

# Putin-Style “Rule of Law” & the Prospects for Change

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*Abstract: In Putin’s Russia, the regime uses the law and legal institutions to fulfill political goals, to communicate them to society, and to manage the authoritarian coalition that helps the president govern. As a result, the law is highly consequential and important, but its use tends to be arbitrary, expedient, and instrumental, rather than predictable and principled. Can we expect any major shifts in the role of law and the courts over the next ten years? Russia’s legal regime is unlikely to undergo major evolutionary change and may outlive Putin’s tenure: both foreign and domestic pressures for change toward constitutionalism are limited. If a positive shift were to take place, Russia would inch toward authoritarian constitutionalism. But negative change is also possible. If Putin’s regime weakens, the politicized use of the courts against both dissidents and political competitors within the authoritarian coalition will increase.*

Listen, all our opponents clamor for the rule of law. What is the rule of law? It is compliance with existing legislation. What does existing legislation say about marches? You need to obtain authorization from the local authorities. You got one? Go ahead and demonstrate. If you didn’t – you don’t have the right to demonstrate. If you do anyway – you will get a baton to the noggin’ [*poluchite po bashke dubinoi*]. End of story!

– V. V. Putin, August 30, 2010<sup>1</sup>

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Ever since his ascent to power in the late 1990s, Putin has pledged his commitment to develop Russia into a law-based state (*pravovoye gosudarstvo*). However, his liberal opposition at home and critics abroad routinely decry Russia’s rule-of-law deficit. Why does this gap exist and will it narrow or widen in the near future? The gap could signal Putin’s disingenuous appeal to *pravovoye gosudarstvo* or the loss of meaning in translation between the term *rule of law* and its potential Russian equivalents. But it is also the case that both Putin and his critics are right even if they

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are talking past each other. Putin's Russia is far from the liberal constitutionalism associated with the rule of law. Neither does it have the authoritarian constitutionalism sometimes called rule *by* law. But the Putin regime does not pursue legal nihilism while trying to hoodwink domestic and foreign audiences into believing that law matters. Law does matter, but it serves a different purpose than it does in a constitutionalist context. In Putin's Russia, the sovereign uses the law and legal institutions to fulfill political goals, to communicate them to society, and to manage the authoritarian coalition that helps the president govern. As a result, the law is highly consequential, but its use tends to be arbitrary, expedient, and instrumental, rather than predictable and principled. Russia's legal regime is unlikely to undergo major evolutionary change and may outlive Putin's tenure; both foreign and domestic pressures for change toward constitutionalism are limited. If a positive shift were to take place, Russia would inch toward authoritarian constitutionalism (that is, rule by law), either because an increasingly professional judiciary starts to assert itself or because the current authoritarian coalition attempts to use the law to entrench its interests and ensure the survival of the regime beyond Putin. But negative change is also possible. If Putin's regime weakens, the instrumental and arbitrary use of the courts against both dissidents and political competitors within the authoritarian coalition will increase.

The liberal constitutionalism associated with the rule of law rests upon two main principles: equal responsibility and protection under the law, and substantive and procedural guarantees for fundamental individual rights. This means that everyone, including high-ranking members of the regime and its sovereign, is equally constrained by the constitution and ordinary legislation, not just on paper, but in prac-

tice as well. Liberal constitutionalism also requires a set of substantive laws that provide for fundamental rights. A politically independent and impartial judiciary is crucial because independent courts can better ensure that all litigants, regardless of their political, material, or legal resources, are equally bound by the law.

Putin's Russia is far from the liberal constitutional ideal. While its constitution does provide many fundamental rights – freedom of speech, freedom of association and assembly, and freedom of movement, to name a few – ordinary legislation has hollowed each of them out. The foreign agents laws and antiextremism laws undermine freedom of association; hate speech legislation and a 2014 amendment to the Criminal Code, which outlaws public calls for violation of Russia's territorial integrity, limit freedom of speech; onerous administrative provisions for registering in one's place of residence restrict freedom of movement; and the 2016 Yarovaya anti-terrorism law stifles freedom of assembly and conscience by introducing harsh sentences for organizers of unsanctioned protests, requiring Internet service providers and phone companies to store customers' communication data logs, and making it a crime not to report information about other crimes. Whatever rights do exist *de jure* are undermined *de facto* by the Russian courts, which do not uphold them consistently or predictably.

Russia's authoritarianism does not completely account for its weak constitutionalism, since constitutionalism is not always incompatible with autocracy. Autocrats can govern within a constitutional framework, even if they are not fully constrained by it. In an ideal type authoritarian constitutional regime, the autocrat sets the substantive law, often in negotiation with his governing coalition. The opposition does not have the opportunity to shape substantive law, either through the legislative process or

by appealing to the Constitutional Court. Many fundamental rights are not provided. Substantive law is biased against the opposition and imposes sanctions on it. For example, it may limit its ability to contest elections or its right to criticize the government.<sup>2</sup> However, once in place, the law is applied predictably rather than arbitrarily to individual cases by functionally independent courts.<sup>3</sup> Oppositionists are sanctioned in accordance with the laws that limit opposition activity, rather than imprisoned on other charges. The courts are sufficiently removed from direct political influence and the constitution serves as a coordinating institution between the autocrat and the elites with whose help he governs. When the autocrat and his governing coalition reach agreements about how power is distributed and enshrine those agreements in the constitution or in ordinary legislation, there is enough expectation that commitments are honored and enforced in good faith by the judiciary.<sup>4</sup>

Currently Russia does not have authoritarian constitutionalism. Consider the contrast between the treatment of dissidents in Singapore, the prime example of authoritarian constitutionalism, and in Russia. In 1988, Singapore's highest court ordered the release of four dissidents arrested under the Internal Security Act. The court found that the government had not followed the proper statutory procedures and, in addition, argued that the government's excessive discretionary power under the Internal Security Act was contrary to the rule of law. The government complied with the decision and released the dissidents, but immediately charged them again and rearrested them, this time scrupulously following the letter of the law. It then passed a constitutional amendment, which forbade the judiciary from curtailing the sovereign's power to make law.<sup>5</sup>

This episode underscores both the authoritarian nature of the Singaporean re-

gime and its adherence to constitutionalism. As any authoritarian government does, the Singaporean regime went after dissidents and did so effectively. When one route to detaining them failed, the authoritarian sovereign pursued another and was ultimately successful in asserting the regime's dominance. However, the regime achieved its goals by respecting the constitutional process, the ordinary legislation that it had put in place, and, to some extent, the independence of the judiciary. The highest court was sufficiently independent to call out the government for failing to adhere to statutory procedure, and the government complied with the court decision and made a better effort at respecting the law. While it prevented further encroachment by the independent judiciary into its discretionary power, the regime did not discipline the judiciary either formally or informally. Instead, using its dominance over the legislature, the sovereign changed the constitution to emphasize his unfettered power to make law.

The Bolotnaya Square cases – in which protestors were charged with counts of mass riots and violence against police – illustrate Russia's deviation from authoritarian constitutionalism. Unlike in Singapore, Russian courts at all levels of the hierarchy failed to stop the government from violating defendants' rights to liberty and fair trial, despite the existence of reasonable protection for those rights in the Russian Constitution. The courts actively participated in the rights violations by holding the protestors in pretrial detention well beyond the statutory provisions. They also failed to note violations of the right to freedom of assembly, which resulted from police conduct during the authorized protest on May 6, 2012. Some Bolotnaya defendants won redress when they appealed to the European Court of Human Rights (ECHR), which affirmed the violations and ordered Russia to pay compensation. To prevent further

encroachment on its ability to use the law against regime opponents, the Russian regime did not introduce any changes that would have made the behavior of police and the prosecution strictly legal. Instead, in late 2015, the Duma passed a law that authorizes the Russian Constitutional Court to deem ECHR decisions “unenforceable.” Given the Constitutional Court’s record of deference to the regime, this effectively allows Russia to arbitrarily disregard individual ECHR decisions. The proponents of the law explicitly identified its purpose as the protection of Russia’s “legal sovereignty” (*pravovoi suverenitet*) vis-à-vis international institutions.<sup>6</sup>

The prosecutions of opposition activist Aleksei Navalny and billionaire oil tycoon Mikhail Khodorkovsky demonstrate that the Putin regime does not adhere to authoritarian constitutionalism, but uses law arbitrarily to sideline potential political opponents. Both Putin critics were indicted not for any opposition activities, but on unrelated fraud and embezzlement charges. Navalny was accused of embezzling funds from the state-run Kirovles timber company, and the indictment of his brother Oleg, which further increased the personal stakes for the opposition leader, underscores the instrumental use of criminal law by the sovereign. The timing of the case, prior to Moscow’s mayoral election, and the decision to give Aleksei Navalny a suspended sentence, but Oleg an effective one, support the impression that the embezzlement investigation was a tool used to suppress Aleksei Navalny’s political activities. In its ruling against Russia in the Kirovles case, the ECHR explicitly argued that criminal law was arbitrarily used against Navalny. In ECHR’s words: “Moreover, the Russian courts had found the applicants guilty of acts indistinguishable from regular commercial activities. In other words, the criminal law had been arbitrarily construed to the applicants’ detriment.”<sup>7</sup>

Khodorkovsky’s case is a bit less straightforward; legal analysts believe that the evidence of malfeasance against him and his oil company, Yukos, was stronger than in Navalny’s case.<sup>8</sup> However, even if Khodorkovsky and Yukos engaged in large-scale tax evasion, fraud, and embezzlement, as the ECHR concluded in 2013, Yukos’s business practices were more the norm than the exception in the murky 1990s. By singling out Khodorkovsky but turning a blind eye to similar activities pursued by oligarchs who toed the Putin regime’s line, the Kremlin used the law selectively and arbitrarily to achieve the politically expedient goal of sidelining a budding political opponent.

The Pussy Riot case provides another example of the arbitrary and selective application of the law for political goals: that is, similar acts produced different outcomes in court. The punk rockers’ performance in the Cathedral of Christ the Savior was construed as a crime under Article 213 of the Criminal Code, which punishes premeditated hooliganism (a planned disturbance of public order). After a highly publicized trial, Nadezhda Tolokonnikova, Maria Alyokhina, and Yekaterina Samutsevich received two-year effective sentences. But Pussy Riot’s performance was far from the first example of an antiregime art performance. Tolokonnikova had long been a member of the radical art collective Voina, which from 2007 to 2011 engaged in about a dozen actions that similarly used the shock value of obscenity to criticize Russia’s police state and to challenge public morality. Voina’s main targets were Putin, Dmitrii Medvedev, the *siloviki*, and the Orthodox Church. Most of Voina’s actions involved some kind of law violation – its members shoplifted, drew graffiti, flipped over and burned police cars, and disrupted court proceedings by releasing three thousand cockroaches in a courtroom. In February 2008, Voina (and Tolokonnikova) staged their most notorious stunt: four couples

had sex in a public area of the Biological Museum while other members of the group held protest signs and filmed. The performance, called "Fuck for the Heir Puppy Bear" – a play on words in that Medvedev's name derives from the Russian word *medved*, or bear – drew significant media attention and was widely condemned as extremely offensive. Several of Voina's performances resulted in criminal investigations against individual members, including some indictments under the same Article 213 of the Criminal Code. However, all cases were eventually dropped by the prosecution or dismissed by the courts. Prior to the Pussy Riot convictions, the most serious legal consequence suffered by members of the art collective was a three-month detention from November 2010 to February 2011 while the prosecution investigated their involvement in a police car-flipping incident. That incident produced significant media coverage, both in Russia and abroad, prompting Banksy to contribute 4.5 million rubles to Voina's legal defense fund. Eventually, the court dismissed the charges.

The contrast in outcomes suggests that Pussy Riot's punk performance resulted in convictions not because it was more critical of the regime or Putin, more shocking to the public, better publicized, or more clearly illegal than Voina's performances. The difference was timing. In 2012, the Putin regime had decided to turn to "morality politics" and promote public commitment to traditional values.<sup>9</sup> Within this context, the Pussy Riot performance attracted the attention of the regime, which used the case to publicize and sell its new morality politics to the Russian electorate. The prosecution and the courts acted in line with this goal and delivered convictions. Offering further evidence of the policy shift, in 2013, three of Voina's leading members fled Russia with their families, reportedly to avoid impending criminal prosecution.<sup>10</sup>

These high-profile cases suggest that Russian legal outcomes, while unpredictable if one goes by the content of the law, are entirely predictable if one knows the preferences of the political sovereign: the Kremlin always wins. However, this predictability is exaggerated. Outside a few very salient cases, the Kremlin either does not reveal its preferences or simply has no preferences. When the Kremlin's position is uncertain, lower-level political actors, the prosecution, and judges try to guess the politically correct outcome and this guessing game introduces significant unpredictability into the legal regime. In addition, when political actors vie for relative power within the regime, they often seek to demonstrate that power by influencing court decisions in politically relevant cases. Consider the frequent conflicts between mayors of major cities and regional governors. These conflicts are often fought vicariously through court cases, with each side attempting to mobilize enough political resources up the power ladder to secure a victory in court. Judges face the tough task of interpreting the signals that come from judicial superiors and the extrajudicial actors to deliver a decision that would be acceptable to whoever represents power (*vlast'*) in that concrete case.

In legal areas with low political salience, either because they are politically inconsequential or because there is broad political consensus over how such cases should be adjudicated, the Russian judiciary functions reasonably well. Freed from direct external interference or from the burden of trying to guess the preferences of politically powerful actors, judges decide cases in accordance with their *bona fide* interpretation of the law. Companies that use the *arbitrazh* courts to resolve disputes report that they expect acceptable judicial decisions if *vlast'* is not involved.<sup>11</sup> Ordinary citizens who have experience with going to court report that the decision in their

case was fair and the judge professional, even against the backdrop of reported lack of trust in the Russian judiciary overall.<sup>12</sup> In the early 2000s, when United Russia comfortably won elections and the regime had not yet moved toward suppression of political dissent, the courts adjudicated electoral registration cases without overwhelming bias toward progovernment candidates.<sup>13</sup> In the late 2000s, Russians filed over half a million administrative lawsuits against the state, demanding compensation for wrongful decisions by federal agencies, and won most of them. Rather than a sign of the judiciary effectively constraining state agencies through law, the high win rate in such cases arguably reflects the regime's policy goal of providing an outlet for popular discontent with the bureaucracy.<sup>14</sup>

How likely is it that, in the near future, Russia would transition away from the current legal regime, based on the politicized use of the law and a reliably dependent judiciary, toward constitutionalism? Are those chances better if authoritarianism persists or if a major democratic breakthrough took place? If constitutionalism were to be established, would it happen through an evolutionary process or through a momentous act? Or should we expect further entrenchment of politicized justice and its increased arbitrary use against dissidents and within-regime competitors?

In the best case scenario, sustained investment in the judiciary, which Putin's regime has pursued since the mid-2000s, may lead to ever increasing professionalization. A more professional judiciary may be less prone to petty judicial corruption, which would increase popular trust in the courts. As trust rises and judges develop more pride in their profession, they may start pushing the boundaries of nonpoliticized adjudication beyond the pockets that now exist only by virtue of the regime's in-

difference. This would be a decades-long process, which could unfold only under conditions of political and economic stability and could take Russia closer to an authoritarian constitutionalist legal regime.

The prospects for short-term positive change, on the other hand, are low because the status quo serves the interests of Putin's regime. In contrast to constitutionalism, which constrains the sovereign, Russia's current legal regime allows the Kremlin to pursue political goals through the courts unfettered. As already discussed, Russia's politically pliable judiciary is an effective instrument for suppressing political opposition. The Kremlin has already used it to threaten, jail, or force into exile numerous political opponents: from credible competitors to far-fetched ones, from declared oppositionists to potential ones, from dissidents with high name recognition to the regular citizen protester.

The reliable dependence of Russia's judiciary also makes it a useful tool, through which the regime can communicate political goals to society. In the 2000s, the criminal cases that drove businessman Boris Berezovsky and media tycoon Vladimir Gusinsky into self-imposed exile told the public that the Yeltsin era of politically active oligarchs was over and the Putin regime had set out to wrest control over the economy from them. The imprisonment of Khodorkovsky, believed to have been the richest man in Russia, and the destruction of his company emphasized the triumph of the state over private business. In 2012, the Pussy Riot case ushered in the Kremlin's "morality politics" and signaled to society that traditional values were back *en vogue*.<sup>15</sup> The Bolotnaya Square cases indicated that individuals who take part in political protests could pay a steep price, even if they are not visible leaders of the opposition. And the terrorism conviction of Ukrainian filmmaker Oleg Sentsov and the murder conviction of Ukrainian poli-

tician Nadiya Savchenko helped make the Kremlin’s argument that Ukrainian extremist nationalists were responsible for the conflict in Donbas and sought to subvert Russia’s newly acquired sovereignty over Crimea. A post-2012 anticorruption campaign has been used to neutralize one of the main rallying points for the opposition: endemic bureaucratic and political corruption.

The frequent use of presidential pardon or amnesty to release political prisoners underscores the information-delivering role of high-profile political trials. Mikhail Khodorkovsky and Nadiya Savchenko were released directly by Putin and, in both cases, he cited mercy and compassion as the drivers behind his decision. The pardons reiterate to the Russian public that, though granted mercy, the prisoners deserved to be prosecuted and convicted. It also emphasizes the power of the political sovereign over the legal process and, as a bonus, shows him as magnanimous.

But if all autocrats benefit from a dependent judiciary and instrumental use of the law, why do some accept some constitutional constraints? For some autocrats, the balance tips toward constitutionalism through external pressure. Authoritarian regimes with economies heavily dependent on foreign direct investment (FDI) have an incentive to credibly constrain themselves at least in the area of property rights in order to reassure investors that they would not be expropriated arbitrarily. Singapore may owe its authoritarian constitutionalism to this mechanism.<sup>16</sup> Authoritarian regimes that need and expect significant foreign aid from democracies that care about the rule of law also have an incentive to accept some of the constraints that come from having an independent judiciary. This is part of the story behind the gradual empowerment of the judiciary in Mubarak’s Egypt.<sup>17</sup> Authoritarian regimes that seek legitimacy and recognition

from the international community are also pressured to adopt constitutions and show that they abide by the constraints in them. Civilian authoritarian regimes that lack the brute force of military dictatorships or the historically or religiously based legitimacy of monarchies are purportedly more likely to adopt a constitutional legal regime.<sup>18</sup> In the near future, Russia is unlikely to move toward constitutionalism as a result of external pressure. Russia is a major recipient of FDI (ranked fourth globally) and it is hardly dependent on foreign aid.<sup>19</sup> Even though per capita FDI is low and could increase significantly if guarantees against expropriation were stronger, there is an ideological obstacle to domestic reforms inspired by external pressure. Russia’s return to self-perceived great power status makes it reluctant to pander to the international community. Over Putin’s tenure, Russian foreign policy has shifted gradually yet decisively away from Yeltsin’s attempts to win praise from the West. The “reset” with the United States failed. The Crimean annexation triggered a standoff with Europe and the United States through reciprocal sanctions. Interpretations of Putin’s motives in the Ukrainian intervention vary. Some predict that as a resurgent expansionist great power, Russia will continue trying to push the West out of its former backyard. Others see the Kremlin pursuing “aggressive isolationism”: a policy aimed at isolating Russia from Western influence to protect against a meddling color revolution.<sup>20</sup> Whether Putin’s reaction to the Euromaidan revolution of 2014 was out of strength or weakness, both scenarios signal Russia’s rejection of Western conditionality. In this context, it is unlikely that Russia would accept constitutional or judicial constraints in order to placate the West or the broader international community. Both the flaunting of international law through the Crimean intervention and the 2015 law spelling out Russia’s intention to disregard certain

ECHR decisions underscore the limits of external pressure.

There could be domestic reasons for autocrats to choose to bind themselves through a credible constitution and an independent judiciary. They may use the constitution and the courts as tools to enhance legitimacy. Civilian and party-based authoritarian regimes like Russia's are purportedly more likely to choose this route toward power consolidation, because they cannot rely on sheer force like military regimes or on religion/tradition like monarchies.<sup>21</sup> Autocrats may also use the constitution and an independent judiciary as a coordinating device. An independent judiciary can be used to keep the bureaucracy in line. A credibly enforced constitution can clarify how power is allocated within the authoritarian governing coalition, which would reduce the potential for intraelite conflict and political instability.<sup>22</sup>

Putin's regime has used criminal law to manage membership of the authoritarian governing coalition. But since law is applied arbitrarily by a judiciary that lacks de facto independence, the legal process does not function as a coordination device, but as a political instrument. The post-2012 wave of criminal indictments of mayors, regional governors, and high-level federal officials for malfeasance, corruption, and abuse of office is a case in point. Members of the authoritarian elite who lose their political standing can expect to come under criminal investigation. They become scapegoats in a public campaign orchestrated by the regime to gain public legitimacy. When different factions fight each other, each seeks to get the upper hand by provoking a criminal case against the opponent. Whoever does get indicted is widely seen as having lost a political fight. Usually, the criminal investigation and the indictment follow, rather than precede, a presidential decree dismissing the governor for loss of confidence (*utrata doveriya*).

In November 2016, even an incumbent member of the government – economy minister Aleksei Ulyukayev – was arrested, allegedly in the act of taking a \$2 million bribe. As the shock of Ulyukayev's detention reverberated through Russian society, commentators focused on guessing why Ulyukayev lost political favor with the president, which faction pushed for his downfall, and who could have protected him. The case underscores the widespread belief that, in Russia, legal repercussions stem from loss of political status, rather than vice versa.

The problem with this form of management is that it creates significant uncertainty within the authoritarian coalition; it is hard to know before a case plays out in the courts which faction has the upper hand. High uncertainty makes the regime more brittle. Factions are likely to pledge outward allegiance to the autocrat, when in fact their support for his rule may be eroding. As succession time approaches, the lack of a credible coordination device is likely to lead to significant political instability.<sup>23</sup>

As Putin's age advances, the issue of authoritarian succession will loom ever larger for Russia's authoritarian elites. Some may try to pursue a policy toward the empowerment of the judiciary as an independent enforcer of the constitution in order to pave the way for an orderly transition of power. The inception of the rule of law and an independent judiciary is often attributed to an intertemporal bargain: current powerholders bind their own hands through an independent court in order to guarantee that their successors are constrained as well.<sup>24</sup> To be successful, though, these elites will need either the indifference or the tacit support of the Kremlin. The likelihood of the emancipation of the judiciary is closely linked to Putin's (and his faction's) view of the mode of regime succession. If Putin intends to die in office or has a credibly loyal suc-

Maria  
Popova

cessor up his sleeve, the Kremlin will refrain from ceding any discretionary power to an independent judiciary. In theory, if Putin decides to retire without designating a successor and wants to guarantee immunity from prosecution for himself and his faction, he may pursue judicial empowerment. In practice, however, such a scenario is far-fetched. Yeltsin's transfer of power to Putin and the former's protection from prosecution through personal, rather than institutional, guarantees is a precedent that works against the institutionalization of an independent judiciary. More broadly, Putin seems to favor personal, ad hoc, behind-the-scenes bargains over formal institutional solutions. Unlike Lee Kuan Yew, the Singaporean patriarch who directed his country's spectacular transformation in part by guaranteeing the security of property rights through an impartial judiciary, Putin has overseen several rounds of property expropriation and redistribution.

As unlikely as it is, what would a policy aimed at moving Russia toward constitutionalism look like? Russia has the basic formal institutions that are associated with a constitutional regime and an independent judiciary, so no major institutional reforms are necessary. Still, some legislative initiatives that bolster the self-governance mechanisms for the judiciary and remove formal channels for executive influence over the courts may signal a commitment to change. What is even more necessary is a clear demonstration that the courts will not be used instrumentally and arbitrarily to achieve politically expedient goals. This means, at a minimum, a moratorium on the use of criminal law against leaders of the opposition. It also means that the courts should be kept at arm's length from major political controversies, so that they could start building a track record of political impartiality. A transition to constitutionalism can happen

only gradually, rather than through one or two major decisions. In the history of the American judiciary's emancipation from political influence, *Marbury v Madison* is often seen as a momentous decision. However, its importance is clear only in hindsight. The U.S. Supreme Court was in a politically precarious position throughout the nineteenth century.<sup>25</sup> And in Ukraine, Kyrgyzstan, and Georgia, what looked like major breakthroughs when the supreme courts ruled against political incumbents at the height of the color revolutions failed to usher in eras of judicial independence.

What about the possibility of a democratic breakthrough ushering in constitutionalism in Russia? If the Putin regime fell amidst prodemocratic social mobilization, rule of law and an independent judiciary may crystalize as one of the democratic revolution's main goals. That does not mean this goal is easy to achieve, however. Post-Euromaidan Ukraine offers a cautionary tale.

Three years after former Ukrainian president Viktor Yanukovich's ouster, the Euromaidan's objective of fundamental changes to the judiciary remains elusive, despite strong societal demand for it. The Ukrainian judiciary continues to be both de jure and de facto dependent on incumbent politicians. After a few months of struggle with entrenched judicial elites, the new Poroshenko administration established control over the courts by muscling in some new appointees and getting old elites to pledge allegiance. In early 2015, the parliamentary assembly and its point man for the judiciary, Aleksei Filatov, outmaneuvered judicial independence champions in the Rada – led by the Samopomich-appointed deputy Rada speaker, Oksana Syroyid – and watered down a bill that was going to increase the formal independence of the judiciary.<sup>26</sup> The lower-levels of the judiciary have refrained from pushing for greater independence. Rank-and-file judges across Ukraine

demonstrated during the April 2014 judicial chair elections that they were afraid to rock the boat: they overwhelmingly reelected their incumbent administrative superiors.<sup>27</sup> The outsiders who Poroshenko initially appointed to clean up the prosecution were pushed out by early 2016. David Sakvarelidze, a veteran of former Georgian president Mikheil Saakashvili's judicial reform team, was fired from his post as deputy prosecutor general for "grave violations of prosecutorial ethics."<sup>28</sup> Vitalii Kas'ko, another deputy prosecutor general, resigned and faced criminal charges for the alleged illegal privatization of a Kyiv apartment. His supporters view his prosecution as political revenge by entrenched elites within the prosecution who were threatened by his investigation into prosecutorial corruption.<sup>29</sup>

At the same time, civil society organizations, including the Lustration Committee, Maidan Self-Defense, and the Reanimation Package of Reforms (RPR), have been closely monitoring the performance of the judiciary. Some organizations, such as RPR, have engaged in advocacy and legislative lobbying for changes to the institutional structure of the judiciary that would increase its independence. Others, however, have blurred the line between civil activism and vigilantism, especially through "trashcan lustration" actions, in which activists physically attacked judges who were perceived as stooges of the Yanukovich regime and forced them into trashcans. Activists who "monitored" judicial elections, in which rank-and-file judges voted for the chair of their court, often disrupted the election and tried to intimidate judges into voting for or against a certain candidate. All this civic engagement happened against the backdrop of numerous public opinion polls that showed that an overwhelming majority of Ukrainians perceive radical judicial reform as a top priority.

The combination of societal demand for radical reforms and a business-as-usual

approach by politicians has put the judiciary in the precarious and humiliating position of being pressured and criticized from all sides. Judges have become scapegoats for much of the pre- and post-Euro-maidan dysfunction in the Ukrainian polity. Their legitimacy has plunged below even Yanukovich-era levels, as has their self-perception of autonomy. A 2015 survey by the Center for Policy and Legal Reforms shows that less than 10 percent of judges believe that the Ukrainian judiciary is independent. Even more damningly for the current government, 46 percent of judges believe that political pressure on judges is now just as strong as under Yanukovich and 29 percent of judges believe that political pressure has increased under Poroshenko!<sup>30</sup>

The first Ukrainian lesson for Russia is that a transition to constitutionalism and judicial independence is harder to pull off than a transition to competitive politics, free and fair elections, and a free press. The second Ukrainian lesson is that judicial independence cannot be achieved through civil society pressure and monitoring. Civil society activists become yet another source of extrajudicial interference in the judicial decision-making process. The result is an even more cowering judiciary, rather than an emancipated one.

In short, it is unlikely that Russia will become a rule-of-law or a rule-by-law state after Putin. Whether Putin plans to die in office, loses power in a color revolution, or is replaced after the disintegration of his authoritarian coalition, the prospects for a transition to constitutionalism and an independent judiciary are slim. Both domestic and external pressures on Putin's regime to abandon its instrumental use of the law are weak. Ironically, the potential agents of change are Putin himself and members of his authoritarian coalition, rather than civil society. A gradual move to authoritarian constitutionalism is

theoretically possible if Putin and his close associates plan to leave politics and need guarantees that the future political incumbents would not use law and the pliable judiciary to prosecute them. Alternatively, a group of major business owners could push for the rule of law as a way of protecting their assets. In practice, however, Putin's demonstrated preference for informal bargains over formal institutions as coordination devices makes the first scenario unlikely. And the robber-barons-for-rule-of-law transformation has been expected for the past two decades; but we have yet to see any indication that it will happen.<sup>31</sup>

While positive change toward the rule of law is unlikely, negative change toward even greater politicization of the judiciary

is easier to imagine. If a credible challenge to the Kremlin's dominance emerges, the regime will reach for the courts as an instrument to suppress dissent. If the danger rises through civil society mobilization, the regime will use administrative and criminal law to deal more harshly with NGOs, social movement activists, and individual protestors. The fines will get bigger, the verdicts longer, and the procedural violations more blatant. If a charismatic politician with broad appeal emerges, either within or outside the authoritarian coalition, and harnesses ethnic Russian nationalism, even show trials could make a comeback. In that scenario, Russia could veer into the legal nihilism characteristic of previous periods of its history.

#### ENDNOTES

- <sup>1</sup> Vladimir Putin cited in "Vladimir Putin: dayu vam chestnoye partiinoe slovo," *Kommersant.ru*, August 30, 2010, <http://kommersant.ru/doc/1495411>.
- <sup>2</sup> For more on the concept of authoritarian constitutionalism, see Mark Tushnet, "Authoritarian Constitutionalism," *Cornell Law Review* 100 (2) (2014): 391.
- <sup>3</sup> For more on judicial independence in authoritarian regimes, see Tom Ginsburg and Tamir Moustafa, eds., *Rule by Law: The Politics of Courts in Authoritarian Regimes* (New York: Cambridge University Press, 2008).
- <sup>4</sup> For more on the relationship between the autocrat and authoritarian elites, see Milan W. Svoblik, *The Politics of Authoritarian Rule* (New York: Cambridge University Press, 2012). For more on constitutions and the courts as a coordinating institution, see Tom Ginsburg and Alberto Simpser, eds., *Constitutions in Authoritarian Regimes* (New York: Cambridge University Press, 2013).
- <sup>5</sup> Gordon Silverstein, "Singapore's Constitutionalism: A Model, but of What Sort?" *Cornell Law Review* 100 (1) (2015): 15.
- <sup>6</sup> "Putin Has Allowed the Constitutional Court to Ignore the Decision of the ECHR," BBC, December 15, 2015, [http://www.bbc.com/russian/news/2015/12/151215\\_putin\\_constitutional\\_court\\_echr](http://www.bbc.com/russian/news/2015/12/151215_putin_constitutional_court_echr).
- <sup>7</sup> The ECHR decision is available at European Court of Human Rights, "Opposition Activist's Conviction of Embezzlement: Result of Arbitrary Application of the Law," press release, ECHR 071, February 23, 2016, <http://hudoc.echr.coe.int/app/conversion/pdf?library=EC&id=003-5307101-6607285&filename=Judgment%20Navalnyy%20and%20Ofitserov%20v.%20Russia%20-%20conviction%20of%20opposition%20activist%20.pdf>.
- <sup>8</sup> See Jeffrey Kahn, "Report on the Verdict Against M. B. Khodorkovsky and P. L. Lebedev," *Journal of Eurasian Law* 4 (3) (2011): 321.
- <sup>9</sup> See Gulnaz Sharafutdinova, "The Pussy Riot Affair and Putin's Démarche from Sovereign Democracy to Sovereign Morality," *Nationalities Papers* 42 (4) (2014): 615–621.

- <sup>10</sup> 5th Column, "The War (Art Group)," <http://xn--80aa3aekaebe4a6lc.xn--p1ai/orgs/org32.html>. Maria Popova
- <sup>11</sup> Timothy Frye, "The Two Faces of Russian Courts: Evidence from a Survey of Company Managers," *East European Constitutional Review* 11 (2002): 125.
- <sup>12</sup> Kathryn Hendley, "Justice in Moscow?" *Post-Soviet Affairs* 32 (6) (2016).
- <sup>13</sup> See Maria Popova, "Watchdogs or Attack Dogs? The Role of the Russian Courts and the Central Election Commission in the Resolution of Electoral Disputes," *Europe-Asia Studies* 58 (3) (2006): 391–414; and Maria Popova, *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine* (New York: Cambridge University Press, 2012).
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- <sup>15</sup> Sharafutdinova, "The Pussy Riot Affair and Putin's Démarche from Sovereign Democracy to Sovereign Morality."
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- <sup>19</sup> Kalman Kalotay, "The Impact of the New Ruble Crisis on Russian FDI," *Baltic Rim Economies – Bimonthly Economic Review* 1 (2015): 31–32.
- <sup>20</sup> Ivan Krastev and Stephen Holmes, "Russia's Aggressive Isolationism," *The American Interest* 10 (3) (2014).
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- <sup>22</sup> Ginsburg and Simpser, eds., *Constitutions in Authoritarian Regimes*, 10.
- <sup>23</sup> Henry E. Hale, "Formal Constitutions in Informal Politics: Institutions and Democratization in Post-Soviet Eurasia," *World Politics* 63 (4) (2011): 581–617.
- <sup>24</sup> Douglass C. North and Barry R. Weingast, "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England," *The Journal of Economic History* 49 (4) (1989): 803–832.
- <sup>25</sup> For a discussion of the slow process of building an independent and powerful judiciary in the United States, see Justin Crowe, *Building the Judiciary: Law, Courts, and the Politics of Institutional Development* (Princeton, N.J.: Princeton University Press, 2012).
- <sup>26</sup> Maria Popova, "Ukraine's Judiciary After Euromaidan: Continuity and Change," *Comparative Politics Newsletter* 25 (2) (2015): 29–32.
- <sup>27</sup> Maria Popova, "Ukraine's Judicial Reforms," VoxUkraine, December 15, 2015.
- <sup>28</sup> "Ukraine's Deputy Prosecutor General David Sakvarelidze Fired," *Ukraine Today*, March 29, 2016, <http://uatoday.tv/politics/ukraine-s-deputy-prosecutor-general-david-sakvarelidze-fired-620102.html>.
- <sup>29</sup> "Housing Problem': Why the GPU is Investigating the Case against Vitali Kaska," *Segodnya*, April 14, 2016, <http://www.segodnya.ua/politics/pnews/intervyu-s-vitaliem-kasko-707496.html>.
- <sup>30</sup> "Judicial Reform: Public Opinion Poll, Judges and Experts Surveys," Centre of Policy and Legal Reform, <http://pravo.org.ua/en/news/20871053-judicial-reform-public-opinion-poll-judges-and-experts-surveys>.
- <sup>31</sup> In his contribution to this volume, Stanislav Markus discusses why Russian oligarchs have accepted the high-risk/high-reward environment of Russia's current politicized legal regime.