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Kirill Ershov

kirill.g.ershov@gmail.com

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**RUSSIAN FEDERATION'S LAW № 87-Φ3:
POLITICAL MACHINATION OR
PROCEDURAL REFORM?**

*Kirill Ershov**

ABSTRACT: Law 87-Φ3 was signed by Russian President Vladimir Putin six months prior to the December 2007 presidential election. Law 87-Φ3 rearranged the division of functions between the investigator and the procurator during the preliminary investigation. It also saw the creation of the investigative committee within the procuracy, which would have exclusive supervision of all investigations within that branch. Because of the Committee's personal jurisdiction over investigations involving individuals with official immunity and agents of Russia's power structures, both Russian media and Western academia saw the law as being politically motivated by the upcoming transfer of power. The new law is seen as a further step in Russia's transition away from a Soviet procurator-centered criminal procedure system and toward a judicial oversight model consistent with adversarial principles. This paper examines the political rationalizations for law 87-Φ3 reforms and points out the flaws. While not denying the

validity of these justifications, this paper posits that such explanations are unverifiable. The paper concludes by providing procedural justifications for law 87-Φ3.

INTRODUCTION

Six months prior to the December 2007 Russian election, which would legitimize Dmitri Medvedev, Vladimir Putin's heir apparent, as the President of the Russian Federation, the Russian Legislature passed law "From 6.5.2007 No. 87-Φ3" (hereinafter "law 87-Φ3"). Signed by Putin on June 5, 2007, the law was due to take full effect in ninety days.¹ Law 87-Φ3 rearranged the division of functions between the investigator and the procurator during the preliminary investigatory stage of a prosecution. It also created the investigative committee within the procuracy and gave the committee exclusive supervision of all investigations within that branch. Because of the committee's personal jurisdiction over investigations involving individuals with official immunity and agents of Russia's power structures, both Russian media and Western academia saw the law as being politically motivated by the upcoming transfer of power.

After a brief description of the preliminary investigation as implemented in Russia, this paper examines the political rationalizations for law 87-Φ3 reforms and points out the flaws. While not denying validity of the law's rationalizations, this paper posits that such explanations are unverifiable and provides procedural justifications for law 87-Φ3. In its rearrangement of the procurator's relationship with the preliminary investigation, law 87-Φ3 is seen as a further step in Russia's transition away from a Soviet procurator-centered criminal procedure system and toward a judicial oversight model consistent with adversarial principles.

* Esquire; Clerk, Capital Habeas Unit, Federal Public Defender for the Central District of California; J.D. UCLA School of Law, 2009; B.A. Univ. of California Berkeley, 2001. For comments and criticism, please contact me at kirill.g.ershov@gmail.com.

¹ Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2007, No. 87, Item 3, *available at* <http://www.consultant.ru/online/base/?req=doc;base=LAW;n=38313;p=2>.

THE 2001 CODE

The modern role of the procurator in the Russian Federation still retains some of the Soviet conception of the procurator's judicial functions. The Soviet system was centered on the procurator as the guarantor of observance of citizens' rights during the judicial process: "[S]upervision over the exact execution of the laws of the USSR, the RSFSR [Soviet Republic of Russia], and autonomous republics in criminal proceedings shall be exercised by the USSR procurator general both directly and through the RSFSR procurator and other procurators subordinate to him."² This approach has been deemed the "procuracy supervision" in order to contrast it with the "judicial oversight" model of Western systems.³

In terms of an inquisitorial or continental model of criminal procedure, the preliminary investigation is the stage which precedes the trial and during which all evidence to be used against the accused is gathered.⁴ Under procuracy supervision, the procurator was seen as the final arbiter in the realm of preliminary investigation. The procurator had the power to vacate a criminal case,⁵ along with the final authority over a suspect's pre-trial detention⁶ and over the legality of searches and seizures.⁷ "Appeals from actions of an agency of inquiry or an investigator shall be made to a procurator⁸ [and] [a]ppeals from actions and decisions of a procurator shall be

² Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedure Code] art. 25 (Russ.), reprinted in HAROLD J. BERMAN, RUSSIAN RESEARCH CENTER STUDIES, SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES (Harold J. Berman & James W. Spindler trans., Harvard Univ. Press 2d ed.1972). This conception of the procurator was inherited from Tsarist Russia. See Jonathan Greenberg, *The Kremlin's Eye: The 21st Century Prokuratura in the Russian Authoritarian Tradition*, 45 STAN. J. INT'L L. 1 (2009).

³ A. Khaliulin & V. Nazarenko, *From Procuracy Supervision to Judicial Oversight*, in 41 STATUTES AND DECISIONS 31 (2005).

⁴ See A. SMIRNOV & K. KALINOVSKI, UGOLOVNI PROCESS, [THE CRIMINAL PROCESS] 346 (2008).

⁵ UPK art. 116.

⁶ William Burnham & Jeffrey Kahn, *Russia's Criminal Procedure Code Five Years Out*, 33 REV. CENT. & E. EUR. L. 1, § 2.2 (2008) (citing UPK arts. 2, 89, 96, 97).

⁷ UPK arts. 167, 168, 218-20.

⁸ *Id.* art. 218.

brought to a higher procurator.”⁹ Even during the trial phase, the procurator often had the final word over procedural legality because the trial courts’ exercise of authority frequently consisted of rubberstamping procuratorial decisions.¹⁰

Judicial oversight first entered Russian procedure after the Soviet collapse, when the Constitutional Court extended supervisory power over preliminary investigations to the courts.¹¹ In 1993, the new Russian Constitution declared that “judicial proceedings shall be conducted based on adversarial principles and equality of the parties.”¹² In 1999 the Constitutional Court found the Constitution as granting individuals a right to appeal state preliminary investigation actions that substantially restricted their rights and freedoms. Then in 2001, with the passing of the Criminal Procedure Code of the Russian Federation (“the 2001 Code”), the legislature adopted judicial oversight principles directly into the Code of Criminal Procedure. In addition to courts expanding their jurisdiction to hear appeals, the courts were required to authorize key state actions during the preliminary investigation, such as preliminary detentions and searches and seizures.¹³

Although the new Criminal Procedure Code’s reforms took away the procurator’s final word over the legality of investigative actions, these reforms also worked to consolidate the procurator’s powers over the investigative process from the perspective of the state. Specifically, procurators were given more powers over the actions of investigators in that a criminal case could no longer be opened without an approval of the

⁹ *Id.* art. 220.

¹⁰ Stephen C. Thaman, *The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond*, 40 CORNELL INT’L L. J. 355, 357 (2007).

¹¹ Khaliulin & Nazarenko, *supra* note 3, at 31.

¹² Burnham & Kahn, *supra* note 6, § 2.2 (citing Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 123(3)).

¹³ Authorizations are required for detentions exceeding forty-eight hours and for searches of residences and of individuals, when not incident to arrest. For detentions, *see* Burnham & Kahn, *supra* note 6, at 11 (citing Ugolovno-Protsessual’nyi Kodeks [UPK] [Criminal Procedure Code] art. 10[1] (Russ.)). For searches and seizures, *see id.* at 46 (citing UPK art. 29[2]). For discussion on appeals, *see* Khaliulin & Nazarenko, *supra* note 3, at 32 (citing UPK art. 125).

procurator.¹⁴ Following a procurator's consent, the preliminary investigation was to be conducted as directed by the procurator.¹⁵ A procurator's consent was also required prior to an investigator's petition to the court for a court-authorized search and seizure and pre-trial detention authorizations.¹⁶

Consequently, the 2001 Code's break with the Soviet model can be seen as taking away most of the procurator's power over the determination of the legality of the preliminary investigation and replacing it with the responsibility for that legality from the perspective of the state.

INVESTIGATIVE JURISDICTION

In Russia the concept of investigative subject matter jurisdiction governs which investigative agency has jurisdiction over which type of crime.¹⁷ This concept is analogous to the divisions in jurisdictions of various federal investigative agencies in the United States, such as the Federal Bureau of Investigation (FBI), the Drug Enforcement Agency (DEA), and the Bureau of Alcohol, Tobacco and Firearms (ATF).

The majority of preliminary investigations are handled by investigators of the Ministry of Internal Affairs (MVD) which is commonly referred to as *Militsia*.¹⁸ *Militsia* investigators handle crimes such as burglary,¹⁹ theft, fraud, and racketeering as related to organized crime,²⁰ money laundering,²¹ sale or purchase of illegally obtained goods,²² and receiving and taking bribes.²³

Two other notable investigative agencies are the Federal Security Service (FSB) and the Federal Drug Control Service (FSKN). FSB is the successor to the Soviet KGB (Komitet

¹⁴ Burnham & Kahn, *supra* note 6, § 2.2 (citing UPK art. 146).

¹⁵ UPK art. 146.

¹⁶ *See* UPK art. 37.

¹⁷ *See* SMIRNOV & KALINOVSKI, *supra* note 4, at 356-60; *see also* UPK art. 151.

¹⁸ *Id.* at 357.

¹⁹ Ugolovnyi Kodeks [UK] [Criminal Code] art. 151 (Russ.).

²⁰ *Id.* arts. 158, 151, 163.

²¹ *Id.* art. 174.

²² *Id.* art. 175.

²³ *Id.* arts. 290-91.

Gosudarstvennoy Bezopasnosti or Committee for State Security); its investigators handle crimes that can be perceived as crimes perpetrated against the state as a whole, rather than a specific individual. Namely, the FSB handles crimes such as contraband activity by state officials,²⁴ and those involving terrorism²⁵ and espionage.²⁶ FSKN, on the other hand, handles investigations related to drug enforcement, specifically crimes relating to the possession, manufacture, or sale of drugs²⁷ and drug precursors.²⁸

Under the subject matter investigative jurisdiction, investigators of the procuracy handle crimes that are considered to pose the greatest threat to society, such as murder, kidnapping, and rape.²⁹ These investigators are also responsible for a wide range of cases falling under their control through the personal jurisdiction exception to the subject matter investigative jurisdiction rules.³⁰ Under personal jurisdiction, the procuracy is assigned investigations of people whose official immunity status entitles their investigations to greater oversight in the chain of command. Individuals entitled to official immunity include members of the federation council (upper house of the legislature), state *duma* (lower house of the legislature), federal judges or jurors, procurators, investigators, lawyers, or the president of the Russian Federation.³¹ Procuracy investigators also handle investigations dealing with crimes committed by agents of the other investigative agencies that are related to their official duties.³²

²⁴ *Id.* art.188 [2].

²⁵ UK arts. 290-91.

²⁶ *Id.* arts. 275-76, 283.

²⁷ *Id.* arts. 228 [2], 228.1.

²⁸ *Id.* art. 232 [2].

²⁹ SMIRNOV & KALINOVSKI, *supra* note 4, at 357 (citing UPK art. 151). Murder can be found in article 105 of the Criminal Procedure Code; kidnapping is defined in article 126; and rape is defined in article 131.

²⁹ UPK art. 155[1][b].

³⁰ UPK art. 155 [1] [b].

³¹ Following Law No.87-Φ3, approval of the head of the investigative committee under the procuracy of the Russian Federation is required for opening of criminal cases against individuals with highest form of official immunity. See UPK arts. 447-48.

³² UPK art. 155 [1][c]. The only exception to procuracy's personal

Key exceptions to power granted by subject matter investigative jurisdiction include universal jurisdiction and alternative jurisdiction. Through universal jurisdiction a procurator can withdraw any case from another agency's jurisdiction and give it to a procuracy investigator.³³ Through alternative jurisdiction, officials of any investigative branch can investigate a limited range of crimes uncovered during performance of their duties.³⁴

THE 2007 REFORMS

The year 2007 was Vladimir Putin's last year in power as the President of the Russian Federation and the year during which the election determining his successor was held. The first major reforms in Russia's Code of Criminal Procedure since the implementation of the 2001 Code also occurred in 2007. Law 87-Φ3 rearranged the division of functions between an investigator and a procurator during the preliminary investigation and created the investigative committee within the procuracy. Signed in early June, the law was due to come into effect in ninety days.³⁵

Law 87-Φ3 takes the control over the preliminary investigation away from the procurator.³⁶ The procurator's consent to the opening of a criminal case has been limited to a right to refusal within twenty-four hours of receiving a resolution of the opening of the case, which is to be sent by the investigator immediately after opening. Refusal can be made on the grounds that the opening of the case is illegal or that it is unsupported by evidence; there are no extensions of the

jurisdiction concerns the above-mentioned types of individuals that are accused of espionage related crimes; those cases are assigned to FSB investigators. SMIRNOV & KALINOVSKI, *supra* note 4, at 359.

³³ UPK art. 37[2][12].

³⁴ UPK art. 151[5] (governs alternative jurisdiction). The range of crimes subject to this exception under the Criminal Code includes articles 158[3-4] and 159[2-4] (severe kinds of theft and fraud respectively); 172-74 (financial crimes); and 208-10 (relating to organized crime and banditry).

³⁵ *Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF]* [Russian Federation Collection of Legislation] 2007, No. 87, Item 3, *available at* <http://www.consultant.ru/online/base/?req=doc;base=LAW;n=38313;p=2>.

³⁶ UPK art. 144, *amended* by SZ RF No. 87, Item 3 § 54.

twenty-four hour window.³⁷ The procurator loses all input regarding the handling of the case by the investigator. The procurator's prior powers over the direction of the case, such as his consent of investigators' petitions for actions requiring court authorizations, have been imputed to the head of the investigative body under law 87-Φ3.³⁸ The only way a procurator can now influence the direction of the investigation is through a refusal to certify the investigator's conclusion that the investigation is finished and the case is ready for trial. Upon such refusal, the case is sent back for further investigation.³⁹

Law 87-Φ3 also creates the investigative committee under the procuracy of the Russian Federation. The investigative committee includes the hierarchy of investigative bodies within the procuracy. Law 87-Φ3 strips the control over the preliminary investigation from the procurator and assigns it to the head of an investigative body.⁴⁰ All decisions of an investigator regarding a preliminary investigation are subject to the approval of the head of the investigative body. An investigator can appeal the head's decisions to the head of the higher order investigative body.⁴¹ This schema is combined with the following facts: (a) the head of the hierarchy, the first assistant to the procurator general, is nominated by the president and can be appointed and removed only through legislation by the federation council,⁴² (b) the first assistant will have full discretion over the appointment of his subordinates, and (c) the committee's financial independence⁴³ makes the investigative committee a part of the procuracy in

³⁷ UPK art. 146, amended by SZ RF No. 87, Item 3 § 56.

³⁸ UPK art. 39, amended by SZ RF No. 87, Item 3 § 9.

³⁹ UPK art. 146, amended by SZ RF No. 87, Item 3 § 56.

⁴⁰ UPK art. 39, amended by SZ RF No. 87, Item 3 § 9.

⁴¹ UPK art. 146 [3].

⁴² Ruslan Kadrmatov, *Sledstvie Veli . . . Genprokuraturu RF Lishili Chasti Polnomchii ee Razdvoili* [Investigation was Led by . . . The Procuracy of RF is Stripped from Some of Its Obligations and Is Split in Half], LENTA.RU, (Russ.), May 11, 2007, <http://Lenta.ru/articles/2007/05/11/sledstvie/>.

⁴³ Stephen Blank, *The Putin Succession and Its Implications for Russian Politics*, INST. FOR SECURITY & DEVELOPMENTALPOL'Y 19 (Feb. 2008), available at http://www.isdp.eu/images/stories/isdp-main-pdf/2008_blank_the-putin-succession-and-its-implications.pdf.

name, but an independent investigative agency in function. The only input that a procurator has into a preliminary investigation, aside from his ability to deny an investigator's request to forward a case to trial, is through his oversight function as a guarantor of citizens' rights. This oversight has been greatly diminished since the procurator has lost all control over the course of the investigation. Whenever the procurator is put on notice of the violation of a private party's rights during an investigation, his or her only option is to notify the investigator of the violation and to appeal to the head of the investigative body if the investigator's response is unsatisfactory.⁴⁴ Appeals can be made all the way up to the procurator general, although a procurator must wait for an unsatisfactory response prior to appealing to the next ranking head. The only temporal limitation on a response to a procurator's appeal is that it be made within a reasonable amount of time.⁴⁵

RAISON D'ETRE AND/OR POLITICS

The legislation's drastic impact on the criminal process in Russia, and the timing and speed with which it was implemented raised eyebrows in both Russian media and western academic press.⁴⁶ Russia's mainstream media was

⁴⁴ UPK art. 37 [6].

⁴⁵ Aleksandr Aleksandrov, Zhivoi Ugolok: Uchenni Disput Pro Prokurorski Nadzor ei Sledstvenni Komitet [Live Corner: Academic Dispute over Procuratorial Oversight and the Investigative Committee], Int'l Union of Assistance of Justice (Russ.), <http://iuaj.net/modules.php?name=News&file=article&sid=372&mode=&order=0&thold=0> (last visited June 2, 2009).

⁴⁶ The legislature first heard the law at the end of March with investigators stopping taking procurators orders by early September of the same year. Kadmatov, *supra* note 42. Blank sees the creation of the committee as the "icing on the cake" of Kremlin elites' machinations to preserve power during the elections. Blank, *supra* note 43, at 23. The legislation was set to take effect ninety days after passing. See SZ RF No. 87, Item 3, available at <http://www.consultant.ru/online/base/?req=doc;base=LAW;n=38313;p=2>. To determine whether this is eyebrow raising quick, contrast to the 2001 legislation that implemented all the changes in the newly rewritten Criminal Procedure Code, which was passed in December 2001 and became effective on July 1, 2002 (around 180 days). SZ RF No. 177, Item 3, available at <http://www.consultant.ru/online/base/?req=doc;base=LAW;n=70219No.p73>. The latter is a Russian Legal Database for the law that implemented the 2001 Code.

quick to point out that the legislation did not fully conform to the motivations underlying its existence. Reform of the investigative process has been previously proposed, but such reform included the creation of a unified investigative service, one that would subsume the different agencies, such as MVD, FSB and FSKN, thus addressing the problems presented by their overlapping jurisdiction.

While law 87-Φ3 was officially characterized as a first step towards such a service, by taking away procuratorial control over the opening and direction of criminal cases in the investigative agencies, it was essentially seen as playing a dividing, rather than a unifying function. As a result, the investigative agencies saw a gain in independence rather than deferring additional control.⁴⁷ Also, the official goal of putting a check on the procuracy's control over both the investigative and the accusatory parts of the criminal process was perceived to be undermined by the legislation's effect of freeing the investigations agencies of legal oversight by the procuracy and the inability of the courts to implement judicial oversight of their own.⁴⁸ The commentators were further puzzled by the procurator general's official support of the legislation despite its weakening the procuracy's strength as an institution, and the widespread discontent within the procuracy.⁴⁹ Due to the above inconsistencies, the mainstream media saw political considerations as being primary to the official explanations put forth by the administration and the legislature.

Aleksandr Bastrykin, who was Putin's university classmate, and who indeed became the head of the investigative committee, was seen as the primary candidate for the position. With Bastrykin's nomination came the realization that individuals with personal relations to Putin would be at the head of every one of Russia's power structures, thus ensuring stability during the transfer to the new presidency. As the head of the investigative committee under the procuracy, Bastrykin joined Putin's ex-FSB colleagues, Nicolai Patrushev and Victor Cherkesov, who headed the FSB and the FSKN respectively. In addition, Putin's university classmate

⁴⁷ Kadrmatov, *supra* note 42.

⁴⁸ *Id.*

⁴⁹ *Id.*

Aleksey Anichin, headed the MVD, while Andrei Belianinov, Putin's colleague at the KGB in East Germany, headed the Federal Customs Service.⁵⁰

Western academic publications that addressed law 87-Φ3's *raison d'être* (reason for being) also saw it as primarily politically motivated. In *Law as Politics: The Russian Procuracy and Its Investigative Committee*, Ethan Burger and Mary Holland found the committee to be "a creature of politics, not law."⁵¹ The authors saw Vladimir Putin, throughout his career, as one to use the procuracy as an instrument for consolidation of wealth and political power. In a realm permeated with corruption, Putin has wielded the procuracy's power to selectively prosecute regional politicians as enforcement of his drive to yoke Russia's federal regions and municipalities under his *power vertical* (hierarchy of power under Putin).⁵² Similarly, the procuracy has been used to perform massive wealth transfers through nationalization and re-sale of illegal assets. The authors saw the Yukos affair as the most notable example of this policy, where at the time, Russia's richest man, Mikhail Khodorkovsky, was imprisoned, when his company Yukos declared bankruptcy and its \$100 billion in assets resold to the highest bidder.⁵³ In Burger's and Holland's opinion, the creation of the investigative committee and the naming of Aleksandr Bastrykin as its head was a move

⁵⁰ *Id.*

⁵¹ Ethan Burger & Mary Holland, *Law as Politics: The Russian Procuracy and Its Investigative Committee*, 2 COLUM. J. E. EUR. L. 143, 185 (2008).

⁵² "The procuracy selectively prosecuted corrupt officials whom the government disfavored. Vladivostok's former mayor fits this description, as does the mayor of Volgograd. By contrast, Moscow Mayor Yuri Luzhkov is well placed enough that he has engaged in extremely questionable activities more than ten years without legal challenge." *Id.* at 170 (internal citations omitted).

⁵³ "The Yukos expropriation is especially important because the assets were so enormous; the Presidential Administration's and procuracy's methods against Yukos, its owners and employees, so severe; and the prosecutions have had such symbolic impact both in Russia and abroad. Former economic adviser, Andrei Illarionov, characterized the seizure and reselling of Yukos' assets to Rosneft as 'the biggest scam of 2006.' He said, 'This falls under the category of what people call the sale of stolen property.' These actions against Yukos undermined property rights, discouraged investment and sparked capital flight." *Id.* at 175.

that further streamlined the president's control of the political investigations process by bypassing Yuri Chaika, the procurator general (i.e., the head of the procuracy).⁵⁴

In *The Putin Succession and Its Implications for Russian Politics*, Stephen Blank saw the decision to cut the procurator general out of the investigations process as a move motivated by power struggles within Kremlin's *siloviki* clans. *Siloviki* literally translates to "strongmen" and refers to heads of power structures, such as the investigative agencies and the procuracy that make up rival Kremlin clans. Blank and other commentators saw the clans as an instance of a feudal system of power based on political patronage and control of rent-generating governmental institutions. Previously this system has been implemented through the workings of the Communist Party, and prior to that, through intrigue within the Tsar's courts. Succession has always been a problematic aspect of such systems, as it realigns the pyramid of power structured on personal patronage.⁵⁵ According to Blank, Putin's appointment of a loyal individual to head the investigative committee was Putin's way to hedge and secure governmental positions within his successor Medvedev's administration. This move would insure that Putin and his appointees are protected from political ambitions of rival *siloviki* and potential threats of political investigation and prosecution.⁵⁶

THE VERIFIABILITY PRINCIPLE

The Verifiability Principle holds that a statement is only meaningful if it is tautological or if it is empirically verifiable.⁵⁷ The key problem with political rationalizations, such as the ones presented for law 87-Φ3 above, is that without reliable sources of information, such as documents made public through the Freedom of Information Act in the United States, these rationalizations are more akin to axioms rather than empirical statements. The political rationalizations described in this

⁵⁴ *Id.* at 185.

⁵⁵ Blank, *supra* note 43, at 3-8

⁵⁶ *Id.* at 24-25.

⁵⁷ Encyclopedia Britannica, Verifiability Principle, <http://www.britannica.com/EBchecked/topic/626091/verifiability-principle> (last visited May 4, 2009).

paper function as valid arguments only if their premises are assumed to be true. Like the problem of evil in theology, where the presence of cruelty in the world can either be seen as logically inconsistent with the existence of God or, instead, as a necessary hardship provided by a benevolent deity to promote spiritual growth, the validity of such rationalizations can neither be confirmed nor denied through observation. From some points of view, because law 87-Φ3 was passed in a climate of a *siloviki* struggle for the incumbent presidency, its *raison d'être* must be necessarily connected to that struggle, with observations consistent with such a rationalization proving the point, and with contrary observations instead evidencing miscalculation on the behalf of the *siloviki*.

Every observation supporting a political rationalization can be countered with an equally valid counter-observation. The Russian media's speculation that the investigative committee's formation headed by Aleksandr Bastrykin was motivated by Putin's desire to stabilize the power structures through the installment of his university classmate⁵⁸ can be countered by the destabilizing results of these events. Soon after taking control of the investigative committee, Aleksandr Bastrykin proceeded to make two high-profile arrests and detentions—that of General Bulbov,⁵⁹ the right hand man to

⁵⁸ The fact that Bastrykin was Putin's university classmate is not indicative of anything in particular. Chaika who's authority under this theory Bastrykin was supposed to undercut can also be seen as connected to Putin, as it was reported that it was Putin then acting as Prime Minister who championed Chaika for the position of Minister of Justice in 2001 and later named him to the procurator General position as president in 2006. Chaika, Yuriy, General'niy Prokuror Rossiiskoi Federatsii, Biographiya [Yuriy Chaika, General Procurator of Russian Federation, Biography], <http://Lenta.ru/lib/14159398/> (last visited June 4, 2006) (Russ.).

⁵⁹ Bulbov was arrested on October 2, 2007. Aleksandr Bulbov – Biography, <http://Lenta.ru/lib/14184728/> (last visited Jan. 26, 2010) (Russ.). He was accused of numerous crimes including giving and receiving bribes (in violation of articles 290[4] and 291[2] of the Criminal Procedure Code respectively) and illegal wiretapping (in violation of article 138[2] of the Criminal Procedure Code). Investigative Committee Under the Procuracy of the Russian Federation, Generalu Bulbovu Prediavleno Obvinenie v Okonchatelnoi Redactsii [General Bulbov is Presented with an Accusation in a Final Form], <http://www.sledcomproc.ru/news/1123/> (last visited Sept. 20, 2009) (Russ.). The investigative committee had jurisdiction to investigate Bulbov under personal jurisdiction (article 155[1][c] of the Criminal Procedure Code) as it was investigating an official of an investigative agency

FSKN head Victor Cherkesov,⁶⁰ and that of Sergey Storchak,⁶¹ the Assistant Minister of finances. The procuracy publicly questioned and opposed the arrests, both in the media and in the courts.⁶² In regards to the reaction by FSKN, Cherkesov publicly denounced his first general's arrest and blew the whistle on the *silovki's* struggle for power, which up until that point, no official had ever been publicly acknowledged.⁶³

for crimes committed when in performance of duties. For more on personal jurisdiction of the investigative committee under the procuracy, see the Investigative Jurisdiction section of this paper.

⁶⁰ Burger and Holland see this arrest, as well as the murder, of two individuals connected to the FSKN as payback by the FSB for FSKN's involvement in the 'three whales' scandal during which high ranking FSB officials were implicated in smuggling and money laundering. Burger & Holland, *supra* note 51, at 172, 186.

⁶¹ Storchak was arrested on November 15, 2007. Sergei Storchak - Biography, <http://Lenta.ru/lib/14185567/> (last visited Sept. 15, 2009) (Russ.). Storchak was charged with attempt to commit large-scale fraud falling under article 159[4] of the Criminal Code. Under article 151[2][3] of the Criminal Procedure Code, this crime falls into the subject matter jurisdiction of the MVD. The investigative committee does not have personal jurisdiction per [2][1][b] of the same article as Storchak is not entitled to official immunity, or per [2][1][c] as Storchak is not an agent of an investigative agency or other agencies falling under the subsection. The Committee could investigate Storchak under universal jurisdiction only if a procurator had officially transferred his case to it from the MVD, this is unlikely as the procuracy publicly opposed Storchak's arrest. Consequently, the Committee must have acted under alternative jurisdiction (article 151[5] of the Criminal Procedure Code) since the fraud that Storchak was accused of committing falls under the range of crimes that can be investigated by any agency if it discovers it in performance of its duties. For more on universal and alternative jurisdiction, refer to the Investigative Jurisdiction section of this paper.

⁶² In regards to both Bulbov and Storchak's arrests, the procuracy filed petitions for dismissal. Burger & Holland, *supra* note 52, at 185-91; Aleksandr Aleksandrov, *Zhivoi Ugolok: Mezhdru Tuchami ei Morem Gordo Reet Tov. Bulbov* [*Live Corner: Between a Rock and a Hard Place, Mr. Bulbov Stands Firm*], <http://iuj103.valuehost.ru/modules.php?file=article&name=News&sid=340> (last visited June 10, 2009). Furthermore, following the arrests, the procuracy relying on its function as the guarantor of citizens' rights and overseer of the legality of the criminal process, launched a wide scale audit into investigative committee's compliance with the law. Burger & Holland, *supra* note 51, at 188. Burger and Holland along with Russian commentators see this audit as countermove in the procuracy's struggle against the investigative committee. *Id.*

⁶³ Victor Cherkesov, *Warriors Must Not Turn into Traders*, KOMMERSANT, Oct. 9, 2007, <http://www.kommersant.ru/doc.aspx?DocsID=812840>, translation available at http://www.robertamsterdam.com/2007/10/viktor_cherkesov_on_the_spy_wa.htm.

If the Kremlin's intent was to stabilize the relations between the power structures, then this scheme can be considered a failure, as the investigative committee's actions saw an unraveling of an internal power struggle into a full-blown war waged in the media, the courts and the streets.

Burger and Holland consider the Bulbov and Storchak affairs as further proof of their thesis that "the Russian Presidential Administration under former President Vladimir Putin misused the procuracy for political purposes."⁶⁴ The Bulbov and Storchak affairs are addressed in detail and presented as continuations of the Kremlin's use of criminal investigations for political purposes; yet, the details of these affairs evidence chaos rather than orchestrated manipulation for political gain. In terms of institutional control, law 87-Φ3 is a destructive rather than a consolidating force. The investigative organs of the various power structures no longer need the procuracy's consent to open criminal cases; consequently these structures become significantly more independent in terms of their institutional actions.

While it is true that through personal and universal jurisdiction exceptions the investigative committee remains the preferred tool for political investigation, its powers are still far from limitless, even after the enactment of law 87-Φ3. For example, the procurator is still required to give consent before the investigative committee can exercise a universal jurisdiction over a case.⁶⁵ Furthermore as a political weapon, the investigative committee will only give so much, as it is still up to the procuracy to prosecute the case in court. As of the time of this writing, and approximately two years after their arrests, neither Storchak's nor Bulbov's cases have proceeded to the trial phase.⁶⁶ This can be compared to Khodorkovsky, cited by Burger and Holland as an earlier victim of the Kremlin's abuse of power, where Khodorkovsky was arrested,

⁶⁴ Burger & Holland, *supra* note 51, at 143.

⁶⁵ See UPK art. 37[2][12]; see also *supra* text in Investigative Jurisdiction section of this paper.

⁶⁶ Storchak was arrested on November, 15, 2007. Sergei Storchak – Biography, <http://Lenta.ru/lib/14185567/> (last visited Mar. 20, 2010). Bulbov was arrested on October 2, 2007. Aleksandr Bulbov – Biography, <http://Lenta.ru/lib/14184728/> (last visited Mar. 20, 2010).

convicted and sentenced within a year and a half, under the supervision of a unified procuracy.⁶⁷ If law 87-Φ3 functioned as designed, then the comparison works to undermine Burger and Holland's thesis that it was implemented to streamline political investigations and prosecutions.

The fact that law 87-Φ3 splits the previously united investigative and prosecutorial powers makes both the investigative committee and the procuracy a *per se* less-effective political weapon than a unified procuracy. By creating the investigative committee, law 87-Φ3 creates a new institutional player whose concerns need to be accommodated prior to its participation in the implementation of any political objective. While this does not mean that law 87-Φ3 is indeed a creature of law rather than politics, its creation is far from an elegant fit into Burger's and Holland's thesis.

As to Blank, his thesis suffers from the same problem. In his paper, Blank refers to the creation of the Committee as the "icing on the cake" of Kremlin's machinations, aimed at insuring the survival of vested players through the succession process: "[G]iven Bastrykin's personal loyalty to Putin, it seems clear that Putin is manipulating the 'power vertical' to ensure that he and his appointments hold on to power in Medvedev period by upholding the threat of investigation and prosecution over all officials and politically interested personages."⁶⁸ Considering law 87-Φ3's effects on the Criminal Procedure Code, such a statement would have been more appropriate had the legislature started out with two divided institutions and fused them into the same organ under the control of Putin's longtime colleague Procurator General Yuri Chaika.⁶⁹ Given that the head of the investigative committee Bastrykin has no prosecution power whatsoever, it seems that Putin and his protectees would have been better hedged under Chaika's supervision of a unified procuracy.

⁶⁷ Khodorkovsky was arrested on October 25, 2003; on May 31, 2005, he was convicted and sentenced to nine years in prison. Mikhail Khodorkovsky – Biography, <http://Lenta.ru/lib/14159417/full.htm> (last visited Mar. 20, 2010).

⁶⁸ Blank, *supra* note 43, at 24-25.

⁶⁹ See *infra* text accompanying note 79.

PROCEDURAL CONSIDERATIONS

Aside from politics and in terms of procedural innovation, law 87-Φ3 can be seen as another step in Russia's transition from procuracy supervision to judicial oversight initiated by the collapse of the Soviet Union and enshrined in the 2001 Criminal Procedure Code.⁷⁰ While law 87-Φ3 retains Article 37's provision that the procurator shall "exert supervision over the procedural activity of the bodies of inquiry and of the bodies for the preliminary investigation" as to preliminary investigations, this oversight loses any vestiges of judicial functions that it had retained from procuracy supervision under the Soviet model. Specifically, the procurator can no longer determine the legality of an investigator's action; he can only voice his objections and hope that they are considered in the investigative organ.

While it is true that through this reform an involved party, such as a victim or suspect, loses a practical avenue to voice objections over the investigator's actions, it nonetheless steers complaints towards the courts, which is the appropriate avenue for resolution of such disputes. Considering the current accusatory functions of the procurator as well as historic functions of the procuracy within Russian society, a procurator is not capable of exercising true due diligence when arbitrating individual party appeals of investigators' actions. This is because the procuracy objectives have been and are still intertwined with the objectives of the state.⁷¹ According to pre-law 87-Φ3 statistics for 2007, courts remedied a greater fraction of involved parties' complaints than the procurators.⁷² The difference between the remedial proportions of the procurators and the courts is miniscule; procurators remedied every sixth objection filed by an individual party in regards to preliminary investigations, whereas the courts remedied every

⁷⁰ See discussion *supra* section on The 2001 Code.

⁷¹ See SMIRNOV & KALINOVSKI, *supra* note 4, at 134. For a western examination of the procuracy's history as an instrument of the sovereign, see Jonathan Greenberg, *The Kremlin's Eye: The 21st Century Prokuratura in the Russian Authoritarian Tradition*, 45 STAN. J. INT'L L. 1 (2009).

⁷² Posting of Dr. Mikhail Silnov to Dura Lex Sed Lex, <http://blogs.privet.ru/community/femida/49188298> (Nov. 4, 2008, 13:12 Russ. T.) (citing statistics from Supreme Court of the Russian Federation).

fifth. Given the conditions in Russia, where the courts are still often overly deferential to the state,⁷³ the proximity of the statistics is indicative of the lack of objectivity in the courts. Although this statistic is a problem, it is not suggestive by itself that the procurator is a more proper venue to remedy appeals brought by individual parties.⁷⁴

Law 87-Φ3 can also be seen as a step away from the 2001 Code's violation of the principle that holds that investigation and accusation should not be vested in the same body, *ne procedat judex ex officio* (one who investigates must not be the one to accuse).⁷⁵ Under this principle, a prosecutor's desire to obtain a conviction interferes with the impartial truth-finding functions of an investigator. Russian commentators saw the procurator's release from investigative functions as a method to allow a more efficient oversight of the propriety of investigators actions by exercising the right to deny certification to investigations deemed unwarranted. In this sense, law 87-Φ3 can overcome institutional biases that could have previously contributed to a procurator overlooking such improprieties.⁷⁶

The separation of powers can result in proper checks and balances that enable each to motivate the other to properly

⁷³ Thaman, *supra* note 10, at 35; see also Yelina Kvurt, *Selective Prosecution in Russia – Myth or Reality?*, 15 CARDOZO J. INT'L & COMP. L. 127 (2007); Jeffrey Kahn, *Vladimir Putin and the Rule of Law in Russia*, 36 GA. J. INT'L & COMP. L. 511 (2008).

⁷⁴ Russian commentators point to the greater volume of appeals heard by procurators than courts, 521,480 to 43,903 in 2007 arguing that following Law No.87-Φ3 as the sole practical avenue for these complaints the courts will not be able to handle the same volume as the procurators. See Posting of Dr. Mikhail Silnov, *supra* note 76; SMIRNOV & KALINOVSKI, *supra* note 4, at 134 (citing Obshestvenni Verdict [Public Verdict], June 28, 2007, <http://control.hro.org/okno/pr/2007/06/28.php>).

⁷⁵ Carlo Guarnieri, *Judicial Education as a Support to Judicial Independence and Major Justice Reform*, in THE SECOND INTERNATIONAL CONFERENCE ON THE TRAINING OF THE JUDICIARY: JUDICIAL EDUCATION IN A WORLD OF CHALLENGE AND CHANGE (2004), available at www.nji.ca/nji/internationalforum/Guarnieri.pdf. This principle is implemented differently in various systems, for example, in France the prosecutor, upon finding serious presumptions that a crime has occurred, officially requests for the investigative judge to investigate it. See Bron Mckillop, *Anatomy of a French Murder Case*, 45 AM. J. COMP. L. 527, 534-35 (1997).

⁷⁶ A. Smirnov & K. Kalinovski, *Komentari K UGOLOVNO-PROESSUALNOMU KODEKSU ROSSII, POSTATEINI*, [*Per Statute, Commentary to CRIMINAL PROCEDURE CODE OF RUSSIA*] 134 (2008) (Russ.).

perform their functions. Commentators have criticized procurators for the low quality of cases presented in court.⁷⁷ This is often caused by poor investigations that are enabled by sympathetic trial courts that produce convictions regardless of the sufficiency of the evidence.⁷⁸ As far as these problems are caused by the intermingling of the investigative, the prosecutorial, and the judicial branches, law 87-Φ3 appears to be a proper remedial step.

As it were, the three branches could not properly check each other if the procurator identifies with the investigator and the courts identify with the procurator. These cross identifications would not have ceased while the procurator performed both investigative and judicial functions. By segregating the prosecution from the investigation (i.e., eliminating the procurator's control over investigation of criminal cases), and by eliminating the procurator's vestigial judicial functions (i.e., procurator's power to determine the legality of an investigation), law 87-Φ3 sets up a system that is capable of proper functioning. However, this reform, even if properly implemented, will not be sufficient to produce a prosecutorial service comparable to western standards. The procuracy's reliance on its ability to re-open poorly investigated cases in perpetuity as well as its reliance on the judiciary's eagerness to overturn acquittals will also need to be separately addressed.⁷⁹

Finally, the obvious can also be stated: no reform will truly be successful until Russia's flagrant and pervasive corruption is somehow mitigated to some degree. Criminal investigation is not only a tool used by the politically powerful, but a way to promote various business interests ranging from giant to small businesses: from backwoods villages to the centers of power, a criminal case opening that was "contracted for," remains as a common business expense in dealing with unwanted

⁷⁷ See Thaman, *supra* note 10, at 370-72 n.103; see also GREENBERG, *supra* note 2, at 22 (citing Stanislaw Pomorski, *Modern Russian Criminal Procedure: The Adversarial Principle and Guilty Plea*, 17 CRIM. L.F. 129, 147 (2006)).

⁷⁸ See Thaman, *supra* note 10, at 370-72 n.103.

⁷⁹ For an in depth analysis of the Russian practices of vacating from trial and re-opening of poorly investigated cases as well of overturning acquittals based on procedural errors committed during the investigation, see *id.* at 357.

competition.⁸⁰ Such competition is eliminated when competitors are placed into preliminary detention upon the opening of criminal cases against them.⁸¹ In some ways law 87-Φ3 can be seen as impeding this process on its own by increasing the scope of actors that need to be on the take.⁸² Accordingly, the Russian media has speculated that the conflict between the procuracy and the investigative committee is over the splitting of the “pie,” rather than the underlying political machinations.⁸³ It must also be pointed out that the 2001 Code’s decision to bring in procurator’s consent to criminal case openings was also argued as motivated by anti-corruption considerations—to curb “contracted for” case openings. The procuracy claimed that such consent was responsible for up to a 10% reduction in baseless case initiation.⁸⁴

CONCLUSION

Without access to reliable sources of information, speculations about the political origins of law 87-Φ3 can never be confirmed nor denied. Closer to unverifiable axioms than to empirical propositions, such speculations are of limited academic use. However, if examined procedurally, then law 87-Φ3 is consistent with a series of post-Soviet reforms moving Russian procedure closer to modern adversarial principles embraced in the West. As such, law 87-Φ3 can be conceived of as a remedy towards systemic Russian ills, including inept preliminary investigation and biased judiciary. Whether or not law 87-Φ3 can be considered a success will only be determined over time. For now, its success will likely depend on introduction of concurrent reforms designed to make it harder to re-open cases and appeal acquittals and to mitigate systemic corruption in Russia.

⁸⁰ See Sergei Mihalich, *Nadzor Na Oba Vashi Doma* [Oversight over Both of Your Houses], NOVAYA GAZETA (Russ.), Dec. 20, 2007, <http://www.Novayagazeta.ru/data/2007/97/13.html>.

⁸¹ See *id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Burnham & Kahn, *supra* note 6, at 10-11.