codified at UK RSFSR, art. 173 (1962)); Ukaz Prezidiuma Verkhovnogo Soveta SSSR o vnesenii izmenenii i dopolnenii k stat'i 22 i 44 Osnov ugolovnogo zakonodatel'stva [Decree of the Presidium of the Supreme Soviet of the USSR on the Introduction of

At the same time that Khrushchev discredited Stalinist terror,⁴⁵ his use of the death penalty preserved the theoretical underpinnings that justified the terror, namely, that crimes against the state could not be tolerated and deserved the most severe punishment, even death. Under Khrushchev, the definition of a crime against the state was modified to focus on different behavior.⁴⁶ The number of capital economic crimes grew and the popular media prominently reported these sentences in a didactic fashion.⁴⁷

Amendments and Additions to Articles 22 and 44 of the Fundamentals of Criminal Legislation], *Vedomosti SSSR*, Issue No. 14, Item No. 147 (1962), translated in 1 CURRENT DIG. SOV. PRESS 18 (1962) (decree incorporating above changes into Fundamentals of Criminal Legislation). See also Willetts, *supra* note 33, at 26 (describing new legislation).

45. See BERTRAM D. WOLFE, *KHRUSHCHEV AND STALIN'S GHOST: TEXT, BACKGROUND AND MEANING OF KHRUSHCHEV'S SECRET REPORT TO THE TWENTIETH CONGRESS ON THE NIGHT OF FEBRUARY 24-25, 1956*, at 88 (1957).

46. In the 1922 Code, crime was defined as "every socially dangerous action or omission, threatening the basis of the soviet order and the system of rights, established by the worker-peasant class for the period of time on the way to the communist order." UK RSFSR, Item No. 6. In 1962, crime was defined as "socially dangerous activities (actions or omissions) encroaching upon the soviet social or government order, the socialist economic system, socialist property, the personality, political, labor, property and other rights of the citizen, and equally other socially dangerous activities encroaching on the socialist system of rights." UK RSFSR, Item No. 7 (1962) (emphasis added).

Compare also the articles discussing the purpose of the Criminal Code. Article 8 of the 1922 Code states its purpose as "the general deterrence of new violations on the part of the violator, as well as on the part of other unstable elements of society; b) the adaptation of the offender to levels of social behavior by means of the influence of labor; c) depriving the criminal of the opportunity to commit further crimes." Article 1 of the 1962 Code explains its purpose as "the defense of the [S]oviet social and governmental order, socialist property, personality and rights of citizens and the entire socialist system of rights from criminal encroachment." The protection of socialist property became a paramount goal.

47. See Willetts, *supra* note 33, at 27 (citing 15 Soviet newspaper reports between January and June of 1962 on death sentences handed down for economic crimes).

Andrei Sakharov dated the beginning of his involvement in the anti-death penalty movement to a story that appeared in *Nedelia* in 1963 about an old man who had counterfeited a few coins and hid them in his yard. The man was sentenced to death after what Sakharov called a "show trial," with the press reporting his death sentence as being the result of "numerous demands from working people." ANDREI SAKHAROV, *MEMOIRS 238-39* (Richard Lourie trans., 1990).

The main textbook for students of criminal law in the 1960s justified this change ideologically: as the Soviet state moved from the perfection of "socialism" and closer to the path of true "communism," the number of counter-revolutionary crimes perpetrated by capitalist or bourgeois elements in society dropped sharply.⁴⁸ As one Soviet commentator put it, "[t]he higher our society ascends toward the communist way of life, the purer its morals, and the more intolerant it is of everything that hampers and damages the people's work and society's well-being."⁴⁹

While Soviet society was supposedly moving closer to communism, crimes like large-scale theft of socialist property were still evident;⁵⁰ in fact, theft of socialist property (whether large-scale or not) comprised the largest category of crimes committed in the post-Stalin era.⁵¹ But it was not the growth in the rate of economic crime that provided the only impetus for the expansion of the death penalty in the 1960s. As one Soviet official wrote, "it is not the number of such crimes that has grown, but the immeasurable growth of the irreconcilability of the Soviet people to elements that bring disgrace on society and poison people's lives."⁵² Despite prominent reporting in the Soviet press of this period, it appears that the number of death penalty sentences for serious economic crime was relatively small, accounting for less than

48. Vsesoiuznyi institut po izucheniiu prichin i razrabotke mer preduprezhdeniia prestupnosti [All-Union Institute for the Study of Causes and Means of Preventing Crime], SOVETSKAIA KRIMINOLOGIIA [SOVIET CRIMINOLOGY] 73-74 (1966) [hereinafter SOVIET CRIMINOLOGY].

49. Shakhnazarov, *O kom pechet'sia "taims"* [About Whom is the "Times" Concerned], IZVESTIIA, May 14, 1961, at 4.

50. SOVIET CRIMINOLOGY, *supra* note 48, at 74.

51. SOVIET CRIMINOLOGY, *supra* note 48, at 75 (theft of socialist property accounted for 20-25% of all crimes committed in the "contemporary" (circa 1966) era).

52. Mironov, *Ukreplenie sotsialisticheskoi zakonnosti i pravoporiadka* [The Strengthening of Socialist Legality and Legal Process], PARTINAIA ZHIZN, Mar. 1962, at 8, 13. The absence of accurate statistics makes it impossible to determine whether or not theft of property had in fact increased.

five percent of the death penalty convictions for this period.⁵³ The disproportionate attention given the death penalty for economic crimes was a powerful tool of social engineering, designed to mold the behavior of the innocent as much as to punish the guilty.⁵⁴

The intensified use of the death penalty under Khrushchev for economic crimes is evidence of a consistent pattern in the Soviet criminal justice system: the search for new enemies and the use of the criminal justice system to influence political, social, and economic behavior. Under Lenin, the enemies were the "white guards," the holdovers from the imperial regime that sought to destroy socialism. Under Stalin, the enemies were numerous and varied: the peasant who dared to enrich himself,⁵⁵ the soldier who wrote letters from the front which were critical of Stalin,⁵⁶ and even the guiding lights of the Communist Party who supposedly strayed from the true Stalinist path.⁵⁷

Under Khrushchev, the scope of enemies subject to death became narrower: those who undermined the economy of the Soviet Union. Befitting their status as "crimes against the state," the new economic capital crimes were prosecuted by the Committee on State Security (KGB), rather than the

53. Gubarev, *Povinnuiu golovu mech ne sechet?* [Does Not the Sword Cut Off a Guilty Head?], *KOMSOMOL'SKAIA PRAVDA*, Feb. 26, 1991, at 1.

54. See Naumov, *Ugolovnyi zakon v usloviakh perekhoda k rynochnoi ekonomike* [Criminal Law under Conditions of Transition to a Market Economy], *SOVETSKOE GOSUDARSTVO I PRAVO* [SOV. GOS. I PRAVO] Issue No. 2, 1991, at 28 ("There exists to this day in Soviet criminal legislation, almost unprecedented in world law-making practice, a collection of criminal law norms of every kind to preserve the ideological purity of socialist economics.").

55. See LEONARD SCHAPIRO, *THE COMMUNIST PARTY OF THE SOVIET UNION* 387 (2d rev. ed. 1971).

56. See, e.g., MICHAEL SCAMMELL, *SOLZHENITSYN: A BIOGRAPHY* 153 (1984) (describing arrest of Aleksandr Solzhenitsyn).

57. See PEOPLE'S COMMISSARIAT OF JUSTICE OF THE U.S.S.R., *REPORT OF COURT PROCEEDINGS: THE CASE OF THE ANTI-SOVIET TROTSKYITE CENTRE* (1937) (partial transcript of 1936 purge trial of Zinoviev, Kamenev, et al.) [hereinafter *TROTSKYITE CENTRE*].

Ministry of Internal Affairs (MVD) and the procuracy, which handled common crimes.⁵⁸

II. CRIMINAL JUSTICE REFORM UNDER GORBACHEV AND YELTSIN

Khrushchev inadvertently began the process of destroying the legitimacy of the Soviet criminal justice system through his revelation of Stalin's abuses in his famous secret speech before the XXth Party Congress,⁵⁹ and through permitting the publication of Aleksandr Solzhenitsyn's description of life in a Stalinist labor camp, *One Day in the Life of Ivan Denisovich*.⁶⁰ Solzhenitsyn's work, published only after Khrushchev's personal approval,⁶¹ threw light for the first time on the brutality of the labor camp system, a system that abused political and common prisoners alike.

The Khrushchev "thaw" was limited to examination and criticism of the Stalin era. No such latitude was permitted to question the contemporary system of criminal justice. The thaw also proved abortive. After Khrushchev's ouster in 1964, Leonid Brezhnev returned to a policy of repressing criticism and other expression.⁶² Brezhnev and his successors, Iurii Andropov and Konstantin Chernenko, continued to use the criminal justice system for political ends.⁶³ The use

58. SAKHAROV, *supra* note 47, at 239.

59. See WOLFE, *supra* note 45, at 88.

60. See Solzhenitsyn, *Odin den' Ivana Denisovicha*, NOVY MIR, Nov. 1962, at 8.

61. For an account of Khrushchev's role in its publication, see ALEKSANDR I. SOLZHENITSYN, *THE OAK AND THE CALF: SKETCHES OF LITERARY LIFE IN THE SOVIET UNION* 40-41 (Harry Willetts trans., 1980).

62. Soon after Khrushchev's ouster, Ivan Denisovich was literally cut out of existing editions of *Novy Mir*. See DAVID REMNICK, *LENIN'S TOMB: THE LAST DAYS OF THE SOVIET EMPIRE* 27 (1993).

63. The number of political prisoners in the Soviet Union was never known with any certainty, and the number of confirmed cases could only serve as a base from which to extrapolate even larger numbers. There were 848 confirmed political prisoners in the USSR in 1982, 903 in 1983, 887 in 1984, and 837 in 1985. HELSINKI WATCH, *VIOLATIONS OF THE HELSINKI ACCORDS: USSR* 176 (1986) [hereinaf-

of the death penalty during this period continued unabated.⁶⁴

It was only under the leadership of Mikhail Gorbachev that the Soviet Union began truly to confront Lenin's and Stalin's legacy and to reveal the moral squalor of the criminal justice system of the present day. This examination led inevitably to a consideration of the role of the death penalty in the criminal justice system and, eventually, to its curtailment.

As with Khrushchev, Gorbachev's criminal-justice "glasnost" began with the revelation of Stalin's manipulation of the criminal justice system. But as in Khrushchev's time, the desire of the public for the truth outpaced the desire of the leadership to permit its revelation.

In 1988 in Moscow a new non-governmental organization called "Memorial" was founded, whose initial purpose was to lay bare Stalin's crimes and construct a memorial and research center in honor of the millions victimized during the Stalin era. Vilified or passively resisted by many Soviet officials, including Gorbachev himself, but never fatally repressed, Memorial became the vanguard of a broad-based movement to acknowledge, publicize and seek redress for Stalin's abuses.⁶⁵

ter HELSINKI WATCH: VIOLATIONS OF THE HELSINKI ACCORDS]. See generally AMNESTY INTERNATIONAL, PRISONERS OF CONSCIENCE IN THE USSR: THEIR TREATMENT AND CONDITIONS (1980) [hereinafter AMNESTY INTERNATIONAL, PRISONERS OF CONSCIENCE].

64. See AMNESTY INTERNATIONAL, THE DEATH PENALTY 130-39 (1979) (reporting on use of the death penalty in the USSR in the mid-1970s). For the 1980s, see Amnesty International's yearly country reports for that period.

65. An important component of the anti-Stalin campaign became advocacy of monetary compensation and official rehabilitation for Stalin's victims. In time, the government tried to offer a blanket rehabilitation, but advocates fought for a more meaningful case-by-case rehabilitation. See Postanovlenie Tsentral'nogo Komiteta KPSS o dopolnitel'nykh merakh po vosstanovleniiu spravedlivosti v otnoshenii zhertv repressii imeiushikh mesto v period 30-40-kh i nachala 50-kh godov [Resolution of the Central Committee of the CPSU on Additional Measures for the Restoration of Justice in Regard to the Victims of Repression Having Taken Place in the Period of the 1930s-40s and the beginning of the 1950s], PRAVDA, Jan. 6,

The literature of repression, previously known only through underground distribution of works such as Solzhenitsyn's *Gulag Archipelago*, burst aboveground and into the mainstream Soviet press.⁶⁶ Hardly a day could go by without an account of Stalin's abuses appearing in a major circulation newspaper or journal.

In 1990, after successfully overcoming official reluctance, Memorial's monument honoring the victims of Stalin was dedicated. The inscription on the monument was a portent of the struggle that was to continue: while conservatives in the Soviet government sought to confine the monument to victims of "Stalinism," its more radical proponents saw it as a memorial to victims of "repression," repression which continued beyond Stalin and to the present day.⁶⁷

The fight over a monument to victims of repression was an important symbol in a larger struggle to create a society of laws and justice out of a long history of totalitarianism. Gorbachev and the scholars who flourished under him popu-

1989, at 1 (providing for rehabilitation of those persecuted between 1930 and 1953); *Zakon RSFSR o reabilitatsii zhertv politicheskikh repressii* [Law of the RSFSR on the Rehabilitation of Victims of Political Repression], *Vedomosti RSFSR*, Issue No. 44, Item No. 1428 (1991) (providing for rehabilitation of those persecuted throughout the history of the Soviet Union); *Ukaz Prezidenta Soiuz SSSR o vosstanovlenii prav vsekh zhertv politicheskikh repressii 20-50-kh godov*, [Decree of the President of the USSR on the Restoration of Rights of All Victims of Political Repression Conducted in the 1920s-50s], *Vedomosti SSSR*, Issue No. 34, Item No. 647 (1990).

66. *Gulag Archipelago* was serialized in *Novy Mir*, the same journal that first published *One Day in the Life of Ivan Denisovich*. See Aleksandr I. Solzhenitsyn, *Arkhipelag Gulag*, *NOVY MIR*, Aug. 1989, at 7. See also, e.g., Alexander Akulichev & Alexai Pamyatnykh, *Katyn: Confirm or Refute*, *MOSCOW NEWS*, May 28, 1989, at 16 (describing Soviet execution of 25,700 Polish officers and prisoners of war at the end of World War II); David Remnick, *Memoir of a Gulag Witness: Lev Rozgon's Newly Published Vignettes from the Stalin Era*, *WASH. POST*, Mar. 3, 1990, at D1 (describing publication of Gulag memoirs in Soviet press).

67. Similarly, Soviet officials could not prevent the critique of Stalin from tainting Lenin and hence the roots of the Soviet state. See Tolz, *supra* note 24, at 8 (noting rehabilitation under Khrushchev concerned only the period between 1934 and 1953, the first rehabilitation under Gorbachev concerned 1930 to 1953, the second concerned the 1920s through the 1950s, and only after the breakup of the Soviet Union did rehabilitation in Russia cover 1917 through 1991).

larized the concept of a "rule of law" state,⁶⁸ and human rights activists, legal scholars, and politicians fought to make the concept a reality, in terms that were more radical than Gorbachev himself conceived.

The legal reform movement began by recognizing and publicizing the serious deficiencies in the Soviet justice system,⁶⁹ past and present. The widespread use of the death penalty was just one of these. Others included: an all-power-

68. See, e.g., Mikhail Gorbachev, *Sotsialisticheskaia ideia i revoliutsionnaia perestroika* [*The Socialist Idea and Revolutionary Restructuring*], PRAVDA, Nov. 26, 1989, at 1, 2 (advocating separation of powers and independent judiciary).

69. The following discussion is limited to the criminal justice sphere, although many of the deficiencies affected the civil sphere as well.

Civil justice reform was less controversial and more successful (at least on paper) than criminal justice reform, with a host of legislation being passed on the All-Union level purporting to guarantee civil liberties. See, e.g., Zakon Soiuza Sovetskikh Sotsialisticheskikh Respublik o poriadke obzhalovaniia v sud nepravomernykh deistvii dolzhnostnykh lits, ushchemliaiushchikh prava grazhdan [Law of the USSR On the Procedure for Appealing to a Court about the Illegal Acts of Officials, Infringing on the Rights of Citizens], Vedomosti SSSR, Issue No. 26, Item No. 388 (1987); Zakon SSSR o Svobode sovesti i religioznykh organizatsiakh [Law of the USSR On Freedom of Conscience and Religious Organizations], Vedomosti SSSR, Issue No. 41, Item No. 813 (1990), translated in HELSINKI WATCH, GLASTNOST IN JEOPARDY: HUMAN RIGHTS IN THE USSR 147 (1991) [hereinafter HELSINKI WATCH: HUMAN RIGHTS IN THE USSR]; Zakon SSSR ob obshchestvennykh ob'edineniiakh [Law on Public Organizations], Vedomosti SSSR, Issue No. 42, Item No. 839 (1990), translated in HELSINKI WATCH: HUMAN RIGHTS IN THE USSR, *supra*, at 141. Ukaz Prezidiuma Verkhovnogo Soveta SSSR o poriadke organizatsii i provedeniia sobranii, mitingov, ulichnykh shestvii i demonstratsii v SSSR [Decree of the Presidium of the Supreme Soviet of the USSR On the Procedure for Organizing and Conducting Meetings, Rallies, Street Marches, and Demonstrations in the USSR], Vedomosti SSSR, Issue No. 31, Item No. 504 (1988), translated in FOREIGN BROADCAST INFORMATION SERVICE—SOVIET UNION [FBIS-SOVI], July 29, 1988, at 40; Zakon SSSR o pechati i drugikh sredstvakh massovoi informatsii [Law of the USSR on the Press and Other Forms of Mass Media], Vedomosti SSSR, Issue No. 26, Item No. 492 (1990), translated in HELSINKI WATCH: HUMAN RIGHTS IN THE USSR, *supra*, at 123; Zakon SSSR o poriadke vyezda iz Soiuz Sovetskikh Sotsialisticheskikh Respublik i v'ezda v Soiuз Sovetskikh Sotsialisticheskikh Respublik grazhdan SSSR [Law of the USSR On the Procedure for Exit from the Union of Soviet Socialist Republics and Entry into the Union of Soviet Socialist Republics by Citizens of the USSR], Vedomosti SSSR, Issue No. 24, Item No. 687 (1991).

The Russian government retained many of these laws and subsequently passed many of its own.

ful procuracy and a compliant judiciary which ensured that the overriding goal of the criminal justice system was to procure convictions;⁷⁰ poorly trained judges and lawyers, making the power of the procuracy unchecked; inadequate legal guarantees for the rights of defendants, including the right to defense counsel and the right to be apprised of the charges and evidence against one; a criminal code that punished activity guaranteed by international human rights instruments;⁷¹ an ideologically biased code that treated crimes

70. See *Kontsepsiia ugolovnogo zakonodatel'stva Rossiiskoi Federatsii* [Framework of Criminal Legislation of the Russian Federation] [hereinafter *Framework of Criminal Legislation*], in *Razrabotka novogo ugolovnogo i ugolovno-protsessual'nogo zakonodatel'stva Rossiiskoi Federatsii* [Elaboration of New Criminal and Criminal Procedure Legislation of the Russian Federation] 8 GOSUDARSTVO I PRAVO [GOS. I PRAVO] Issue No. 8, 1992, at 38, 40 (noting that the procuracy and MVD viewed the criminal statutes as "utilitarian" and sought through amendments to create the illusion that they were fulfilling Party directives and waging a decisive war on crime) [hereinafter *Razrabotka*]; *Kontsepsiia ugolovno-protsessual'nogo zakonodatel'stva Rossiiskoi Federatsii* [Framework of Criminal Procedure Legislation of the Russian Federation] [hereinafter *Framework of Procedure*], in *Razrabotka*, *supra*, at 46, 46 ("in reality not only the investigator and the procurator, but to a significant extent the court as well fulfills the function of accusation."); G. KHOKHRIAKOV, PARADOKSY TIUR'MY [THE PARADOXES OF PRISON] 173-75 (1991) (noting the lack of due process resulting from the fact that the militia, the procuracy, the investigator and the court are all charged exclusively with the mandate to fight crime).

The Frameworks of Criminal Legislation and Procedure are hortatory guidelines for developing new criminal laws that were "adopted" by vote of the Congress of People's Deputies. The Congress also adopted a Framework of Judicial Reform. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, HUMAN RIGHTS AND LEGAL REFORM IN THE RUSSIAN FEDERATION 29-35 (1993) (describing framework of judicial reform).

71. See, e.g., UK RSFSR, art. 70 (anti-Soviet agitation and propaganda) and art. 190-1 (anti-Soviet slander) (used to punish any criticism of the government or life in the Soviet Union); art. 79 (mass disorders) and art. 190-3 (participation in group actions that disturb the peace) (used to punish peaceful assembly and petitioning); art. 83 (illegal entry to or exit from the USSR) and art. 64 (treason, which included fleeing the USSR) (used to curtail freedom of movement); art. 142 (infringement of laws on separation of church and state and church and school) and art. 227 (infringement of the rights of citizens in the guise of performing religious rites) (used to curtail freedom of religion); and, art. 209 (parasitism) (used to punish dissidents for failure to have officially sanctioned employment) (1987).

In addition to these code items, which on their face were overbroad, vague, or designed purposely to punish activity protected by international human rights

against the state as more serious than crimes against the person;⁷² excessive reliance on an inhumane correctional system;⁷³ the use of psychiatry in the criminal justice system as a tool to punish dissent;⁷⁴ and a practice of flouting the few procedural safeguards that existed.⁷⁵ In all these areas, the USSR was recognized as failing to live up to international standards as established by international law and

instruments, there were as many articles of the criminal code which, while appearing to punish activity recognized by the international community as criminal, were in fact used predominantly or frequently to punish dissent. See, e.g., UK RSFSR, art. 193 (threats or force against an official) (used to punish peaceful challenges to official action); art. 88 (violation of currency regulations) (used against dissidents, who, prevented from working in the USSR, were compelled to live on donations of hard currency from abroad); art. 218 (illegal possession, production or sale of weapons) and art. 224 (illegal possession, production or sale of narcotics) (weapons and drugs were planted on those the government wished to punish); art. 188 (maliciously disobeying the demands of labor colony administrators) (used to extend term of dissidents due to be released) (1987). Most of the criminal code articles mentioned in this footnote are similar to those found in Harold Berman's English translation of the 1965 Code. SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES (Harold J. Berman & James W. Spindler trans. & eds., 2d ed. 1972).

Even after the facially objectionable articles listed above were abolished or fell into disuse, the misuse of those in this second category continued. For example, in 1991, a group of retired military personnel belonging to the activist group Shchit' who had been investigating the use of force by Soviet troops in Vilnius, Lithuania in January, 1991, were arrested and charged with illegal possession of weapons, narcotics and gold. The accused described the charges as fabricated, and the charges were eventually dropped. Interview with Evgenii Evstigneev, one of the arrestees, Moscow, Russia (Mar. 1991).

72. *Framework of Criminal Legislation*, supra note 70, at 40.

73. See generally AMNESTY INTERNATIONAL, PRISONERS OF CONSCIENCE, supra note 63. See also *Framework of Criminal Legislation*, supra note 70, at 40 n.2 (noting the sharp increase in the availability of deprivation of freedom as a punishment in the 1960 code compared to the 1926 code).

74. See, e.g., KORYAGIN, A MAN STRUGGLING FOR HUMAN DIGNITY (R. van Voren ed., 1987) (describing work of psychiatrist and political prisoner Anatolii Koriagin to expose abuses of Soviet psychiatry).

75. See *Framework of Procedure*, supra note 70, at 47 (noting the failure of Soviet judicial process to fulfill even those modest principles it established for itself).

municipal practice.⁷⁶ Most of these deficiencies persist to this day.

The Russian criminal justice system has relied to a great extent on confessions as the main source of evidence.⁷⁷ Criminal trials are in many cases more similar to an American sentencing hearing after plea bargaining than an impartial examination of the evidence and a determination of guilt—the defendant admits his guilt, and his attorney argues to the judge for mitigation of punishment. The conviction rate in Russia is one of the highest in the world, estimated at around ninety-nine percent.⁷⁸ The reason for the high conviction rate has less to do with the skill of the militia and procuracy in finding the guilty party than with the pressure to maintain such high statistics.⁷⁹

76. See *Framework of Criminal Litigation*, *supra* note 70, at 41, 43 (pointing out deficiencies in the old code compared to international law and practice and noting the necessity of a new criminal code to conform to the "norms of humane civilization and international agreements"). Cf. Golik, *Prestupnost' v SSSR: Problemy starye i novye* [*Crime in the USSR: Old and New Problems*], SOV. GOS. I PRAVO, Issue No. 2, 1991, at 20, 26 (criminal legal reforms motivated by desire to comply with international agreements).

The Soviet Union deposited instruments of ratification to the International Covenant on Civil and Political Rights in 1973. It was also a Party to the Helsinki Final Act and subsequent agreements of the Commission on Security and Cooperation in Europe. Russia succeeded to these international instruments upon the dissolution of the Soviet Union in 1991.

77. The roots of this practice can be traced to the work of Stalin's Procurator General and chief engineer of the purges, Andrei Vyshinskii, who relied almost exclusively on coerced and false confessions in the trials of Bukharin, Piatakov, Kamenev, Radek, and others. BERMAN, *supra* note 6, at 70-71; John N. Hazard, *Where are the Peril Points*, 15 LAW & SOC. INQUIRY 521, 522 (1990). See TROTSKYITE CENTRE, *supra* note 57.

78. Fletcher, *supra* note 2, at 14.

79. See Louise L. Shelley, *Policing Soviet Society: The Evolution of State Control*, 15 LAW & SOC. INQUIRY 479, 517 (1990) (noting that Communist Party once required police to "clear 95% of all crimes"); KHOKHRIAKOV, *supra* note 70, at 173-74 ("demand for positive results" causes "militia to 'hide' statistics, that is, to not register the facts of crimes known to them, and the procurator . . . closes its eyes"); Ger P. Van den Berg, *Judicial Statistics in a Period of Glasnost*, 13 REV. OF SOCIALIST L. 299, 311 (1987) (analyzing statistics from 1970 to 1986 and concluding that statistics are generally manipulated to "show the effects of the policy of the new leadership"). It is easy to infer that vigorous prosecution of the inno-

Criminal justice critics of the Gorbachev era faulted the system not just for punishing the innocent, but also for mistreating the guilty. When the human rights movement emerged above ground, it demonstrated that the injustice of this system was not limited to punishing dissident intellectuals. Former dissidents who had spent years as subjects in the criminal justice system and in the penal system⁸⁰ lived and worked side by side with real criminals who, like the politicals, also suffered unjustly at the hands of the state.⁸¹ A component of the new legal reform/human rights movement was therefore a prisoner rights movement that advocated penal reform.⁸²

The second stage in the legal reform movement was the implementation of reforms through changes in practice and through promulgation of new legal safeguards. Changes in practice tended to occur first. For example, the use of two of

cent occurs for the same reasons just cited.

Recent news reports suggest that the obsession with statistics as a measurement of the efficacy of law enforcement continues to this day. See, e.g., *The Wild and the "New Criminality,"* 48 NEDELIA 7 (1992), translated in FBIS-USR, Jan. 27, 1993, at 33 (interview with Russian Procurator General Stepankov in which he notes that in the first half of 1992, "47,000 procuratorial checkups were conducted, in the course of which more than 29,000 illegal juridical acts were uncovered . . . This exceeds by many times the number of violations uncovered by all the control organs taken together (of which, by the way, there are almost 10 times more than procuracy employees).").

80. For example, Andrei Sakharov (seven years in internal exile), became a deputy in the newly created Congress and was the leading congressional spokesperson for human rights. Sergei Kovalev (seven years in prison and labor camp, three years in internal exile) became, and is currently, the Chairman of the Human Rights Committee of the Russian Parliament. Valerii Abramkin (six years in labor camps and prisons for his human rights activity) began the "Sodeistvie" organization, whose goal is the reform of the criminal justice system and, in particular, the prison system.

81. Cf. *Comments on a Draft Russian Criminal Code by V.S. Ustinov*, GOS. I PRAVO, Issue No. 6, 1992, at 87 (characterizing the present criminal code in practice as "one of the most cruel pieces of legislation in the civilized world").

82. See *infra* text accompanying notes 133-37. The work of Valerii Abramkin's Prison Project and Marina Rumshiskaia's work on behalf of prisoner rights at Memorial are particularly noteworthy. Other organizations, such as Gummanost' in Petersburg, have also addressed the treatment of prisoners.

the most notorious "political" articles of the criminal code, articles 190-1 and 70, decreased markedly beginning in 1987.⁸³ The number of political prisoners entering the system slowed, and at the same time, the number being released increased.⁸⁴

Such practical changes have been motivated as much by external pressure from foreign and domestic human rights groups and foreign governments as by a genuine governmental commitment to reform.⁸⁵ At various times, influential members of the criminal justice establishment have passively or actively obstructed criminal justice reform.⁸⁶ While the leadership of the MVD has supported some reform efforts, the procuracy, which stands to lose the most from any redistribution of authority in the criminal justice system, has been a serious obstacle to reform, as has the state security appara-

83. HELSINKI WATCH, TOWARD THE RULE OF LAW: SOVIET LEGAL REFORM AND HUMAN RIGHTS UNDER PERESTROIKA 116 (1989).

84. In 1985, the year Gorbachev became head of the Communist Party, the number of confirmed cases stood at 837. HELSINKI WATCH: VIOLATIONS OF THE HELSINKI ACCORDS, *supra* note 63, at 175-76. By the end of his tenure and the dissolution of the USSR in the fall of 1991, this number had decreased to approximately 91 (including 54 prisoners in Georgia). VESTI IZ SSSR [USSR NEWS BRIEF], Oct. 30, 1991.

85. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 70, at 16 (citing KGB memo noting that political prisoners were freed to create appearance of human rights protection). The resolution of political prisoner cases was one of the main goals of U.S. human rights policy toward the Soviet Union. HUMAN RIGHTS WATCH, WORLD REPORT 1990, at 398 (1991).

86. In 1988, for example, the author met with then Chairman of the Moscow College of Advocates (at the time the rough equivalent of a bar association), Georgii Alekseevich Voskresenskii, who denied the existence of political prisoners and the "dopusk" system whereby political cases could only be defended by attorneys screened and approved by the KGB. Voskresenskii was also one of a minority of members of the Collegium that voted in 1988 against the readmission to the bar of Boris Zolotukhin, who had been disbarred in 1968 for defending Aleksandr Ginzburg in a political trial. In 1990 the Chairman of the Russian Supreme Court, Viacheslav Lebedev, made similar misrepresentations in a meeting with the author. The "dopusk system" is reported still to exist, with prosecutors unsuccessfully attempting to dictate choice of counsel to some of those accused in the August 1991 coup attempt. See Valerii Rudnev, *Today Lawyers Also Need Protection*, IZVESTIIA, Apr. 16, 1992, at 3, translated in FBIS-USR, Apr. 29, 1992, at 42.

tus. Reformist legislators have had to fight a political opposition that represents both the authoritarianism of the recent Soviet past⁸⁷ and the public fear of increasing crime and social chaos.⁸⁸ Despite the new-found voice of the human rights movement, these forces remain powerful barriers.

Nevertheless, significant changes have occurred in legislation, even if effective implementation has proven problematic. A limitation on pretrial detention was passed in 1989.⁸⁹ The right to counsel was enshrined in 1990 in the USSR and in 1992 in the Russian Federation.⁹⁰ In 1992 amendments to

87. The RSFSR Congress of People's Deputies was selected from a slate of candidates, 75% of whom were nominated by Communist Party labor collectives. Eighty-six percent of the elected deputies were Communist Party members. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 70, at 45. One analyst of Russian affairs estimates that the current Russian Supreme Soviet, which is elected by and from the Congress of People's Deputies, consists of 10-15% reformers who support President Yeltsin, 15-20% hard line conservatives—most former Communists or extreme nationalists—with the remainder filling out a spectrum that is tilted toward the conservatives. Interview with Dmitri Simes, *Russian Politics* (C-Span 2 television, cablecast Jan. 28, 1993).

88. See Gerasimov, *Sociologists Offer Evidence: Fate is Criminal, Life is Cheap—What Could Free Weapons Sales Lead to?*, PRAVDA, Oct. 15, 1992, at 4, translated in FBIS-USR, Oct. 24, 1992, at 5 (reporting on popular concern for personal safety; citing poll in which majority of Moscow residents express desire to carry weapon for self-defense). See also *infra* note 150 (citing crime statistics).

89. See Zakon SSSR o vnesenii izmenenii i dopolnenii v stat'iu 34 Osnov ugolovnogo sudoproizvodstva Soiuzs SSR i soiuznykh respublik [Law of the USSR on the Introduction of Amendments and Additions to Article 34 of the Fundamentals of Procedure of the USSR and Union Republics], Item No. 1, Vedomosti SSSR, Issue No. 25, Item No. 493 (1989). The "maximum" term was limited to two months, but with the approval of the procuracy could be extended to up to one and one-half years. In practice, the author found that the law was routinely violated.

90. See Zakon SSSR o vnesenii izmenenii i dopolnenii v Osnovy ugolovnogo sudoproizvodstva Soiuzs SSR i soiuznykh respublik [Law of the USSR on the Introduction of Amendments and Additions to the Fundamentals of Procedure of the USSR and Union Republics], Vedomosti SSSR, Issue No. 16, Item No. 272 (1990); Zakon Rossiskoi Federatsii o vnesenii izmenenii i dopolnenii v ugolovno-protsessual'nyi kodeks RSFSR [Law of the Russian Federation on the Introduction of Amendments and Additions to the RSFSR Criminal Procedure Code], art. I (5-7), Vedomosti S'ezda narodnykh deputatov Rossiskoi Federatsii i verkhovnogo soveta Rossiskoi Federatsii [Vedomosti RF], Issue No. 25, Item No. 1389 (1992), translated in FBIS-USR, Aug. 5, 1992, at 1 (amending articles 47, 49 and 51 of

the Russian criminal procedure code gave detainees the right to a court review of the legality of detention.⁹¹ The long-awaited introduction of the jury system was announced for 1993, to begin on an experimental basis in five areas in Russia.⁹²

Reforms to the substantive criminal code were also implemented: articles 190-1 and 70 were replaced, not without some backsliding, to cover a narrower range of incitement to violence.⁹³ "Parasitism," entrepreneurial activity, religious activity, the violation of passport rules, consensual sex between men, and other acts were decriminalized.⁹⁴ The crimi-

Criminal Procedure Code).

To this day, the right to counsel continues to be of limited value since there is no requirement that detainees be advised of the right, and there is no provision for punishing violations, for example by an exclusionary rule for confessions obtained in the absence of counsel. Many criminal defendants interviewed by the author have described the function of their attorneys as limited to pleading with the court for mitigation of their sentences.

91. See *Zakon Rossiskoi Federatsii o vnesenii izmenenii i dopolnenii v Ugolovno-protsessual'nyi kodeks RSFSR* [Law of the Russian Federation on the Introduction of Amendments and Additions to the Criminal Procedure Code of the RSFSR], Item No. I (1 & 18), *Vedomosti RF*, Issue No. 25, Item No. 1389 (1992), translated in *FBIS-USR*, Aug. 5, 1992, at 1, 3-4 (amending Criminal Procedure Code article 11 and adding articles 220.1 & 220.2).

92. Valerii Rudnev, *Trial by Jury is Returning to Russia*, *IZVESTIYA*, Nov. 27, 1992, at 3, translated in *FBIS-USR*, Dec. 30, 1992, at 24.

93. See *Ukaz Prezidiuma Verkhovnogo Soveta SSSR o vnesenii izmenenii i dopolnenii v Zakon SSSR "Ob ugovlovnoi otvetstvennosti za gosudarstvennye prestupleniia" i nekotorye drugie zakonodatel'nye akty SSSR* [Decree on the Introduction of Amendments and Additions to the "Law of the USSR on Criminal Responsibility for State Crimes" and Several Other Legislative Acts of the USSR], *Vedomosti SSSR*, Issue No. 15, Item No. 106 (1989) [hereinafter Decree]; *Zakon SSSR ob utverzhdenii Ukaza Prezidiuma Verkhovnogo Soveta SSSR ot 8 apreliia 1989 goda "O vnesenii izmenenii i dopolnenii v Zakon SSSR 'Ob ugovlovnoi otvetstvennosti za gosudarstvennye prestupleniia' i nekotorye drugie zakonodatel'nye akty SSSR,"* [Law of the USSR on Affirming the Decree of the Presidium of the Supreme Soviet of the USSR of April 8, 1989 "On the Introduction of Amendments and Additions to the 'Law of the USSR on Criminal Responsibility for State Crimes' and Several Other Legislative Acts of the USSR"], *Vedomosti SSSR*, Issue No. 9, Item No. 203 (1989) (affirming the decree).

94. See, e.g., *Zakon RSFSR o vnesenii izmenenii i dopolnenii v Ugolovnyi kodeks RSFSR, Ugolovno-protsessualnyi kodeks RSFSR i Kodeks RSFSR ob administrativnykh pravonarusheniakh* [Law of the RSFSR on the Introduction of

nal code was also amended to punish the use of the criminal justice system to violate individual rights.⁹⁵

Even before the ink was dry on many of these reforms, however, other laws were passed in the criminal sphere that represented a step backward in the protection of human rights and civil liberties: a new code provision punished slandering the President,⁹⁶ and another punished incitement of

Amendments and Additions to the Criminal Code of the RSFSR, the Criminal Procedure Code of the RSFSR and the Code of the RSFSR on Administrative Violations], Item No. 11, *Vedomosti RSFSR*, Issue No. 52, Item No. 1867 (1991); *ROSSIISKAIA GAZETA*, May 27, 1993 (decriminalization of homosexuality).

95. See, e.g., *Polozheniie ob usloviakh i poriadke okazaniia psikhiatricheskoi pomoshchi* [Regulations on the Conditions and Procedures for Rendering Psychiatric Care], *Vedomosti SSSR*, Issue No. 2, Item No. 19 (1988) (providing for criminal penalties for those who confine healthy people in psychiatric hospitals); *Ukaz Prezidiuma Verkhovnogo Soveta RSFSR o vnesenii izmenenii i dopolnenii v Ugolovnyi i Ugolovno-protsessualnyi kodeksy RSFSR* [Decree of the Presidium of the RSFSR on the Introduction of Amendments and Additions to the Criminal and Criminal Procedure Codes of the RSFSR], Item No. 2, *Vedomosti RSFSR*, Issue No. 2, Item No. 35 (1988) ("placement of a person not known to be mentally ill in a psychiatric hospital") (codified at UK RSFSR, art. 126² (1990)); *Ukaz Prezidiuma Verkhovnogo Soveta RSFSR o vnesenii izmenenii i dopolnenii v Ugolovnyi kodeks RSFSR* [Decree of the Presidium of the Supreme Soviet of the RSFSR on the Introduction of Amendments and Additions to the Criminal Code of the RSFSR] Item No. 2, *Vedomosti RSFSR*, Issue No. 45, Item No. 1572 (1985) ("intentional infringement by an official of the rights . . . of a citizen, associated with his persecution for submission of proposals, petitions or complaints in accordance with the established procedure") (codified at UK RSFSR, art. 139¹ (1990)); *Ukaz Prezidiuma Verkhovnogo Soveta RSFSR o vnesenii izmenenii i dopolnenii v Ugolovnyi kodeks RSFSR i Kodeks RSFSR ob administrativnykh pravonarusheniakh* [Decree of the Presidium of the Supreme Soviet of the RSFSR on the Introduction of Amendments and Additions to the Criminal Code of the RSFSR and the Code of the RSFSR on Administrative Violations], art. I (1), *Vedomosti RSFSR*, Issue No. 50, Item No. 1477 (1989) (interference in criminal cases) (codified at UK RSFSR, art. 176¹ (1990)).

96. See *Zakon SSSR o zashchite chesti i dostoinstva Prezidenta SSSR* [Law of the USSR on the Protection of the Honor and Dignity of the President of the USSR], *Vedomosti SSSR*, Issue No. 22, Item No. 391 (1990); *Postanovlenie Verkhovnogo Soveta SSSR o poriadke primeneniia i vvedeniia v deistvie Zakona SSSR "O zashchite chesti i dostoinstva Prezidenta SSSR"* [Resolution of the Supreme Soviet of the USSR on the Entry into Force of the Law of the USSR "On the Protection of the Honor and Dignity of the President of the USSR"], *Vedomosti SSSR*, Issue No. 22, Item No. 392 (1990). This provision was not codified in the 1990 RSFSR Code.

ethnic hatred,⁹⁷ which was used in some parts of the Soviet Union as a pretext to punish political opponents of the Communist regime.⁹⁸ A Presidential decree and subsequent law expanded the power of the militia to conduct searches.⁹⁹ A law on the state security apparatus has enshrined its authority to conduct warrantless searches and monitor phone conversations and mail, without adequate protections against abuse of these sweeping powers,¹⁰⁰ while a subsequent law has provided only procuratorial, not judicial, oversight of such activities.¹⁰¹

The failed coup in August 1991 gave reformers a short-lived political opportunity to pass more comprehensive reforms. On September 5, 1991, the USSR Congress of People's Deputies passed the Declaration of Human Rights and Free-

97. Decree, *supra* note 93.

98. See HELSINKI WATCH, CONFLICT IN THE SOVIET UNION: BLACK JANUARY IN AZERBAIJAN 33 (1991) (incitement of ethnic hatred used to imprison Etibar Mamedov and other opponents of Communist regime in Azerbaijan in 1990).

99. See Ukaz Preziduma Verkhovnogo Soveta SSSR ob obiazannostiakh i pravakh vnutrennikh voisk Ministerstva vnutrennikh del SSSR pri okhrane obshchestvennogo poriadka [Decree of the Presidium of the Supreme Soviet of the USSR on the Responsibilities and Rights of Internal Troops of the Ministry of Internal Affairs of the USSR while Preserving Public Order], *Vedomosti SSSR*, Issue No. 31, Item No. 505 (1988) (decree accompanying law on demonstrations, *supra* note 71, that authorized entering houses in hot pursuit or for the prevention of crimes threatening public order or personal safety); Zakon SSSR ob obiazannostiakh i pravakh vnutrennikh voisk Ministerstva vnutrennikh del SSSR pri okhrane obshchestvennogo poriadka [Law of the USSR on Responsibilities and Rights of Internal Troops of the Ministry of Internal Affairs of the USSR Concerned with Protecting Public Order], *Vedomosti SSSR*, Issue No. 14, Item No. 233 (1990), translated in FBIS-SOV., Apr. 2, 1990, at 39 (authorizing MVD troops to enter nonresidential buildings without a warrant "in pursuit of persons suspected of committing crimes" and to enter residences without a warrant in order "actually to stop crimes").

100. See Zakon SSSR ob organakh gosudarstvennoi bezopasnosti v SSSR [Law of the USSR on State Security Organs in the USSR], art. 14 (3) & (9), *Vedomosti SSSR*, Issue No. 22, Item No. 630 (1991), translated in FBIS-SOV, May 28, 1991, at 35.

101. See Zakon Rossiskoi Federatsii ob operativno-rozysknoi deiatel'nosti v Rossiskoi Federatsii [Law of the Russian Federation on Operational-Investigative Activities in the Russian Federation], art. 8, *Vedomosti RF*, Issue No. 17, Item No. 892 (1992).

doms (Declaration) as a precursor to guarantees of human rights and civil liberties to be contained in a new USSR Constitution.¹⁰² In the criminal justice sphere, the Declaration contained guarantees of equal protection¹⁰³ and due process,¹⁰⁴ a prohibition of torture or cruel and inhumane treatment,¹⁰⁵ protections against unlawful search and seizure,¹⁰⁶ and a prohibition against the arbitrary deprivation of life.¹⁰⁷

The Declaration was short-lived, as the Soviet Union dissolved just four months later. Shortly before dissolution, on November 27, 1991, the Supreme Soviet of the Russian Federation passed an even more ambitious Declaration of Rights and Freedoms (Russian Declaration).¹⁰⁸ The Russian Declaration contains guarantees of equal protection,¹⁰⁹ the presumption of innocence in criminal proceedings,¹¹⁰ the right to habeas corpus,¹¹¹ the right to counsel,¹¹² protections against double jeopardy¹¹³ and warrantless search and seizure,¹¹⁴ and an exclusionary rule.¹¹⁵ The Russian Declara-

102. See Deklaratsiia prav i svobod cheloveka [Declaration of Human Rights and Freedoms], *Vedomosti SSSR*, Issue No. 37, Item No. 1083 (1991), translated in *Soviet Turmoil: Text of Rights Adopted by the Soviet Congress*, N.Y. TIMES, Sept. 7, 1991, § 1, at 5.

103. *Id.* art. 3.

104. *Id.* arts. 15 & 16.

105. *Id.* art. 17.

106. *Id.* arts. 18 & 19.

107. *Id.* art. 13.

108. Postanovlenie Verkhovnogo Soveta RSFSR o deklaratsii prav i svobod cheloveka i grazhdanina [Resolution of the Supreme Soviet of the RSFSR on the Declaration of Rights and Freedoms of People and Citizens], *Vedomosti RSFSR*, Issue No. 52, Item No. 1865 (1991), translated in *FBIS-USR*, Jan. 7, 1991, at 48 [hereinafter *RSFSR Declaration*].

109. *Id.* art. 3.

110. *Id.* art. 34.

111. *Id.* Item No. 8.

112. *Id.* Item No. 37.

113. *Id.* art. 34.

114. *Id.* art. 9 & 11.

115. *Id.* art. 34.

tion also contains an article stating Russia's aspiration to abolish the death penalty.¹¹⁶ Despite this seemingly broad protection, the Declaration is generally not considered to be self-executing and hence of limited practical value.

The Russian Constitution was also amended in 1991 and 1992 to include similar human rights provisions:¹¹⁷ an equal protection clause,¹¹⁸ a prohibition of torture and cruel and unusual punishment,¹¹⁹ protections against unlawful search and seizure,¹²⁰ and a prohibition against the arbitrary deprivation of life that limited the application of the death penalty.¹²¹ The Constitution also added a right against self-incrimination and the prohibition of ex post facto laws.¹²² Finally, primacy was granted to international human rights instruments with an effort to make them self-executing.¹²³

These protections suffer from two serious drawbacks. The first is that many are subject to subsequent limitation in accordance with Russian law.¹²⁴ Second, and more important, the Constitution was treated throughout Soviet history

116. *Id.* art. 7. See *infra* note 178 and accompanying text.

117. See Zakon Rossiskoi Federatsii ob izmeneniakh i dopolneniakh Konstitutsii (osnovogo zakona) Rossiskoi Sovetskoi Federativnoi Sotsialisticheskoi Respubliki [Law of the Russian Federation on Amendments and Additions to the Constitution (Basic Law) of the Russian Soviet Federated Socialist Republic], part 5, *Vedomosti RF*, Issue No. 20, Item No. 1084 (1992) [hereinafter Amendments to the Constitution].

118. *Id.* art. 34.

119. *Id.* art. 39. In contrast to the Constitution, the Declaration contained an additional clause guaranteeing a right to humane treatment and dignity in prison. RSFSR Declaration, *supra* note 108, art. 17.

120. Amendments to the Constitution, *supra* note 117, arts. 40 & 41.

121. Amendments to the Constitution, *supra* note 117, art. 38. See *infra* note 178 and accompanying text.

122. Amendments to the Constitution, *supra* note 117, arts. 66 & 67.

123. Amendments to the Constitution, *supra* note 117, art. 32. As important as the provisions themselves, the new Constitution abandons the socialist notion of rights existing only with correlative duties. In the amended Constitution, the duties are sharply curtailed and do not correspond to rights. They include the duty to defend the country, to pay taxes, to serve on juries, and to protect the environment. Amendments to the Constitution, *supra* note 117, part 6.

124. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 70, at 56.

as an aspirational document seldom invoked as the basis for a judicial decision. Thus far, constitutional reform in these areas has had little practical impact on the criminal justice system. Only when trial courts begin to use the Constitution in their decisions will the new provisions acquire true significance. The new Constitutional Court offers some hope that the Constitution will become a useful judicial tool, although up until now this court has ruled mostly on the constitutionality of laws and decrees, and not on the constitutionality of official actions. The Court has not yet demonstrated an ability to provide meaningful remedies to individual litigants in civil liberties cases.¹²⁵

Despite these piecemeal changes, the law reform movement has been unable to generate comprehensive reform legislation. While many drafts of substantive and procedural criminal codes have been published and discussed, none are close to passage.¹²⁶ As a result, the substantive criminal code to this day retains many provisions that are holdovers of antiquated ideology, reminders of the use of the criminal justice system for political and social engineering purposes. Many of the state crime articles are ideologically obsolete, and a long list of economic crimes that would be considered normal business practices in the rest of the industrialized

125. The statute governing the Court provides for jurisdiction in such cases. See *Zakon RSFSR o konstitutsionnom sude RSFSR* [Law of the RSFSR on the Constitutional Court of the RSFSR], gl. 3, *Vedomosti RSFSR*, Issue No. 30, Item No. 1017 (1991), translated in *FBIS-USR*, Sept. 10, 1991, at 21. In January 1993, the Court reportedly had 40 cases under consideration pursuant to this jurisdiction. Most of these cases concerned labor disputes over pensions and other compensation. Ostapchuk, *Konstitutsionnyi sud—pravozashchitnik* [The Constitutional Court—Defender of Rights], *NEZAVISIMAIA GAZETA*, Jan. 27, 1993, at 2. See also *LAWYERS COMMITTEE FOR HUMAN RIGHTS*, *supra* note 70, at 68 (reporting an age discrimination complaint decided by the Constitutional Court in 1991).

126. See Carla Thorson, *Toward the Rule of Law: Russia*, *RADIO FREE EUR/RADIO LIBERTY, INC. RES. REP.*, July 3, 1992, at 41, 43-45 (describing abortive attempt to pass new criminal codes in 1990-92).

world¹²⁷ are still made criminal in Russia, even if not all of these provisions are now being vigorously enforced.¹²⁸

The criminal procedure code is also inadequate because it maintains the enormous and coercive power of the procuracy. A law on the procuracy passed in 1992 did little more than confirm the procuracy's control over every aspect of the criminal justice system.¹²⁹

Penal reform has followed the same pattern, but with an even smaller constituency of supporters. Under Interior Minister Vadim Bakatin and his Chief of Corrections, General Vladimir Guliaev, Soviet and Russian prisons began an uneven course of reform¹³⁰ in 1988 that was hindered by political indifference, economic constraints, and ideological conflict.¹³¹ The reforms were dictated by the breakdown of the system. Inhumane overcrowding, the physical deterioration of facilities, and other squalid conditions contributed to a sharp increase in prison disturbances that threatened MVD personnel. Economic collapse crippled the once profitable prison industry and resulted in a decrease of government funds for

127. See, e.g., UK RSFSR, art. 88 (speculation in currency and securities); art. 154 ("speculation, that is the buying up and resale of goods or other articles for the purpose of making a profit") (1991).

128. The stepped-up enforcement of the crime of currency speculation at the end of 1992 demonstrates that dormant laws can be revived easily to suit political ends. See *Survey of Currency Exchange Markets: Currency Trading Has Become Dangerous*, KOMMERSANT, Dec. 7, 1992, at 8, translated in FBIS-USR, Jan. 16, 1993, at 1.

129. Zakon Rossiskoi Federatsii o prokurature Rossiskoi Federatsii [Law of the Russian Federation on the Procuracy of the Russian Federation], Vedomosti RF, Issue No. 8, Item No. 366 (1992), translated in RUSDATA DIALINE-RUSLEGISLINE, available in LEXIS, World Library, SOVLEG File.

130. Chief among the improvements were the marked decrease in systemic physical abuse of prisoners by guards in correctional facilities, an end to the withholding of food as a means of punishing violations of prison rules, and the enhancement, on an experimental basis, of privileges such as family visits, furloughs, and telephone calls, mostly with female prisoners. HELSINKI WATCH, PRISON CONDITIONS IN THE SOVIET UNION: A REPORT ON FACILITIES IN RUSSIA AND AZERBAIJAN 20, 22, 43, 46 (1991) [hereinafter PRISON CONDITIONS].

131. Bakatin's career proved short-lived; in the beginning of 1990 he was replaced by former Latvian KGB chairman and subsequent coup plotter, Boris Pugo.

the prison system. The response was a move toward self-financing that made operation of prison facilities even more difficult.¹³²

However, it was not until 1992 that amendments were passed to the Russian law on penal facilities, and they are fragmentary at best. The amendments contain guarantees of respect for prisoners' freedom of conscience¹³³ and personal safety vis-à-vis other prisoners,¹³⁴ and provide for many improvements in their daily lives.¹³⁵ The law also contains a provision for legislative oversight of penal facilities, but not independent of the MVD. For the first time, the law speaks of disciplinary or criminal penalties, including dismissal from the MVD, for prison workers who act in an "inhumane" manner.¹³⁶ Prison officials are obligated to deliver prisoner complaints to the procuracy, judiciary, or other governmental

132. See generally PRISON CONDITIONS, *supra* note 130.

133. See *Zakon Rossiiskoi Federatsii o vnesenii izmenenii i dopolnenii v Ispravitel'no-trudovoi kodeks RSFSR, Ugolovnyi kodeks RSFSR i Ugolovno-protsessual'nyi kodeks RSFSR* [Law of the Russian Federation on Introduction of Amendments and Additions to the Correctional Labor Code of the RSFSR, the Criminal Code of the RSFSR, and the Criminal Procedure Code of the RSFSR], *Vedomosti RF*, Issue No. 29, Item No. 1687 (1992), translated in *FBIS-USR*, Sept. 1, 1992, at 10, 11 [hereinafter Labor Code Amendments] (creating article 81 of the *Ispravitel'no-Trudovoi Kodeks* [ITK RSFSR] [Correctional Labor Code]).

134. *Id.* (creating ITK RSFSR, art. 82).

135. For example, male prisoners are now permitted to wear facial hair or to shave every day; female prisoners can wear clothing of their choice rather than a prison uniform. *Id.* (codified at ITK RSFSR, art. 22). Many categories of prisoners are allowed to receive money from outside the prison to purchase goods at the prison commissary. *Id.* (codified at ITK RSFSR, art. 24). Restrictions on reading material have been eased, although not eliminated. *Id.* (codified at ITK RSFSR, art. 25). Prisoners are allowed to make telephone calls for the first time. *Id.* (codified at ITK RSFSR, art. 26). The number of letters prisoners are allowed to send and receive is now unlimited. *Id.* (codified at ITK RSFSR, art. 30). Pregnant women, women with young children, and invalids receive a variety of additional privileges.

136. *Id.* (codified at ITK RSFSR, art. 117). See Anna Broydo, "The Crosses" Are a Powder Keg, *NEVSKOE VREMIA*, Nov. 25, 1992, at 1, translated in *FBIS-USR*, Dec. 30, 1992, at 27 (quoting head of Russian prison system as saying 2,400 prison staff were dismissed in 1992 and 44 criminal cases begun due to misconduct).

entities without reading or censoring them, and prisoners are entitled to receive written responses to their complaints.¹³⁷

In other substantial respects the penal law remains the same. Compulsory labor remains the cornerstone of the Russian prison system,¹³⁸ and prisoners remain subject to punishment for refusal to work.¹³⁹ No attempt has been made to ameliorate the horrendous overcrowding in the prisons and pretrial detention centers.¹⁴⁰ Conditions in punishment cells remain the same, with warm clothing denied the prisoners, pallets that serve as beds, as well as a suspension of privileges.¹⁴¹ And the procuracy, the body responsible for prosecuting defendants, is still primarily responsible for protecting prisoners' rights and dealing with their complaints.¹⁴²

A modest amnesty passed in 1992¹⁴³ demonstrated the

137. Labor Code Amendments, *supra* note 133 (codified at ITK RSFSR, art. 36).

138. Labor Code Amendments, *supra* note 133, (codified at ITK RSFSR, art. 37) ("Every convict is obliged to work."); Shumikhin & Rozhkov, *Reforma ugolovno-ispolnitel'nogo zakonodatel'stva v usloviakh perekhoda k rynochnoi ekonomike* [Reform of the Criminal-Correctional Legislation in Conditions of Transition to a Market Economy] GOS. I PRAVO, Issue No. 7, 1992, at 54 (noting that the main thrust of the colony system was and continues to be production). This aspect of the Russian prison system has been criticized by many commentators. See, e.g., Abramkin, *Shag Vpered na meste* [One Step Forward without Advancing], ROSSIYSKAIA GAZETA, July 21, 1992, at 1, 2, translated in FBIS-USR, Aug. 7, 1992, at 25.

139. PRISON CONDITIONS, *supra* note 130, at 41. In recognition of the difficult economic reality, where many prison factories are forced to stand idle due to a lack of materials, the law now specifies that prisoners cannot be punished for failure to fulfill quotas for such reasons beyond their control. Labor Code Amendments, *supra* note 133 (codified at ITK RSFSR, art. 53).

140. Part of the problem is a lack of money to build new prisons. Equally important is the failure to institute a real bail system and to curb the use of pretrial detention by the procuracy as a coercive tool to extract confessions from detainees.

141. Labor Code Amendments, *supra* note 133 (codified at ITK RSFSR, art. 54).

142. ITK RSFSR, art. 11. See V. Abramkin & Iu. Chizhov, V POMOSHCH' UZNIKU: KAK VYZHIT' v SOVETSKOI TIUR'ME (1992) (prisoner rights handbook that instructs that the majority of prisoner complaints must be directed to the procuracy).

143. Postanovlenie Verkhovnogo Soveta Rossiskoi Federatsii ob amnistii [Resolution of the Supreme Soviet of the Russian Federation on Amnesty], Vedomosti RF, Issue No. 27, Item No. 1565 (1992), translated in FBIS-USR, July 29, 1992, at 21;

public unease and official opposition to criminal justice reform, particularly reform to ameliorate conditions for convicts. A previous attempt to pass similar legislation failed in the wake of hysterical claims by the Procurator General that 400,000 prisoners (roughly two-thirds of the prison population) would be released if the amnesty were approved.¹⁴⁴ Another report falsely claimed that violent criminals would be amnestied.¹⁴⁵

The reasons for the failure of broader criminal justice reform on the statutory level are varied. One is that the topic has received relatively little attention from lawmakers preoccupied with a collapsing economy,¹⁴⁶ armed conflict,¹⁴⁷ and a paralyzing struggle for political power between the executive and legislative branches.¹⁴⁸ Other reasons are structural: an ever more serious shortage of money and talented

Postanovlenie Verkhovnogo Soveta Rossiskoi Federatsii o poriadke primeneniia Postanovlenii Verkhovnogo Soveta Rossiskoi Federatsii ob amnistii [Resolution of the Supreme Soviet of the Russian Federation on the Procedure for Implementing the Resolution of the Supreme Soviet of the Russian Federation on Amnesty], *Vedomosti RF*, Issue No. 27, Item No. 1566 (1992), translated in FBIS-USR, July 29, 1992, at 22.

Some offenders were released immediately (MVD estimates were 20,000 prisoners). M. Mitiukov & L. Ivanov, *Ne tak strashna amnistiia, kak ee maliuiut* [Amnesty is not as Terrible as They Say], *ROSSIISKAIA GAZETA*, July 14, 1992, at 4, translated in FBIS-USR, July 24, 1992, at 21. Others had their sentences reduced (MVD estimates were 40,000). Valeri Rudnev, *Rossiiia Ob'iauliaet amnistiia* [Russia Explains the Amnesty], *IZVESTIIA*, June 20, 1992, at 2, translated in FBIS-USR, July 3, 1992, at 34.

144. Rudnev, *supra* note 143; Mitiukov & Ivanov, *supra* note 143.

145. Rudnev, *supra* note 143.

146. Gross domestic product fell approximately 20% per year in 1991 and 1992, with a similar drop predicted for 1993. Aleksandr Frenkel, *Forecast: Russia's Economy in 1993*, *DELOVOI MIR*, Jan. 5, 1993, at 6, translated in FBIS-USR, Feb. 24, 1993, at 52, 54-55. By the beginning of 1993, inflation was running close to 25% per month. Glazachev & Iakovlev, *Do giperinflatsii odin shag* [One Step Toward Hyperinflation], *NEZAVISIMAIA GAZETA*, Feb. 2, 1993, at 4.

147. Russian troops from 1992 to 1993 were engaged in military or "peacekeeping" actions in South Ossetia and Abkhazia, Tadjikistan, the Armenia-Azerbaijan war, Moldova, and Ingushetia.

148. The April 1993 referendum, in which voters gave a vote of confidence to President Yeltsin, was but another inconclusive battle in this struggle.

personnel keeps the defense bar and the judiciary from fulfilling their role as guardians of due process¹⁴⁹ and keeps the MVD from building new prisons, refurbishing old ones, and paying salaries sufficient to attract conscientious employees.

Just as important, in the wake of a rising crime rate¹⁵⁰ and the dislocation of Soviet society on all levels, the reform movement has failed to create any consensus among politicians, the law enforcement community, and the general public of what the criminal justice system should look like in the post-Soviet era. Each step toward reform has been accompanied by a small step back, as politicians, like their American counterparts, strive to appear "tough on crime." In addition to the stifling of comprehensive reform legislation, the result has been a series of exhortative statutes and decrees on law enforcement that have little practical impact except to make comprehensive reform all the more unlikely.¹⁵¹

149. Some lawyers the author knows spend more time out of economic necessity pursuing such sidelines as chicken farming than practicing law.

150. Statistics for the first 10 months of 1992 reveal an increase in reported crimes of 28.8% over the same period the previous year, to more than 2.2 million. This includes an increase in robbery by 61%, an increase in theft by 60%, and an increase in murder and attempted murder by 35.6%. Gordenko & Tsarev, *The Forecast Does Not Promise Peace*, TRUD, Dec. 1, 1992, at 2, translated in FBIS-USR, Dec. 11, 1992, at 68, 69 (citing Ministry of Internal Affairs statistics). Statistics for 1989 and 1990 showed a similar increase. See Golik, *Prestupnost' v SSSR: problemy starye i novye*, 2 SOV. GOS. I PRAVO 20, 20-21 (1991).

151. See, e.g., *Decree of the Congress of People's Deputies of the Russian Federation on the State of Lawfulness and the Struggle Against Crime and Corruption*, ROSSHSKAIA GAZETA, Dec. 17, 1992, at 6, translated in FBIS-SOV, Dec. 30, 1992, at 31 (calling on government to consider, pass, or implement a long list of measures ranging from criminalizing money laundering, to ensuring that Russian prisons comply with U.N. standards, to criminalizing calls for violating the territorial integrity of Russia); Talalaiev, *Boris Yeltsin Addresses All-Russia Conference on Problems of the Fight Against Organized Crime and Corruption: Full Text of Speech*, ITAR-TASS WORLD SERVICE, Feb. 12, 1993, translated in FBIS-SOV, Feb. 16, 1993, at 25; *Nabliudenie* [Monitoring], MOSKOVSKIYE NOVOSTI, Jan. 31, 1993, at 4, translated in FBIS-SOV, Jan. 28, 1993, at 26 (quoting Russian Vice President Aleksandr Rutskoy: "We are spending our whole time trying to create laws to fit the Declaration of Human Rights, while the criminal world should be being mercilessly punished.")

This failure to reach a consensus has serious consequences for the abolition of capital punishment. Human rights reforms in Russia fall on a spectrum of popularity and controversy. Reforms in the civil law sphere, such as laws guaranteeing freedom of speech, assembly, and association,¹⁵² have garnered the greatest popular and political support. The popularity of such measures has been due in large part to the perception that they were designed to protect the rights of the law-abiding. Reform of criminal law has been more controversial, and of penal law still more so. Reform of the death penalty, which concerns the rights of those judged by the criminal justice system to be society's most reprehensible pariahs, lies at the opposite extreme of public opinion. As is demonstrated below, death penalty reform has proven captive to political leaders who lack the will to oppose popular opinion on this issue.

III. DEATH PENALTY REFORM

The movement to abolish the death penalty in Russia has been rejuvenated by the revelation of a corrupt and unreliable criminal justice system, and by the attempts at reform noted above. Skepticism regarding the criminal justice system has been as much a driving force behind the current calls for abolition as the morally absolute objections to the death penalty. The execution of innocent people has been a very real problem in the former Soviet Union, although the extent of this practice cannot be determined.¹⁵³

152. See *supra* note 69.

153. See Valerii Konovalov, *Cases of Erroneous Passing of the Death Sentence in the Soviet Union*, RADIO FREE EUR./RADIO LIBERTY, INC. RES. REP., July 1, 1987, at 1 (reporting press accounts of death sentences erroneously passed, but in most cases, eventually overturned before execution). Based on the extreme incompetence of the procuracy in these cases, Konovalov speculates that some of these cases resulted in erroneous executions, and in a subsequent report he confirms this for at least one case. Valerii Konovalov, *The Death Penalty in the USSR, 1987*, RADIO LIBERTY RES. BULL., Jan. 25, 1988. In at least one other reported case, the 1992 conviction of a mass murderer (based on his confession) revealed

The period between the Khrushchev and the Gorbachev eras saw occasional calls for abolition of the death penalty.¹⁵⁴ Andrei Sakharov, one of the only vocal supporters of abolition during that time, is considered the father of the contemporary movement to abolish capital punishment. In 1972 he gathered signatures on an abolition petition that he sent to the Presidium of the Supreme Soviet. His opposition was absolute: he wrote that the death penalty "contradicts moral sensibility" and "cannot be justified by any general social considerations."¹⁵⁵ Yet his opposition was profoundly influenced by the abuses which he saw and personally experienced in the Soviet criminal justice system.¹⁵⁶ Sakharov disdained the use of the death penalty as a deterrent¹⁵⁷ and found it "disproportionate for the vast majority of crimes."¹⁵⁸ He also dismissed the propriety of the penalty for the sake of retribution, arguing that in no case is such a degree of retribution justified.

that a prior suspect who had been executed for the same crimes 14 years before was in fact innocent. See Serge Schmemmann, *Citizen 'Ch': Russia Opens Files on Serial Killings*, N.Y. TIMES, Apr. 4, 1992, at A3.

154. See, e.g., Albert Motivans & Elizabeth Teague, *Capital Punishment in the USSR*, RADIO FREE EUR/RADIO LIBERTY, INC. RES. REP., June 26, 1992, at 67, 68.

155. ANDREI D. SAKHAROV, SAKHAROV SPEAKS 240 (Harrison E. Salisbury ed., 1974).

156. ANDREI D. SAKHAROV, MEMOIRS 655 (Richard Lourie trans., 1990) (the death penalty is particularly heinous in the USSR because of the "backward and dismal condition of our criminal justice system, its subservience to the state machine, the prevalence of bribery and corruption, and the frequent interventions of local big shots in judicial procedures."). In arguing against the death penalty, Sakharov notes some of the particular failings of the criminal justice system: "superficial and prejudicial investigation, . . . the impossibility of obtaining review of clearly mistaken or dubious verdicts, . . . beatings during police questioning." *Id.*

157. *Id.* at 653 ("I reject the notion that the death penalty has any real deterrent effect whatsoever on potential criminals. I am convinced that the contrary is true—that savagery begets only savagery."). See also *id.* at 239-40, 502 (criticizing cases in which the death penalty was being used for didactic purposes).

158. *Id.* at 654.

In the 1970s Sakharov's appeal fell on the deaf ears of the Soviet bureaucracy; even intellectuals of the period were reluctant to speak out for fear of official persecution.¹⁵⁹

In the Gorbachev 1980s, however, the arguments for and against the death penalty were played out in the public arena. In 1987 the liberal weekly, *Ogonek*, ran an article in which Aleksandr Iakovlev, a prominent criminal law scholar, called for the abolition of the death penalty. His arguments were similar to Sakharov's, if slanted a bit toward the pragmatic: the death penalty was of little deterrent value;¹⁶⁰ no criminal justice system, in particular the Soviet one, could be relied upon to apply the death penalty infallibly; the death penalty was legally sanctioned murder; and not even the government had the right to deprive another of life.¹⁶¹ Iakovlev also echoed an argument often heard among criminal justice reformers and human rights activists: by abolishing the death penalty, the USSR would be joining the "majority of developed nations."¹⁶² The debate has continued

159. *Id.* at 364-65.

160. Iakovlev claimed that after the imposition of the death penalty in 1962 for large-scale theft of state property, the number of such offenses grew rather than declined. He also argued that its widening use created an incentive to commit graver crimes; a rapist with the knowledge that he faced the death penalty might be more likely to kill his victim to eliminate an eyewitness, since the penalty for the rape and murder would be the same, namely death. Allova, *Vremia Milovat'* [*Time to Show Mercy*], *OGONEK*, Aug. 15, 1987, at 29. See also *Ustinov*, *supra* note 81, at 88 (noting the increase in serious theft and bribery even after these crimes were made capital in 1962).

161. Allova, *supra* note 160.

162. Allova, *supra* note 160. See also *Ustinov*, *supra* note 81, at 88 (noting that death penalty had been abolished by most "civilized countries"). The United States is an exception that has not escaped the notice of Russian commentators. Burobin et al., *Uzakonnenoe ubiistvo* [*Legalized Murder*], in *PROTIV SMERTNOI KAZNI: SBORNIK MATERIALOV* [AGAINST THE DEATH PENALTY: A COLLECTION OF MATERIALS] 4, 18-19 (1992) [hereinafter *SBORNIK*].

throughout the popular media to the present day,¹⁶³ as well as in more scholarly venues.¹⁶⁴

The first concrete public step in death penalty reform under Gorbachev occurred in January, 1991, when the then Minister of Justice of the USSR, Sergei Lushchikov, held a press conference at which death penalty statistics were revealed for the first time.¹⁶⁵ The data were fragmentary, but represented an important advance in official candor.¹⁶⁶

163. See, e.g., Rozhnov, *Zakon Surova [The Law is Strict]*, OGONEK, Oct. 1988, at 20 (article by prison official criticizing use of death penalty, suggesting it was applied in random fashion and that it was impossible to evaluate petitions for amnesty fairly); Kardin, *Crime and Punishment: Discussing Legal Issues*, MOSCOW NEWS, Apr. 26, 1987, at 13; Kelina, *But Not at Once!*, MOSCOW NEWS, Apr. 26, 1987, at 13; Efimova, *Smertnaia Kazn': Eltsin za ili protiv? [The Death Penalty: Is Yeltsin for or Against?]*, STOLITSA, Issue No. 29(35), 1991, at 18 (discussing efforts at statutory abolition of death penalty). See also KHOKHRIAKOV, *supra* note 70, at 3 (recounting debate about death penalty on television show "Piatoe Koleso" in around 1990).

164. See, e.g., Ustinov, *supra* note 81, at 87, 88 (recommending abolition of the death penalty with an increase in length of sentences, including life sentence); Karpets, *Vysshaia mera za i protiv [The Highest Measure for and Against]*, SOV. GOS. I PRAVO, Issue No. 7, 1991, at 49; Chernilovskii, *Smertnaia kazn': istoriko-filosofskii aspekt [The Death Penalty: The Historical-Philosophical Aspect]*, SOV. GOS. I PRAVO, Issue No. 1, 1991, at 128. The death penalty was the subject of a seminar hosted by Amnesty International at the Conference on the Human Dimension, Commission on Security and Cooperation in Europe, that occurred in Moscow during September and October 1991.

165. Until recently, criminology statistics have always been a matter of secrecy and questionable accuracy in the USSR and Russia. Ger P. Van den Berg, *Judicial Statistics in a Period of Glasnost*, 13 REV. SOCIALIST L. 299, 311 (1987) (analyzing statistics from 1970 through 1986 and concluding that statistics are manipulated to "show the effects of the policy of the new leadership"). See also KHOKHRIAKOV, *supra* note 70, at 173-74; Nevinnaiia, *Arkadiy Murashev: "In the Past This Riff-Raff Would be Afraid to Show up in Moscow": A Far From Optimistic Interview with the Capital's GUV [Main Internal Affairs Administration Chief]*, TRUD, Aug. 20, 1992, at 4, translated in FBIS-USR, Sept. 4, 1992, at 76 (noting how crimes are unreported by officials in order to produce favorable statistics).

166. The data provided were for 1985-88: In 1985, 13,081 people were convicted of capital crimes, 770 were sentenced to death, and 20 of these were eventually pardoned. In 1986 the numbers were: 11,744 convicted, 526 sentenced to death, 41 eventually pardoned. In 1987 the numbers were: 7,590; 344; 47. In 1988: 5,827; 271; 72. Lushchikov did not reveal how many people were actually executed in a given year, although one can infer that the number sentenced to death and not pardoned were in fact executed, although not necessarily in the same year they

The data revealed that, behind the scenes, death penalty practice under Gorbachev was changing considerably, with a sharp decrease in convictions for capital crimes and a con-

were sentenced. Motivans & Teague, *supra* note 54, at 69; Gubarev, *supra* note 53, at 1.

Other frequently inconsistent statistics were subsequently reported in the Russian press. See, e.g., Rubnikovich, *Rossiskie sudy prodolzhaui deistvovat'* [*The Russian Courts Continue to Function*], NEZAVISIMAIA GAZETA, Oct. 2, 1992, at 2, translated in FBIS-USR, Oct. 24, 1992, at 6; Illesh & Rudnev, *Kak i za shto sudiat v Rossii* [*How and for What Are People Judged in Russia*], IZVESTIIA, Apr. 10, 1992, at 2; Goriacheva, *Ravno 249 let nazad imperatritsa Elizaveta uperuye otmenila smertnuiu kazn' v Rossii* [*Exactly 249 Years Ago Empress Elizabeth I Abolished the Death Penalty in Russia*], Nezavisimaia Gazeta, Aug. 13, 1992, at 1; Kononov, *Pravo na ubiistvo* [*The Right to Murder*], TRUD, Aug. 18, 1991, at 6; Kononov, *SSSR po chislu smertnykh prigovorov zanimaet pervoe mesto v mire* [*The USSR Holds First Place in the World for Death Sentences*], NEZAVISIMAIA GAZETA, Sept. 28, 1991, at 6 [hereinafter *First Place*]. KONONOV, PRAVO NA ZHIZN' I PREMENENIE SMERTNOI KAZNI V SSSR: TEZISY EKSPERTNOGO DOKLADA [THE RIGHT TO LIFE AND THE APPLICATION OF THE DEATH PENALTY IN THE USSR: THESES OF AN EXPERT REPORT] 3 (1991).

New data emerged for prior years as well: 24,422 were sentenced to death between 1962 and 1989, 2,355 of whom received commutations from the amnesty board and an additional 1042 of whom had their death sentences reduced to prison terms on appeal. Gubarev, *supra* note 53; *First Place*, *supra*. More than 12,000 were reported executed in the period from 1975 to 1991. Nikolaev, *Nravy i nravstvennost': Strana neutomimyykh palachei* [*Morals and Morality: A Country of Indefatigable Executioners*], MEGALOPOLIS-EXPRESS, Oct. 3, 1991, at 14 (citing figures provided by Kononov).

Gubarev also notes that the 24,422 sentenced to death from 1962 to 1989 represented 6% of those offenders who were convicted of crimes for which the death penalty was available. In the years 1985 to 1989, this percentage was 5.9%, 4.5%, 4.5%, 4.7%, and 5.1% respectively. Finally, Gubarev notes a marked decrease in the percentage of death sentences handed down for convictions of intentional murder under aggravating circumstances, from 23.5% of such cases between 1962 and 1966 to 10% between 1987 and 1989.

All of these press accounts differ from statistics compiled by Amnesty International from records of the Russian Clemency Commission. Memorandum from Tanya Smith, Feb. 18, 1993 (reporting the following data for Russia):

Year	Total Sentenced to Death	Reversed	Commuted	Executed
1989	97	26	4	67
1990	206	28	2	176
1991	144	37	37	70

comitant decrease in death sentences. Under Gorbachev the death sentence became used almost exclusively for crimes of violence.¹⁶⁷

Legislative reform efforts in the Soviet Union began in the late 1980s with the circulation of draft substantive criminal codes proposing a complete abolition of the death penalty. These efforts came to nothing, as the USSR Congress failed to enact comprehensive criminal law reform of any kind.

The 1991 USSR Fundamentals of Criminal Legislation promised a sharp restriction in the use of the death penalty. The Fundamentals limited civilian capital crimes to high treason, intentional homicide under aggravating circumstances, child abduction accompanied by violence, rape of a minor under aggravating circumstances, and crimes against peace and the security of humanity (a vague formulation that apparently refers to war crimes or genocide).¹⁶⁸

The Fundamentals also restricted application of the death penalty by gender and age: males who were below the age of eighteen at the time of the commission of their crime and females regardless of age were no longer subject to the death penalty.¹⁶⁹ The Fundamentals thus promised the

167. See, e.g., AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 1988, at 220 (1989) (noting no reported executions for economic offenses in 1988 and speculating that executions may have been suspended for such crimes). But see AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 1989, at 239 (1990) (reporting death sentence for embezzlement handed down in Turkmenia, with no information on whether it was carried out).

168. Osnovy ugolovnogo zakonodatel'stva Soiuzu SSR i respublik [Fundamentals of Criminal Legislation of the USSR and Republics], art. 40, Vedomosti SSSR, Issue No. 30, Item No. 862 (1991) [hereinafter Fundamentals]. One commentator suggests that the phrase "crimes against peace and humanity" encompasses war crimes, genocide, piracy, and crimes against international humanitarian organizations or their members. N.F. Kuznetsova, *TSeli i mekhanizm reformy ugolovnogo kodeksa* [The Goals and Mechanism of Reform of the Criminal Code], 6 GOS. I PRAVO, Issue No. 6, 1992, at 78, 84.

169. Fundamentals, *supra* note 168.

The elimination of the death penalty for women is consistent with the solicitude shown to women in the penal system in general, a solicitation that is only partly explained by the lower incidence of crime among women. For example, there are no special regime labor colonies for women (which does not mean that

tightest restriction on the use of the death penalty, short of abolition, ever enacted in the Soviet Union.

The death penalty provisions of the Fundamentals did not take full effect in most of the Republics either before or after the dissolution of the Soviet Union, however, for somewhat murky reasons.¹⁷⁰ As a general rule, Fundamentals of USSR law were not self-executing; they required positive enactment in Republic codes to take effect. None of the Republics enacted such legislation before the Soviet Union dissolved in December 1991. A Resolution of the Supreme Soviet which accompanied the Fundamentals, however, provided that the death penalty provision would enter into force from the moment of its publication, that is, from July 19, 1991.¹⁷¹ The Commonwealth Treaty signed on December 8, 1991, is perhaps dispositive; it provides that legislation of the Soviet Union in effect at the time of the Treaty ceases to have effect in the newly independent Republics.¹⁷² In practice, however,

women do not commit crimes that are theoretically punishable by special regime). Women's colonies were also the first to benefit from experimental improvements in privileges and living conditions during the Guliaev reforms. See PRISON CONDITIONS, *supra* note 130, at 39-40. See also Fletcher, *supra* note 2, at 16 (quoting a drafter of the death penalty provision justifying it by saying that women in practice are never executed; women have a "special" role in Soviet society; abolishing capital punishment for women is politically acceptable, and any step toward abolishing capital punishment is a good one).

170. In some Republics, such as Latvia, the death penalty was limited after independence. *Mezhdunarodnaia Amnestiia, SSSR: Perspektiva otmeny smertnoi kazni* [Amnesty International, *USSR: Perspectives on the Abolition of the Death Penalty*], in SBORNIK, *supra* note 162, at 23, 31 [hereinafter *Mezhdunarodnaia Amnestiia*]. In Georgia, the legislature reportedly abolished the death penalty for economic crimes; in Uzbekistan, its use was widened to include the crime of rape during a period of mass disorder. Kuznetsova, *supra* note 168, at 78-79. The use of the death penalty is reportedly on the rise in Tadjikistan and Kazakhstan as well. Interview with Viktor Kogan-Iasnyi, Co-Chairman of the Moscow-based Society Against the Death Penalty and Torture, in Moscow, Russia (Feb. 3, 1993).

171. See Postanovlenie Verkhovnogo Soveta SSSR o vvedenii v deistvie Osnov ugolovnogo zakonodatel'stva Soiuzs SSR i respublik [Resolution of the Supreme Soviet of the USSR on the Entry into Force of the Fundamentals of Criminal Legislation of the USSR and Republics], art. 2, *Vedomosti SSSR*, Issue No. 30, Item No. 863 (1991).

172. Agreement Establishing the Commonwealth of Independent States, Dec. 8,

Soviet legislation continues in force on an ad hoc basis in all the Republics.¹⁷³

Russia appears to be applying the Fundamentals in a piecemeal fashion. The Russian Parliament in December 1991 passed legislation providing for only a minor reduction in the number of capital offenses, eliminating violation of hard currency regulations, theft of state property in large quantities, and bribe-taking from the list of capital crimes.¹⁷⁴ Some commentators claim that Russia is restricting application of the death penalty to adult males, consistent with the Fundamentals, although in the absence of any implementing legislation.¹⁷⁵ The death penalty remains in the criminal code for more than twenty offenses, including nonviolent crimes.¹⁷⁶

1991, art. 11, 31 I.L.M. 143, 145.

The RSFSR Supreme Soviet resolution on ratification of the Commonwealth Treaty provides that "the norms of the former USSR" remain in effect in Russia if they are not inconsistent with Russian law, and until corresponding Russian legislation is passed. *Postanovlenie verkhovnogo soveta RSFSR o ratifikatsii Soglasheniia o sozdanii Sodruzhestva Nezavisimykh Gosudarstv* [Resolution of the Supreme Soviet of the RSFSR on Ratification of the Agreement on the Creation of the Commonwealth of Independent States], art. 2, *Vedomosti RSFSR*, Issue No. 51, Item No. 1798 (1991). Arguably, the death penalty provisions of the Fundamentals are inconsistent with RSFSR law and hence do not apply under this resolution.

173. See generally Ger P. Van den Berg, *Human Rights in the Legislation and the Draft Constitution of the Russian Federation*, 18 REV. CEN. & E. EUR. L. 197, 199-203 (1992) (discussing question of applicability of Soviet law in Republics that are members of Commonwealth of Independent States).

174. See *Zakon RSFSR o vnesenii izmenenii i dopolnenii v Ugolovnyi kodeks RSFSR, Ugolovno-protsessual'nyi kodeks RSFSR i Kodeks RSFSR ob administrativnykh pravonarusheniakh* [Law of the RSFSR on the Introduction of Amendments and Additions to the Criminal Code of the RSFSR, the Criminal Procedure Code of the RSFSR, and the Code of the RSFSR on Administrative Violations], *Vedomosti RSFSR*, Issue No. 52, Item No. 1867 (1991). See KONONOV, *supra* note 166, at 2 (reporting with assurance the elimination of the death penalty for only the three offenses noted in text, and questioning whether any further reduction had been achieved).

175. KONONOV, *supra* note 166, at 2.

176. One commentator suggests that, until the Fundamentals are codified, they could be interpreted broadly to allow the use of the death penalty for "analogous" offenses such as murder of a militiaman. KONONOV, *supra* note 166, at 2 n.1.

New drafts of the criminal code propose further limiting the death penalty to intentional murder under aggravating circumstances,¹⁷⁷ a restriction which would be consistent with current Russian practice.

The death penalty has also figured in constitutional reform efforts. The Constitution was amended on April 21, 1992, to include the following article, similar to Article 7 of the Russian Declaration of Rights and Freedoms:

Everyone has the right to life. No one can be arbitrarily deprived of life. The government strives for the complete abolition of the death penalty. Before its abolition, the death penalty can be applied as an exceptional measure of punishment for especially serious crimes against the person only pursuant to the sentence of a court.¹⁷⁸

177. Kuznetsova, *supra* note 168, at 79.

178. Zakon Rossiiskoi Federatsii ob izmeneniiakh i dopolneniiakh Konstitutsii (Osnovogo Zakona) Rossiiskoi Sovetskoi Federativnoi Sotsialisticheskoi Respubliki [Law of the Russian Federation on Amendments and Additions to the Constitution (Basic Law) of the Russian Soviet Federated Socialist Republic], art. 26, Vedomosti RF, Issue No. 20, Item No. 1084 (1992) (creating article 38).

A 1990 draft of the Constitution by the Constitutional Commission of the RSFSR contained a provision limiting the death penalty to premeditated murder. This provision reappeared in a February 1991 Commission draft, with alternative versions of this draft including aggravated rape of a minor, and another version limiting the death penalty to "grave crimes." Draft Constitution of the Russian Federation, Feb. 21, 1991. Subsequent drafts of the Constitution contained no death penalty provision at all, e.g., Konstitutsiia Rossiiskoi Federatsii—Proekt, Sept. 15, 1991 (draft of the Constitutional Commission). See also draft printed in ROSSIISKAIA GAZETA, Oct. 11, 1991, at 3, translated in FBIS-USR, Oct. 25, 1991, at 1.

By October 24, 1991, however, the draft of the Constitutional Commission contained an article similar in substance to the one eventually enacted. Proekt Konstitutsii Rossiiskoi Federatsii, po sostoianiiu na 24 oktiabria 1991 g. [Draft Constitution of the Russian Federation, as of Oct. 24, 1991], art. 21, KONSTITUSIONNII VESTNIK, Oct. 1991, at 84, 92.

Article 7 of the RSFSR Declaration, *supra* note 108, limited the death penalty to "especially serious crimes," but did not specify "crimes against the person." The Declaration contained an additional requirement of jury participation in the proceeding, although it was unclear whether this was required at the trial stage, at sentencing, or both.

While enshrining this aspiration in the Constitution may be seen as an advance for death penalty opponents, this article is similar to the formula contained in criminal codes since 1922. Given the unproven track record of constitutional review,¹⁷⁹ it remains to be seen if this clause will provide any basis for judicial review of capital sentences in individual cases.

Constitutional reform is still a live issue in Russia because of the failure to resolve the distribution of power between the executive and legislative branches,¹⁸⁰ and other draft constitutions circulating in 1993 contained variations on the death penalty article currently in force. For example, the July 14, 1993 draft of the Constitutional Commission of the Russian Federation adds a requirement that death penalties can be handed down only pursuant to jury trial.¹⁸¹ President Yeltsin's April 1993 draft Constitution contained the sharpest limitation on the use of the death penalty (short of abolition) to date. Article 26 provided that the death penal-

179. See *supra* note 125 and accompanying text.

180. A Constitutional Assembly convened in June 1993 in a thus-far unsuccessful effort to resolve these issues.

181. Konstitutsionnaia Komissiiia Rossiskoi Federatsii, Konstitutsiia Rossiskoi Federatsii (Proekt) [Constitutional Commission of the Russian Federation, Constitution of the Russian Federation (Draft)], July 14, 1993, art. 20.

It is not clear whether the provision envisions juries to determine guilt or to determine the sentence, or both. While jury trials have been used experimentally in various republics, they are not yet in use in Russia. Current plans call for the introduction of the jury system in five regions in Russia in 1993. Rudnev, *supra* note 92. See Law of the Russian Federation: On Making Changes and Additions to the RSFSR Law "on the Judicial System of the RSFSR," the RSFSR Criminal Procedure Code, the Criminal Code of the Russian Federation, and the RSFSR Code on Administrative Legal Violations, *translated in* FBIS-USR, Aug. 13, 1993, at 1 (laws creating jury system in Russia) (translation not available for general distribution, on file with author).

Given public support for the death penalty, it is not apparent that leaving sentencing to the jury would result in any decrease in the death penalty's application, although one could expect that, in time, the rate of conviction might decrease with a jury system. One Russian commentator expressed hope that the jury system would lead to fewer death sentences and greater transparency in the sentencing process. Interview with Viktor Kogan-Iasny, *supra* note 170.

ty could be used only in cases of premeditated murder and felony-murder.¹⁸² However, his July 12, 1993 draft broadened the application to especially serious crimes against the person.¹⁸³

Perhaps the most important practical change to date in the disposition of death penalty cases has been the revitalization of the clemency process.¹⁸⁴ Before Mikhail Gorbachev was "elected" President by the USSR Congress of People's Deputies in 1990, authority to grant commutations of the death penalty lay in the final instance in the USSR Supreme Soviet Presidium,¹⁸⁵ as well as in the Supreme Soviet Presidia of the Union Republics. The USSR and the Republic Supreme Soviet Presidia had special clemency commissions that analyzed clemency appeals, including death penalty appeals, and made recommendations to the Presidia. The workings of these clemency commissions were virtually unknown to the public.

The first impact of the Gorbachev reforms on the clemency process was greater publicity surrounding its work and an increasing receptivity to granting commutations of death sentences. Republic-level commissions, in contrast, granted commutations only in very rare circumstances.

The creation of the position of President of the USSR in 1990 and the vesting in the President of the authority to grant clemency in death penalty cases after the exhaustion of judicial appeals¹⁸⁶ resulted in a new procedure for clemency

182. *Proekt Konstitutsii (Osnovogo Zakh'ona) Rossiskoi Federatsii* [Draft Constitution (Basic Law) of the Russian Federation], art. 26, *IZVESTIYA*, Apr. 30, 1993, at 3, translated in *FBIS-SOV*, May 3, 1993 (Supp.), at 3.

183. *Konstitutsiia Rossiskoi Federatsii (Proekt)* [Constitution of the Russian Federation (Draft)], July 12, 1993, art. 20.

184. Interview with Viktor Kogan-Iasnyi, *supra* note 170, provided most of the information on the history of the clemency appeals process.

185. The Presidium reviewed cases that it received from a review commission consisting of seven deputies from the Supreme Soviet. Reshetnikov, *Posleslovie k vysshchei mere* [The Afterword to the Highest Measure], *IZVESTIYA*, Oct. 1, 1990, at 3.

186. Article 121⁵ (15) of the Russian Federation Constitution vests in the Presi-

appeals. President Gorbachev established his own review commission in November 1990 to replace that of the USSR Supreme Soviet, and all decisions of that commission had to be ratified by Presidential decree.¹⁸⁷ The creation of the post of President, therefore, did not create an additional opportunity to appeal. Gorbachev's review commission dispensed death penalty commutations more frequently than did the old USSR Supreme Soviet.

After Boris Yeltsin's selection as Chairman of the Russian Supreme Soviet in 1990, the RSFSR clemency commission was revamped to include three opponents of the death penalty and five moderate supporters. However, the new commission did not commute appreciably more death sentences, because an intractable Supreme Soviet Presidium frequently refused the commission's recommendations to commute.

President Yeltsin created a new review commission in February 1992 consisting of thirteen members, a mix of writers, religious figures, jurists, and people's deputies. Death penalty sentences are automatically reviewed by the commission,¹⁸⁸ with the President signing the final decree for commutation or execution.¹⁸⁹

The most recent development in legislation affecting capital punishment as of this writing was the passage in December 1992 of an amendment to the criminal code that pro-

dent authority to grant clemency.

187. The Commission consisted of 12 members, including deputies, jurists, and members of social organizations. Details of the Commission's work are sketchy, but one report indicated that between 1990 and 1991 the Commission reviewed 226 death sentences and recommended commutation of 18. The percentage of commuted sentences was claimed to be higher than in the past. Alimov, *Poslednee slovo - za prezidentom [The Last Word—Before the President's]*, IZVESTIYA, Apr. 2, 1991, at 7. *But see* Reshetnikov, *supra* note 185 (reporting that Presidium Commission in September 1990 considered 68 appeals and granted commutations to 7).

188. Other appeals must be lodged by the prisoner's counsel, parents, or by a people's deputy on his behalf.

189. Interview with Tanya Smith, Amnesty International, in Moscow, Russia (Mar. 6, 1993).

vided for sentences of life imprisonment upon commutation of a death sentence.¹⁹⁰ This marks the first time since the 1917 revolution that life imprisonment is available as a form of punishment, and undercuts a primary argument of death penalty proponents that the previous maximum fifteen- or twenty-year prison term would be too lenient for those offenses that presently carry the death penalty. However, the life term has not been incorporated in the criminal code for particular offenses and is not yet available to the sentencing judge. As of this writing there have been no reported cases of life imprisonment being imposed, but the clemency commission is said to have delayed consideration of some appeals in expectation of the new law.

Important changes in practice appeared as well in 1992. While the number of death sentences for 1992—159—is consistent with recent years,¹⁹¹ there were only eighteen executions,¹⁹² and no indication of a large increase in judicial reversals of death sentences or grants of commutation. It may be that other death sentences have been held in abeyance pending the implementation of life sentencing and that many of those currently on death row might have their sentences commuted to life in prison.

190. See *Zakon Rossiskoi Federatsii o vnesenii izmenenii v stat'iu 24 Ugolovnogo kodeksa RSFSR* [Law of the Russian Federation on the Introduction of Amendments to Article 24 of the Criminal Code of the RSFSR], art. 1, *Vedomosti RF*, Issue No. 1, Item No. 9 (1993), translated in *FBIS-USR*, Jan. 27, 1993, at 32.

191. See *supra* note 166. Statistics for 1993 were not available at the time of this writing.

192. Telephone Interview with Ol'ga Alberteevna Shvarts, Dep't of Judicial Reform, Russian Ministry of Justice, in Moscow, Russia (Sept. 2, 1993). Clemency Commission statistics, however, indicate only one execution in 1992. Interview with Viktor Kogan-Iasnyi, *supra* note 170, and Interview with Tanya Smith, *supra* note 189. It is possible that the 17 additional executions reported by the Ministry of Finance were of people sentenced prior to 1992, while the Clemency Commission statistics referred only to those sentenced during 1992. However, neither the Commission nor the Ministry could definitely account for the discrepancy. See also Zalmanov & Skuz, *To Execute or Pardon?*, *ROSSIJSKAIA GAZETA*, Apr. 3, 1993, at 9, translated in *FBIS-USR*, Apr. 14, 1993, at 29, 30 (reporting 16 executions in first six months of 1992, without citing source).

The curtailment in practice and legislation in the use of the death penalty has not been without its setbacks. After the break-up of the Soviet Union, those sentenced to death were effectively denied a level of appeal due to the disappearance of the USSR Supreme Court. Death penalty cases, usually heard in the regional (*oblast'*) courts in Russia,¹⁹³ used to be appealable to the Republic Supreme Court and then to the USSR Supreme Court. Now the only recourse left a death-row inmate after the Republic Supreme Court is an appeal for clemency to the President. Even in Russia, high-profile or politically sensitive criminal cases, including capital cases, are heard in the Supreme Court, with the result that the defendant cannot appeal a guilty verdict to an independent appeals court. This lack of appeal violates Russia's obligations under the International Covenant on Civil and Political Rights.¹⁹⁴ Conditions on death row remain some of the worst in the Russian prison system, with prisoners held for months in isolation cells that resemble the punishment cells used for prisoners who violate prison rules.¹⁹⁵ Finally, the number of death sentences has again risen from its lowest point in 1989.¹⁹⁶

Despite revelations of the historical misuse of the death penalty and the enormous problems and inequities in the criminal justice system, public support for the death penalty endures. The emergence of free debate on the subject has

193. In some republics, however, (for example, the Baltics, Armenia, Belarus, Moldova and Azerbaijan) death penalty cases are routinely heard in the Supreme Court, acting as a court of first instance. With the dissolution of the Soviet Union, those convicted in these republics are effectively denied a judicial appeal. *Mezhdunarodnaia Amnestiia*, *supra* note 170, at 23, 35.

194. International Covenant on Civil and Political Rights, art. 14(5), Dec. 16, 1966, 999 U.N.T.S. 171, 176. The problem is more acute in many of the other former Soviet republics, where all capital cases are routinely heard at the trial level by the Supreme Court. *See supra* note 193.

195. PRISON CONDITIONS, *supra* note 130, at 29-30. Some of the few improvements in conditions on death row is that inmates can meet with priests and other religious figures, and they are now allowed to have a radio in the cell. Interview with Viktor Kogan-Iasny, *supra* note 170.

196. *See supra* note 166.

only confirmed that a sizable majority of the population opposes abolition of the death penalty, even if it may support some limitations on its application.¹⁹⁷ In one televised debate on the death penalty, 112 out of 120 people in the studio audience expressed a willingness personally to carry out the sentence.¹⁹⁸ The view against abolition is shared by Russian parliamentarians¹⁹⁹ and undoubtedly by a majority of law enforcement officials.²⁰⁰

A chief reason for this strong public support for the death penalty is the steep rise in the reported crime rate,²⁰¹ some of it real, some of it undoubtedly due to more honest reporting of crime statistics.²⁰² Coupled with other manifestations of social upheaval, economic decline, and political chaos, popular opinion sees the death penalty as a barrier

197. Recent poll results indicate that 62% of the Russian population agrees that "the death penalty is necessary," with 20% disagreeing and 18% not sure. See Motivans & Teague, *supra* note 154, at 67, 71. The numbers were similar in Ukraine and the three Baltic Republics. These results are consistent with past polling on the subject. In 1987 only 9% of a Moscow polling sample supported abolition. *Id.* Another survey in 1988 in Moscow found 63% in favor of capital punishment and 23% opposed. *Id.* And a 1990 poll found 67% of the respondents in Russia advocating the retention or expansion of the death penalty. *Id.*; Bystrova, *Doroga na eshafot [The Road to the Chopping Block]*, TRUD, June 11, 1992. See also Nikolaev, *supra* note 166, at 14 (claiming 1991 surveys show 80% opposed to abolition, only 15-20% in favor).

198. KHOKHRIAKOV, *supra* note 70, at 3.

199. See *Mezhdunarodnaia Amnestiia*, *supra* note 170, at 23, 39 (reporting results of June, 1990 poll of 466 deputies of the Russian parliament, in which 87% favored capital punishment).

200. Cf. Rozhnov, *supra* note 163, at 21 (Deputy warden of labor colony, writing about abuses in use of death penalty, nevertheless rejecting abolition of the death penalty as "unrealistic," because of the growth in organized crime and because popular opinion supported the death penalty).

In 1991 the author inspected approximately 20 detention facilities in Russia and Azerbaijan. Ministry of Internal Affairs (MVD) personnel uniformly spoke in favor of the death penalty. One labor colony warden began a conversation on the topic by speaking critically of the inhumane use of the death penalty in the United States, only to add quickly, "yes, the electric chair is really barbaric. The system in Russia is much better: one shot to the back of the head. No suffering."

201. See *supra* note 150.

202. See *supra* note 165.

between the populace and a Hobbesian state of nature.²⁰³ The death penalty remains a powerful symbol of control in a society accustomed to living under authoritarianism and seeing few tangible results in the new permissiveness.²⁰⁴

Historical memory of the misuse of the death penalty and the criminal justice system, which provided the impetus for many of the reforms noted in Part II, has had limited impact as far as abolition of the death penalty is concerned; with the death of Communism, the general public has become more concerned with self-preservation and does not see in the use of the death penalty the opportunity for widespread abuse of the innocent, but rather a tool to punish the guilty.

IV. CONCLUSION

What is to be done with the Russian criminal justice system and with capital punishment? As a preliminary matter, the lawmaking process must itself be reformed so that all laws affecting the criminal justice system are freely debated and published after enactment.²⁰⁵ The rules of the clemency commission are not publicly available, for example.²⁰⁶ There

203. Cf. Gerasimov, *supra* note 88.

204. In a variation of the adage that under Mussolini at least the trains ran on time, one of Stalin's interpreters is reported to have recently remarked: "Look, they don't even clear the snow off the streets. Why? Because no one is afraid. But Stalin would have long ago shot a few people, and the streets would be clean. It was, of course, severe, but it would work." KHOKHRIAKOV, *supra* note 70, at 4.

205. See W.E. Butler, *The Rule of Law and Soviet Legal Transformations*, 15 LAW & SOC. INQUIRY 527, 531 (1990) (citing recent case in which unpublished regulation formed the basis for criminal defendant's acquittal). See generally Eugene Huskey, *Government Rulemaking as a Break on Perestroika*, 15 LAW & SOC. INQUIRY 419, 419 (1990) ("Rulemaking by the Soviet Government is remarkable . . . for its scale, its secrecy, and its refusal to respect basic principles of technical rationality.").

A recent presidential decree attempts to impose transparency in the lawmaking process, mandating that the government newspaper *Rossiskie Vesti* be the official place of publication of all normative acts, similar to the U.S. Federal Register. See Lev Chernenko, *Commentary: Want to Safeguard Your Rights? Rely on Documents Published in Rossiskie Vesti*, ROSSISKIE VESTI, Jan. 27, 1993, at 2, translated in FBIS-USR, Feb. 5, 1993, at 4.

206. In fact, the Commission appears to be functioning without any rules at

is a continued need to de-ideologize the criminal justice system.²⁰⁷ Crime must be recognized as endemic to Russian society, as it is to any society, and not an artifact of capitalist influences. In the substantive criminal code, this would involve the further decriminalization of "economic" offenses such as personal speculation, foreign currency trading, and the like;²⁰⁸ shifting to civil or administrative penalties for other economic offenses such as tax violations, monopolistic behavior, or commercial espionage; and the reduction in penalties for certain state crimes. Other necessary changes are the decriminalization of petty offenses;²⁰⁹ creating new categories of offenses, if necessary, to deal with such burgeoning problems as organized crime; and increasing penalties for repeat offenders and especially serious crimes.²¹⁰

In the area of penal law, fundamental reform requires: the elimination of production as the *raison d'être* of incarceration; the continued use of amnesties to reduce the prison population, particularly to release those convicted of offenses

all, since the Supreme Soviet annulled the Resolution that guided the Commission's operation in 1992, and none has been promulgated to replace it. Interview with Tanya Smith, *supra* note 189.

207. See, e.g., *Framework of Criminal Legislation*, *supra* note 70, at 39 (recognizing the 1960 criminal code, the basis for the one in effect today, as inadequate because it is based on "the ideas of class struggle and the dictatorship of the proletariat").

Russian legal scholars express various views on the fundamental question of the purpose of the criminal code. Kuznetsova sees the first goal of a criminal code as being "prophylactic" in nature, that is, deterring crime from occurring in the first place. (She duly cites Marx to support this idea). Kuznetsova, *supra* note 168, at 80. Ustinov proposes that the goal of the criminal code be widened to include: "the protection of the individual, the rights and freedoms of citizens, property, natural resources, social and governmental interests, as well as peace and security of humanity from encroachment causing substantive unrecompensable damages." Ustinov, *supra* note 81, at 88.

208. Kuznetsova, *supra* note 168, at 83.

209. Kuznetsova, *supra* note 168, at 78-80, 85.

210. Kuznetsova, *supra* note 168, at 85; Ustinov, *supra* note 81, at 90; *Framework of Procedure*, *supra* note 70, at 43-44. Currently, the longest prison term available under Russian law is 15 years, although death penalties theoretically can be commuted to life imprisonment. See *supra* text accompanying note 190.

that would not now be considered criminal;²¹¹ stricter isolation of serious from petty offenders;²¹² better training of and pay for prison personnel;²¹³ use of bail in order to reduce overcrowding in pretrial detention facilities; and a commitment of resources to building new prisons.

In the area of procedure, fundamental reform requires a reorientation of the goals of the criminal justice system away from conviction at any cost toward the protection of defendants' rights and safeguarding against erroneous or otherwise unjust convictions. Such a change would require a shift in power from the procuracy to the judiciary and defense bar.²¹⁴ A strong exclusionary rule is also essential, particularly as long as there are no meaningful civil remedies for the deprivation of defendants' rights.

The prospects for such criminal justice reform as outlined above are bleak in the short term, due to the ever-deteriorating economy, the continued increase in crime, and the increasingly strident political debate over Russia's future. Eco-

211. Viktor Sokirko's Society for the Protection of Convicted Entrepreneurs is a non-governmental organization that has been addressing this issue in Russia vis-à-vis economic crime. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 70, at 113-14.

212. Some commentators have even recommended abolition of the labor camp system entirely in favor of closed prisons, arguing that incarcerating small numbers of prisoners in cells is a more effective way to isolate disruptive prisoners. Shumikhin & Rozhkov, *supra* note 138, at 54, 56.

213. One proposed project discussed at a meeting on prison reform in Moscow in November 1992 was the creation of a set of model prisons centered around a school for training prison personnel. Funding for such a project remains the biggest obstacle, however.

214. See, e.g., Fedorov, *O sudebnoi reforme v Rossii* [On Judicial Reform in Russia], GOS. I PRAVO, Issue No. 6, 1992, at 3, 9, translated in FBIS-USR, Oct. 15, 1992, at 12, 13.

The 1992 law on the status of judges attempts to safeguard judicial independence; however, it fails to guarantee life tenure, a reform long sought by Russian legal scholars. See Zakon Rossiskoi Federatsii o statuse sudei v Rossiskoi Federatsii [Law of the Russian Federation on the Status of Judges in the Russian Federation], Vedomosti RF, Issue No. 30, Item No. 1792 (1992), translated in FBIS-USR, Sept. 1, 1992, at 4. Draft laws on lawyers have been criticized as avoiding the issue of the "dopusk" system.

nomic hardship precludes financially costly reform, such as an increase in the number or quality of prisons, or an increase in pay to members of the law enforcement community—including judges, police, defense lawyers, and the procuracy.

As of this writing in 1993, President Yeltsin is fighting for his political life against an array of opponents in an intractable parliament ranging from conservatives to unreconstructed Communists to Fascists. These opponents point to the rising crime rate as evidence of the failure of Yeltsin's (and Gorbachev's) brand of liberalism. Nikolai Fedorov, Yeltsin's reformist Justice Minister, was a particular target of attack at the emergency session of the Congress held in March 1993 and resigned shortly thereafter.

The general public, although not necessarily supporting the opposition, is terrified by the increase in crime, supports most new law enforcement efforts, and reacts negatively to any criminal justice reform that appears to be "soft on crime." Joint army-police patrols, fiercely resisted as a move backward to a police state when Mikhail Gorbachev unsuccessfully tried to introduce them in 1990 and 1991,²¹⁵ have now appeared under President Yeltsin with apparently only muted protests.

The criminal justice establishment remains badly fragmented on issues of reform. The judiciary and defense bar, who would embrace procedural reform that enhances their prestige and power, remain a weak political force and are thus ill-suited to advocate such reform. The procuracy, jealously guarding its powers, cannot be expected to support any reform efforts that would diminish them. In a December 1992 speech, Procurator General Stepankov criticized the legal reform effort as focusing too much on improving the judicial system, which is the procuracy's main rival for power, and on protecting the rights of the accused. In the eyes of

215. HELSINKI WATCH: HUMAN RIGHTS IN THE USSR, *supra* note 69, at 112.

Stepankov, only the procuracy has the authority and the ability to protect everyone's rights and win the fight against crime.²¹⁶

The failing economy and the power struggle between the executive and the legislative branches will continue to preoccupy politicians, and even those who support criminal justice reform are likely to preserve their political capital for these fights, rather than risk discrediting the liberal democratic agenda by pushing criminal justice reform. It is likely that statutory changes in the death penalty will fall victim to similar political pressures. Yeltsin's proposed restriction of the death penalty to premeditated murder and felony-murder appears to have met such a fate at the 1993 Constitutional Assembly.²¹⁷

If Yeltsin's hold on power becomes tenuous, or if he loses power, through legal or extra-legal means, the result is a likely increase in state coercion through the use of the criminal justice system and the death penalty, as conservative and even proto-fascist political forces come to the fore. Yeltsin's opposition, having thus far voiced no coherent economic program, may find a crackdown on crime to be a temporary political palliative and a facade behind which to reimpose authoritarian rule. There is no guarantee that Yeltsin himself, lately speaking about the possibility of imposing a state of emergency or presidential rule, may not succumb to the same temptation.

Of the reforms outlined above, the most likely to succeed would be a carefully packaged new substantive criminal code. A new code that presented a mixture of decriminalization and creation of new offenses, the use of longer prison terms with a decrease in the number of offenses carrying the death penalty, for example, could prove politically acceptable.

216. Speech by Stepankov (Dec. 10, 1992) translated in BRITISH BROADCASTING CORP., SUMMARY OF WORLD BROADCASTS, Dec. 14, 1992, available in LEXIS, Nexis Library, BBCSWB File.

217. See *supra* text accompanying notes 182-83.

Even were the criminal justice reforms outlined above to pass, the rising crime rate could create greater pressure for the increased use of the death penalty. If the criminal justice system is perceived as capable of doing justice, death penalty opponents will be stripped of what until now has been a very potent argument against its use. If petty and nonviolent offenders are dealt with more humanely and efficiently, the criminal justice system, and in particular the prisons and labor colonies, will become saturated with serious offenders whose rehabilitation is unlikely and whose propensity for recidivism is high. Frustration with the intractable crime problem may prompt calls for an increase in the death penalty's use. Even with long-term or life sentences as a theoretical option, the skyrocketing cost of incarceration²¹⁸ makes this option less attractive in practice.

The debate over the death penalty in Russia will remain as polarized as ever for the foreseeable future. For many Russian legal scholars, there is no room in an actual or idealized criminal justice system for capital punishment: they advocate abolition, even in the face of contrary popular opinion. Others will always believe the death penalty serves an amalgam of deterrent and retributive motives, with the overriding justification that the public supports it. It is ironic that in post-totalitarian Russia, public opinion is so often invoked to justify the maximum level of legalized state coercion. It is perhaps indicative of the lingering allure of totalitarianism that, despite the abuses of the death penalty throughout Soviet history, the public continues to support it as a contribution to social peace.

218. Barinov, *Russian Prisons are Near Bankruptcy: Introduction of the New "Prison Law" Will Cost the State 20 Billion Rubles*, NEZAVISIMAIA GAZETA, Mar. 14, 1992, at 6, translated in FBIS-USR, Apr. 15, 1992, at 50, 51. In addition to rising costs, economic dislocation has sharply eroded the value of prison production. See Shumikhin & Rozhkov, *supra* note 138, at 55.

