Human Rights in Transition: The Success and Failure of Polish and Russian Criminal Justice Reform

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NOTES

HUMAN RIGHTS IN TRANSITION: THE SUCCESS AND FAILURE OF POLISH AND RUSSIAN CRIMINAL JUSTICE REFORM

Shannan C. Krasnokutski*

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INTRODUCTION

In June of 1993 in the Khabarovsk region of Russia, authorities detained Oleg Myachikov, a military serviceman, on suspicion of the rape and brutal murder of three women. The only evidence supporting the arrest was Myachikov's recollection that he saw the women near a café sometime near the time of their disappearance.

Once in custody, Myachikov endured hours of questioning, supplemented by beatings with clubs and sticks. Officers threatened that he would endure more pain unless he gave out information, including the names of his accomplices. Under torture, Myachikov shouted out several names.

Based on this "confession," the authorities arrested two friends of Myachikov. The authorities told Myachikov that his friends had confessed to the crime, and that he himself would fare better if he signed a protocol admitting his guilt. Myachikov promised to sign whatever he was given, but the beatings continued. On one occasion, officers hit him in the head with a bottle of liquor.

In the case of Myachikov, the military prosecutor's office intervened to separate him from the other prisoners. As a result, he survived the brutal treatment. Myachikov was the only suspect in that case to survive pre-trial investigation. One of his alleged "accomplices"

1 See Moscow Center for Prison Reform, Human Rights Violations in the Criminal Justice System of Russia: Arrest, Investigation, Pretrial Detention 7 (1994).
2 See id.
3 See id.
4 See id.
5 See id.
6 See id.
7 See id.
8 See id.
9 See id.
10 See id. at 9.
11 See id.
was beaten and left to die in the woods. The other was impaled on a stake after undergoing unspeakable tortures. Neither had been tried for the crime.

Rather than conducting inquiries regarding the misconduct of its investigators, the Russian Procuracy, the institution responsible for criminal investigations, allowed the investigators to engage in an unconscionable cover-up. One day after abandoning a suspect’s broken body in the woods, two investigators appeared on local television and announced his escape from detention. When Myachikov finally obtained a lawyer and filed a protest with respect to his own treatment, Procuracy officials said that his complaint would be sent to the military Procuracy. The military Procuracy had no authority to supervise the departments of the regular Procuracy, thus, no action was taken.

Witnesses to this actual case in Khabarovsk recounted these horrors in 1993. Similar atrocities have occurred even more recently. Last year, the U.S. Department of State criticized the Russian system for coercing confessions through torture and failing in other respects to protect human rights in the criminal system. The Russian Constitution prohibits detention for over forty-eight hours except where authorized by judicial decision; however, detention that is arbitrary and illegal is widely practiced.

Both the Russian Constitution and the Russian Criminal Code prohibit torture. From a legal standpoint, Russia has achieved a democratic system dedicated to protecting the rights of the individual. Several questions remain: why does the Russian system fail so miserably in

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12 See id. at 8.
13 See id.
14 See id.
15 See id.
16 See id.
17 See id.
19 See KONST. RF (Constitution of the Russian Federation) Sec. 1., ch. 2, art. 22 (1993).
20 See 1999 Russia Report, supra note 18, at Sec. 1 (d); 1998 Russia Report, supra note 18, at Sec. 1 (d).
practice and how does an ostensibly democratic society in the twenty-first century allow it to fail? Are these conditions, nine years after the change in government, simply a natural stage of the transition process or are they avoidable? Are there specific weaknesses in the Russian system that perpetuate its shocking human rights abuses?

Limited comparative experience suggests that, during an effective transition from a Communist to a democratic government, society need not suffer these abuses. Poland, whose Communist government fell only two years before that of Russia, provides a useful contrast to Russian reform failures. Undoubtedly, Poland is not free of police brutality. However, each reported case was either resolved through the criminal justice system or is still pending.\(^2\) Furthermore, the 1999 Department of State Report for Poland did not report any cases of torture.\(^2\) Poland also adheres to its constitutional prohibition against arbitrary arrest and its requirement of court authorization for detention for over 48 hours.\(^2\)

Scholars have examined national reform programs and analyzed the variables that may cause the results of reform to differ widely from one society to another. Jeffrey Sachs has published a recent essay analyzing the factors that affect economic success in transition nations.\(^2\) Sachs contends that civil society is a necessary prerequisite for the implementation of a functional capitalist system.\(^2\) He contrasts relative failures in Russia with comparative successes in Poland and attributes Poland's success to its law-based state.\(^2\) According to Sachs, organized groups, including the Solidarity trade union and the Roman Catholic Church, raised public


\(^{24}\) See 1999 Poland Report, supra note 23, at Sec. 1 (c).


\(^{27}\) See id. at 9.

\(^{28}\) See id. at 9.
awareness. Thus, those groups provided a check on the government and created an environment in which a law-based state was possible.\textsuperscript{29}

At least one scholar has analyzed nations in transition and proposed a non-economic theory that complements that of Sachs. Janos Kis argues that certain factors are necessary for successful transition.\textsuperscript{30} Among these factors are the existence, within the population, of "credible" opposition and popular acceptance of the idea of negotiated reform.\textsuperscript{31} In addition, high popular mobilization provides the necessary impetus for the government to undertake a negotiated reform program.\textsuperscript{32}

Poland's comparative success and Russia's relative failure have been widely noted throughout different sectors of society.\textsuperscript{33} This paper will explore whether the factors identified by Sachs and Kis explain the different outcomes in Polish and Russian criminal procedure reforms in the transitional period. It will also analyze reforms proposed for the Russian system in light of Polish achievements. Specifically, this Note will focus on attempts to shorten pre-trial detention and to eliminate the use of torture to extract confessions.

Criminal justice reforms in Poland and Russia have focused, at least in part, on increasing judicial independence. One major problem with protecting human rights under the former Communist systems was the dependence of the judiciary on the Communist party. Judicial dependence under the Soviet regime led to the prevalence of "telephone law," or the ability of powerful individuals to control judicial decisions simply by making a phone call.\textsuperscript{34} This dependence persists into the post-transition period and prevents courts from applying the human rights protections that exist in law.\textsuperscript{35}

Scholars have proposed several solutions to the problem of the dependent Russian judiciary and the resulting criminal justice abuses. One proposed solution is the establishment of an effective Ombudsman

\begin{itemize}
  \item[29] See id.
  \item[31] See id.
  \item[32] See id.
  \item[33] See generally, Moscow Center for Prison Reform, supra note 1; see generally 1999 Russia Report, supra note 18; 1999 Poland Report, supra note 23; Sachs, supra note 26.
  \item[34] See Valery M. Savitsky, \textit{Judicial Protection of Personal Rights in Russia}, in \textit{Legal Reform in Post-Communist Europe: the View from Within} 117, 120 (Stanisław Frankowski & Paul B. Stephan III eds., 1995).
  \item[35] See id.
\end{itemize}
(Commissioner for Human Rights) in Russia. Another possible solution is removing criminal trials from the purview of the judiciary by implementing jury trials throughout Russia. Poland has achieved great success in protecting human rights through its active Ombudsman, a position in existence since before the end of the Communist period. It has not, however, implemented jury trials.

This paper will analyze these and other proposed reforms and evaluate how they may contribute to preventing arbitrary detention and the use of torture in Russia. It will view these reforms from the perspective of the Polish experience, in an attempt to gain insight that may aid Russia in its transition. This paper will also lend support to the complementary Sachs and Kis theories and may help reformers to understand which strategies may be more easily transferable from one society to another. This Note argues that the institution of the Ombudsman is one that might be successfully transferred to Russia. In addition, it argues that jury trials are an inappropriate reform in Russia at the present time.

Section I will provide general background on the most important historical events surrounding the fall of the Communist governments in Poland and Russia, as well as a brief overview of the structure of the criminal systems in both Poland and Russia. Section II will outline the Sachs and Kis framework and provide the perspective from which reforms will be analyzed.

Section III will evaluate the efficacy of reforms in both Poland and Russia, focusing on the institution of the Ombudsman and the implementation of jury trials as important proposals for Russia. It will also recognize that no reform can operate successfully in isolation. Thus, Section III will give appropriate treatment to the constitutional tribunals in each country, as well as the emerging importance of international law standards in protecting human rights. The goal of Section III is to provide an integrated analysis of whether and how current reforms work together in each country to protect human rights in the criminal justice system.

Section IV will move to a comparative focus and reevaluate reform strategies in light of the Sachs and Kis theories, demonstrating that these theories aid in predicting the success or failure of reform proposals. Section IV will draw on the Polish experience to propose solutions to

39 See 1999 Poland Report, supra note 23, at Sec. 1(e); 1998 Poland Report, supra note 23, at Sec. 1(e).
Russian reform problems. It will argue that the institution of the Ombudsman is a reform that should be supported in Russia, while jury trials are a reform that should be postponed to a more appropriate time. Finally, Section V will discuss broader implications of the Sachs and Kis theories and the importance of international law in reforming legal systems.

I. HISTORICAL FOUNDATIONS OF CRIMINAL JUSTICE REFORM

The problems of criminal justice reform are closely linked to the social currents underlying the introduction of new reforms. This Section briefly describes the historical and social events leading up to the fall of Communism in Poland and Russia and the ensuing transitions to democratic government. In addition, it provides a brief overview of the Polish and Russian criminal systems and introduces the difficulties those countries have encountered in implementing criminal justice reform.

A. Historical Foundations

An analysis of social factors contributing to the success and failure of reforms would be incomplete without a brief discussion of the social conditions existing in Poland and Russia during the years leading up to the fall of Communism. This Section provides a general background on historical and societal events and the influence of opposition movements to the Communist regime.

1. Polish Solidarity and the Unified Reform Movement

The decade preceding Poland's transition to a democratic, capitalist system was a turbulent one for the Poles. It began, as in Russia, with a history grounded in a repressive Communist past. Poland had been under Soviet dominion since 1944.\(^{40}\) Nearly four decades later, the birth of the Solidarity movement ushered in the beginning of the decline of the Communist regime in Poland.

The Solidarity movement began as a regional labor revolt, spurred by discontent with poor working conditions and rising prices.\footnote{See Gale Stokes, The Walls Came Tumbling Down: The Collapse of Communism in Eastern Europe 34 (1993).} Shipyard workers in the northern city of Gdansk (including future President of Poland Lech Walesa) initiated the primary stage of the movement when they protested the firing of a crane operator.\footnote{See id. at 35.} In the summer of 1980, approximately 81,000 people in 177 industries engaged in strikes, pressing management for wage increases and other concessions.\footnote{See Michael D. Kennedy, Professionals, Power and Solidarity in Poland: A Critical Sociology of Soviet-type Society 51 (1991).}

The strikes in the north proved so effective that the Communist authorities were forced to negotiate with the strikers.\footnote{See id. at 38.} The Social Accords, signed in 1980, allowed Solidarity to establish an independent labor union.\footnote{See id. at 39-40.} In making this concession, the Communist government underestimated the popular appeal of the movement. Following the Accords, delegations were initiated in Gdansk by strike committees from across the country.\footnote{See id at 40-41.} The strike leaders determined that, although local organizations should have considerable autonomy, a unified nationwide organization could be more effective.\footnote{See id at 42.} Thus, a nationwide union, headed primarily by Walesa, came into being under legal authority.

The Solidarity movement existed legally for over a year, during which time workers in various plants were able to achieve their goals by means of strikes and protests.\footnote{See id.} However, dissent from various factions within the movement also increased. Some groups sought more open confrontation with the Communist government and, throughout 1981, negotiation between the regime and Solidarity became more difficult.\footnote{See Stokes, supra note 41, at 37.}

In late 1981, General Wojciech Jaruzelski stepped into power as Poland's Prime Minister.\footnote{See id. at 44.} One of his first actions was to impose a crackdown on Solidarity. All Solidarity leaders who could be found were arrested, and martial law descended on Poland.\footnote{See id. at 44.} Martial law imposed a
degree of "order" to Poland but did not completely suppress the Solidarity movement. The Solidarity leaders who escaped went "underground" and reorganized. Solidarity published a significant amount of underground literature during the years of martial law, including several widely read opposition newspapers. Incongruously, support for Solidarity continued and even increased during the martial law period.

As martial law lifted, the aftermath of public sentiment resulting from the Solidarity movement compelled Jaruzelski to implement several reforms. In 1986, Jaruzelski granted complete amnesty to all those detained under the 1982 martial law crackdown. Jaruzelski and his successor, Zbigniew Messner, also implemented several economic reforms that drove food prices sharply upward. In 1988, strikes began again. This time, Solidarity leaders were not the organizers of the protest.

The Communist authorities began to realize that they lacked the strength to control the people. Recognizing the power still held by the Solidarity movement, the government invited Solidarity to participate in negotiations with it and several other organizations, including the Catholic Church and PRON.

These negotiations became the Roundtable Talks of 1989. Out of the talks came an economic plan, an independent judiciary, freedom of association and numerous constitutional innovations. The new constitutional provisions provided for a transition to free elections for the Senate and the Sejm (Polish Parliament). The first elections, held only two months after the Roundtable Talks, finally ushered out the Communist regime. Solidarity candidates won all of the contested Sejm seats and all

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53 See STOKES, supra note 41, at 105-06.
54 See id. at 106-07.
55 See id. at 108.
56 For example, the Patriotic Movement for National Rebirth (PRON), created by Jaruzelski, was to "reflect a pluralism of views and the differentiation of interests." Id. at 110.
57 See id. at 115.
58 See id. at 121.
59 See id.
60 See id.
61 See id. at 125; see also supra note 56 (defining PRON as the Patriotic Movement for National Rebirth).
62 See id. at 124-25.
63 See id. at 125-26.
but one Senate seat. Tadeusz Mazowiecki, a former Catholic dissident, was elected as the new Prime Minister. Poland had begun to leave its Communist days behind.

Solidarity began as a moral rather than a political movement. Although it primarily focused on labor concerns, Solidarity later developed a nationalist element (to which the Roman Catholic Church contributed a strong sense of identity) and a democratic element. Since Solidarity did embody all of these components, it moved from its original concern with self-organization to broader economic, and finally political, goals.

The Catholic Church was a key player in adding credibility to the Solidarity movement. The Polish Pope John Paul II may have played a role in bringing the opposition movement to life and later linking the opposition with the Church. During the Pope's 1979 visit, he called for law, justice and respect for the dignity of human beings. He imputed responsibility for Poland's decline to members of the Communist regime. The Pope's words connected the Catholic Church with Polish identity and inspired the religious Poles to action.

Over the ten years preceding the fall of the Communist government, Solidarity assumed the interests not only of its original leaders but of many different sectors of Polish society. Thus, Solidarity was from the beginning more than a labor movement. It represented the Polish nation itself. Solidarity became a functional alliance between different interest groups and the principal "counter-culture" in opposition to the regime. These diverse groups were united only by their common dislike of the Communist Party. Throughout the 1980s, Polish citizens came to view Solidarity as a unified opposition movement to the Communist regime.

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64 See id. at 127.
65 See id. at 127-28.
66 See id. at 39.
67 See KENNEDY, supra note 43, at 64-65.
68 See id. at 86.
69 See id. at 43.
70 See id. (blaming "evil prophets" and years of "falsehood" for Poland's decline).
71 See id. at 44.
72 See id. at 4-5.
73 See id. at 7.
and they understood the societal conflict as one between Solidarity and Communism. In 1989, the Polish population made its choice between the two alternatives and ended the Communist regime.

2. Russian Dissidents: "Voices Crying in the Wilderness"

Russia's transition from Communism to a democratic society took a very different course from the Polish experience. There was no mass social movement in Russia comparable to Solidarity. The opposition to the Russian Communist regime was disunified and isolated. Thus, when change came, it occurred from within the regime itself.

Mikhail Gorbachev, the last leader of the Russian Communist regime, came to power in 1985. Gorbachev was more liberal than his predecessors and sought to introduce revolutionary policy reforms. These included the concepts of "glasnost," or "openness," and "perestroika," or reconstruction of the Communist regime. Such concepts were essentially capitalistic and democratic reforms. Gorbachev believed that, once the Communist regime was revitalized by these reforms, it would triumph in Europe.

Despite Gorbachev's aspirations, the reforms of the 1980s shook the foundations of the Russian regime. Once Gorbachev had relaxed the central controls of the Soviet Union, the nation became unstable. An economic crisis turned the population against Gorbachev, and support shifted to Gorbachev's rivals in the Communist regime, such as Boris Yeltsin. In order to control the population, Gorbachev was forced to begin a program of cooperation with Yeltsin.

In August 1991, while Gorbachev vacationed with his family in Crimea, several officers from the KGB and the Interior Ministry staged a coup in Moscow. Yeltsin, still in Moscow, defended the Supreme Soviet building and defeated the rebels. When Gorbachev returned, Yeltsin had

76 See id. at 201.
78 Among other consequences of glasnost was a relaxation of censorship within Russian society. See id. at 448-49.
79 See id. at 441.
80 See id. at 443.
81 See id. at 466.
82 See id.
83 See id. at 494-95.
84 See id. at 494.
85 See id. at 499.
86 See id. at 500-01.
effective control of the government.\textsuperscript{87} Gorbachev resigned officially in late 1991.\textsuperscript{88}

The Communist regime had been severely weakened by the events of the Gorbachev years. With Gorbachev's resignation, the Soviet Union disintegrated and gave way to numerous independent republics.\textsuperscript{89} Yeltsin reorganized the remaining republics into a state now known as the Russian Federation and swiftly introduced market reforms.\textsuperscript{90} Russia had embarked upon what would become not only an economic, but a political transition as well.

The primary difference between the Polish transition and its Russian counterpart is that Russian reform did not come from an opposition group. Such groups did exist in Russia, even prior to the Gorbachev era; however, the persecution those groups suffered under the repressive regime kept them from uniting or gaining much influence within society as a whole.

In the 1970s, well-known dissidents, such as Andrei Sakharov, were imprisoned or exiled.\textsuperscript{91} Groups such as the refuseniks\textsuperscript{92} and nationalist organizations also existed in the republics during that period.\textsuperscript{93} The problem was that there was no unifying force in Russia comparable to the Solidarity movement in Poland. Moscow-based opposition groups had only limited contact with refuseniks in the capital, and they had virtually no contact with opposition groups in the republics.\textsuperscript{94} In addition, interest groups were not able to ignore old rivalries of ideology, region and class.\textsuperscript{95} Thus, the spread of opposition ideas was limited and no unified opposition emerged.\textsuperscript{96}

Because the dissident groups of the USSR failed to unite, their influence was short-lived. By the post-transition period of the 1990s, the former dissenters remaining in Russia had become marginalized.\textsuperscript{97} The few who still survived in the Yeltsin era, including Andrei Sakharov's widow

\begin{threeparttable}
\begin{tabular}{ll}
\textsuperscript{87} & \textit{See id.} at 501-02. \\
\textsuperscript{88} & \textit{See id.} at 507. \\
\textsuperscript{89} & \textit{See id.} \\
\textsuperscript{90} & \textit{See id.} at 511. \\
\textsuperscript{91} & \textit{See id.} at 412. \\
\textsuperscript{92} & "Refuseniks" were Russians who were refused permission to emigrate on the grounds that they had access to important state information. Two-hundred and fifty thousand refuseniks left the USSR during Brezhnev's rule. \textit{See id.} at 400. \\
\textsuperscript{93} & \textit{See id.} at 414. \\
\textsuperscript{94} & \textit{See id.} \\
\textsuperscript{95} & \textit{See id.} at 476. \\
\textsuperscript{96} & \textit{See id.} at 414-15. \\
\textsuperscript{97} & \textit{See id.} at 541.
\end{tabular}
\end{threeparttable}
Yelena Bonner, were isolated from the rest of society. Although those individuals were still staunch advocates of human rights and democracy, they were but "voices crying in the wilderness." Russia thus entered its transition period devoid of any strong, unified opposition movement.

B. Overview of the Polish and Russian Criminal Systems

This Section provides a brief overview of the current structure of the Polish and Russian systems and how well they have protected human rights. It outlines the successes and failures of each country's criminal procedure system in the years since the fall of Communism.

1. Polish Criminal System

Under Polish criminal law, defendants are presumed innocent until proven guilty. The prosecutor thus has the legal burden of proof. Defendants also have the right to counsel at all stages of criminal proceedings. If a defendant cannot afford to hire an attorney, one must be provided at public expense.

It is usually the function of the police to investigate offenses, although the public prosecutor may investigate serious offenses. At this time it is the courts, rather than the public prosecutors, that issue arrest warrants. In order to detain a defendant, the police must have "sufficient evidence that can demonstrate the suspects' [sic] involvement in an..."
Detention is appropriate where there is good reason to fear a defendant would: (1) flee; (2) obstruct the criminal proceedings or induce others to give false evidence; (3) commit another "felony or misdemeanor against life, health or public safety." In addition, it may be appropriate if the accused has been charged with a felony punishable by eight years or more in prison or convicted by a trial court and sentenced to three years or more. Bail is available as an alternative to pretrial detention, and may be granted by the courts or the prosecutor. Most defendants are released on bail pending trial.

Detention must be ordered by the Supreme Court. Under no circumstances may it last more than eighteen months until the trial court's judgment, or two years in the case of a felony offense.

After preparation, a case proceeds to trial, which is generally public. Cases are tried before a panel including a judge and two lay magistrates, who participate on an equal footing with the judge in passing a decision. A defendant's confession may be considered as evidence but is alone insufficient to prove guilt. In addition, the defendant may not be interrogated under oath. The prosecution and defense do not make separate evidentiary presentations; instead, the judge plays an active role in examining evidence. If found guilty, a defendant may appeal errors of law or procedure, as well as the court's determination of punishment.

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105 Id.
106 Id.
107 See id.
108 See id.
109 See 1999 Poland Report, supra note 23, at Sec. 1(d); 1998 Poland Report, supra note 23, at Sec. 1(d).
110 See Adamski, supra note 100, at Sec. V(3).
111 See id.
112 The Polish Constitution provides for the right to a "fair and public hearing" of one's case. THE CONSTITUTION OF THE REPUBLIC OF POLAND, supra note 25, at art. 45(1).
113 See Adamski, supra note 100, at Sec. V(1). The Polish Code of Criminal Procedure provides for a panel of one judge and two laypersons. "At trial, the head judge adjudicates in a panel of one judge and two laypersons, if a law does not provide otherwise." KODEKS POSTEPOWANIA KARNEGO [CODE OF CRIMINAL PROCEDURE] art. 28, § 1 (PoL) (author's translation).
114 See Adamski, supra note 100, at Sec. V(1).
115 See id.
116 See id.
117 The Polish Constitution grants every party the right to appeal from a judgment of the court of first instance. See THE CONSTITUTION OF THE REPUBLIC OF POLAND, supra note 25, at art. 78.
The defendant's punishment may not be increased as a result of his own appeal.\textsuperscript{118}

The Polish court system consists of four levels: (1) the courts of first instance; (2) district courts; (3) courts of appeal; and (4) the Supreme Court in Warsaw.\textsuperscript{119} Judges are nominated by the National Council of Judiciary and appointed by the President for life terms.\textsuperscript{120}

Poland, for the most part, adheres to legal restrictions on the power of investigators and judges, as well as constitutional provisions that protect the human rights of defendants.\textsuperscript{121} However, the U.S. State Department has noted several instances of police brutality in the past year.\textsuperscript{122} In all of these instances, charges were filed and the incidents were resolved through the court system.\textsuperscript{123} The Department of State also criticized Poland for its poor prison conditions, perpetuated by a drastic lack of funding.\textsuperscript{124}

Perhaps the most serious problem for Poland is its underfunded court system. The system is still slow and inefficient, and there are few effective mechanisms for enforcing civil judgments.\textsuperscript{125} The United Nations Committee on Human Rights noted that these inefficiencies violated a defendant's right to a speedy public trial and harshly criticized Poland for the delays.\textsuperscript{126} It stated that one year was too long a wait for trial and urged Poland to make progress before the next report.\textsuperscript{127} It praised, however, the

\textsuperscript{118} See Adamski, supra note 100, at Sec. VI(1).

\textsuperscript{119} See id.

\textsuperscript{120} See The Constitution of the Republic of Poland, supra note 25, at art. 179 (1997). See also Adamski, supra note 100, at Sec. VI(3). Judges are removable from office only for reasons specified in the Polish Constitution. See id. at art. 180.

\textsuperscript{121} See 1999 Poland Report, supra note 23; 1998 Poland Report, supra note 23. In addition to the protections for criminal defendants noted above, Poland's constitutional provisions generally protect the rights and dignity of persons. See The Constitution of the Republic of Poland, supra note 25, at art. 5. 1997; Id. at art. 30.

\textsuperscript{122} See 1999 Poland Report, supra note 23, at Sec. 1(c); 1998 Poland Report, supra note 23, at Sec. 1(c).

\textsuperscript{123} See 1999 Poland Report, supra note 23, at Sec. 1(c).

\textsuperscript{124} See id.

\textsuperscript{125} See id. at Sec. 1(e). The former Polish Ombudsman, Adam Zielinski, also criticized the inefficiency of the system and stated that the slow system created problems in protecting the rights of Polish citizens. See Ombudsman: Poland still not a Law-Abiding State, POLISH PRESS AGENCY, May 9, 2000, available in LEXIS, Country & Region Library, Poland News File.


\textsuperscript{127} See id.
constitutional protection of human rights and the enactment of a new 1997 penal code.\[128\]

2. Russian Criminal System

In Russia, punishment without trial and conviction is legally forbidden.\[129\] Torture and other cruel treatment are prohibited as well.\[130\] Each defendant has the right to request counsel from the first moment detained and to have appointed counsel if he cannot afford to pay.\[131\] Nonetheless, the extreme lack of funds often keeps defendants from exercising this right in practice.\[132\]

The Constitution also prohibits arrest without a judicial decision or detention for over forty-eight hours without access to a lawyer.\[133\] A 1994 bill passed by President Yeltsin to combat organized crime seriously compromised those rights by extending the allowable detention period before the formal filing of charges to thirty days.\[134\] A 1997 decree decreased the period to ten days.\[135\]

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\[128\] See id.; see also KODEKS KARNY (CRIMINAL CODE) (Pol.) (unofficial translation by Polish Ministry of Justice, on file with author).

\[129\] See KONSTR. RF (Constitution of the Russian Federation) Sec. 1., ch. 2, art. 47 (1993); THE CODE OF CRIMINAL PROCEDURE OF THE RSFSR, ch. 1, art. 13 (1960), translated in THE SOVIET CODES OF LAW 166 (William B. Simons ed., Harold J. Berman & James W. Spindler trans., 1980); see also FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, RUSSIA: A COUNTRY STUDY 422 [hereinafter RUSSIA STUDY]. The 1960 Code of Criminal Procedure is still in effect in Russia and, although it has been modified by amendments, the basic provisions on arrest and detention remain unmodified. See also Todd Foglesong, Habeas Corpus or Who Has the Body? Judicial Review of Arrest and Pretrial Detention in Russia, 14 Wis. INT'L L.J. 541, 552-553 (1996).


\[131\] See KONSTR. RF (Constitution of the Russian Federation) Sec. 1., ch. 2, art. 48 (1993); see also RUSSIA STUDY, supra note 129, at 422.

\[132\] Some lawyers in Russia attempt to avoid work as appointed counsel, because the Russian government often fails in its obligation to compensate appointed counsel. See 1999 Russia Report, supra note 18, at Sec. 1(d).

\[133\] See KONSTR. RF (Constitution of the Russian Federation) Sec. 1., ch. 2, art. 22 (1993); see also RUSSIA STUDY, supra note 129, at 422.

\[134\] See 1999 Russia Report, supra note 18, at Sec. 1(d); 1998 Russia Report, supra note 18, at Sec. 1 (d).

\[135\] See Russia Report, supra note 18, at Sec. 1(d).
The Procuracy is a large, centralized agency responsible for investigating and prosecuting crimes. Under the traditional Soviet system, the Procuracy had the authority to oversee both criminal investigations and judicial conduct. Today, the Procuracy retains the power to commence an investigation and arrest an individual on suspicion of a crime.

The Russian Criminal Procedure Code sets a two-month time limit on the period between the opening of the investigation and the time that a file is transferred to the Procurator to initiate formal court charges. The Procurator General may extend this period to six months, or to eighteen months in "exceptional" cases. Often, when an extension is granted, no explanation is made to the detainee. In addition, the time limits are frequently violated, sometimes for the purpose of extorting money from the detainee's friends or relatives. Bail is very infrequently used in Russia, even where a suspect poses no risk of flight or violence. The large number of pretrial detainees contributes to the already severe overcrowding problem in Russian prisons.

Trials are public in most cases. Jury trials were reintroduced in Russia in 1995, but to date have only been implemented in nine regions.

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136 See THE CODE OF CRIMINAL PROCEDURE OF THE RSFSR, ch. 1, art. 3 (1960), translated in THE SOVIET CODES OF LAW 162 (William B. Simons ed., Harold J. Berman & James W. Spindler trans., 1980); see also id. at 582.


141 See 1999 Russia Report, supra note 18, at Sec. 1(d); 1998 Russia Report, supra note 18, at Sec. 1(d).

142 See 1999 Russia Report, supra note 18, at Sec. 1(d).

143 See id.

144 See id.

In the other eighty regions, cases are tried before a judge or panel of judges. The judge plays an active role in examining the evidence; however, the proceedings are often heavily weighted in favor of the Procurator. If, as occurs in 60% of cases, the Procurator does not appear, the judge plays both roles, interrogating the suspect as well as making the final determination of guilt.

The trial stage is subject to frequent delays, and some suspects spend as much time in pretrial detention as they would if found guilty of the crime charged. This is, in part, due to the Procuracy's tendency to delay in submitting necessary paperwork to the court. One study found that in only one-third of cases did the Procuracy submit materials within statutory time limits. Still, judges are reluctant to dismiss cases on the grounds of improper investigation or indictment and more often send cases back to the Procuracy for reinvestigation.

Criminal courts in Russia have three levels: (1) primary jurisdiction courts; (2) courts of appeals; and (3) higher courts. A defendant who is convicted may appeal his sentence, however, a lower court decision may

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146 See RUSSIA STUDY, supra note 129, at 587.
147 See 1999 Russia Report, supra note 18, at Sec. 1(e); Russia Report, supra note 18, at Sec. 1(e).
148 See 1999 Russia Report, supra note 18, at Sec. 1(e).
150 See 1999 Russia Report, supra note 18, at Sec. 1(d); see 1998 Russia Report, supra note 18, at Sec. 1(d).
151 See Foglesong, supra note 129, at 560.
152 See 1999 Russia Report, supra note 18, at Sec. 1(d); 1998 Russia Report, supra note 18, at Sec. 1(d). The Code of Criminal Procedure authorizes the court to refer a case for supplementary investigation. See THE CODE OF CRIMINAL PROCEDURE OF THE RSFSR, ch. 21, art. 258 (1960), translated in THE SOVIET CODES OF LAW 254 (William B. Simons ed., Harold J. Berman & James W. Spindler trans., 1980). There is no limit on the number of times a case can be referred for reinvestigation. See 1999 Russia Report, supra note 18, at Sec. 1(c).
153 See 1999 Russia Report, supra note 18, at Sec. 1(e); 1998 Russia Report, supra note 18, at Sec. 1(e).
154 The Russian Constitution guarantees the right to appeal both to internal courts and to international bodies, where applicable. See KONST. RF (Constitution of the Russian Federation) Sec. 1., ch. 2, art. 46 (1993); see also RUSSIA STUDY, supra note 129, at 422. The Code of Criminal Procedure also provides for appeal. See THE CODE OF CRIMINAL PROCEDURE OF THE RSFSR, ch. 27, art. 325 (1960), translated in THE SOVIET CODES OF LAW 276 (William B. Simons ed., Harold J. Berman & James W. Spindler trans., 1980).
be appealed only to the next level unless a constitutional issue is involved.\textsuperscript{155}

Overall, most scholars acknowledge that Russia has serious difficulties protecting the human rights of defendants in its criminal justice system. Among the more severe problems are arbitrary arrest and detention of suspects. In short, factors such as the pressure on police to solve crimes and the dependence of the judiciary on the powerful Procuracy mean that "there are great incentives...to arrest and detain suspects...and few obstacles to doing so."\textsuperscript{156} Police often detain individuals without following mandated procedures.\textsuperscript{157} Although a 1992 law gives defendants the right to have a court review a complaint against an arrest or detention,\textsuperscript{158} judges have rarely used this provision to allow the release of a defendant.\textsuperscript{159} In several of the few cases where defendants have been released, police have immediately rearrested the defendants.\textsuperscript{160}

As has been suggested, a central problem of the judiciary is its continued dependence on other branches of government, including the Procuracy. Russia has implemented piecemeal reforms to address the problem; for example, it is in the process of granting lifetime appointments to judges.\textsuperscript{161} These changes have increased the independence of the judiciary and represent a significant step in the reform process.\textsuperscript{162} Most of Russia's judges, however, have retained their positions from the former Soviet system\textsuperscript{163} and are thus accustomed to dependence on the Party. In addition, the budgets of all Russian courts except the Supreme Court are controlled by executive agencies, which increases the dependence of courts on these agencies.\textsuperscript{164} Russian courts, due to underfunding, are often unable even to pay their own electricity bills without local government aid.\textsuperscript{165} Under the Russian Constitution, the judiciary is to receive its funding only

\textsuperscript{155} See 1999 Russia Report, supra note 18, at Sec. 1(e); 1998 Russia Report, supra note 18, at Sec. 1(e).

\textsuperscript{156} Foglesong, supra note 129, at 549.

\textsuperscript{157} See 1999 Russia Report, supra note 18, at Sec. 1(e); 1998 Russia Report, supra note 18, at Sec. 1(e).

\textsuperscript{158} See Foglesong, supra note 129, at 559.

\textsuperscript{159} See id. at 542.

\textsuperscript{160} See id. at 563.

\textsuperscript{161} See Boylan, supra note 37, at 1332.

\textsuperscript{162} See id. at 1329.

\textsuperscript{163} See id. at 1333.

\textsuperscript{164} See id. at 1334.

\textsuperscript{165} See 1999 Russia Report, supra note 18, at Sec. 1(e); 1998 Russia Report, supra note 18, at Sec. 1(e).
The judiciary's critical shortage of funds, however, obviously makes it even more susceptible to outside influence.

The U.S. Department of State criticized Russia for its frequent use of torture to extract confessions. Oleg Mironov, the Human Rights Ombudsman, estimated that approximately 50% of detainees were tortured in 1999. In some cases, torture was even used to force testimony from witnesses who might have no knowledge of the case. In court, defendants frequently recant confessions made under coercion; however, such a confession may still be considered in a decision to convict the defendant. The State Department also noted that deplorable prison conditions frequently cause death in Russia.

In sum, the Russian criminal justice system does not protect human rights as effectively as does its counterpart in Poland. Section III will address proposed reforms in both countries and the impact they have had in alleviating systemic problems. Prior to this analysis, Section II will provide a framework for evaluating the potential success and failure of reforms in transition nations.

II. THE SACHS AND KIS FRAMEWORK FOR THE SUCCESS AND FAILURE OF REFORM

Much of the literature proposing reforms for countries in transition focuses on legal and structural reform. Two scholars have used a broader perspective and have identified societal factors that may affect the relative success or failure of a transition. Jeffrey Sachs examines economic transition from Communism to capitalism. In contrast to this economic

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166 See Konst. RF (Constitution of the Russian Federation) Sec. 1., ch. 7, art. 124 (1993); see also 1999 Russia Report, supra note 18, at Sec. 1(c).

167 See generally 1999 Russia Report, supra note 18, at Sec. 1(c); 1998 Russia Report, supra note 18, at Sec. 1(c). The incidence of the use of torture to extract confessions in Russia may also be related to the prolonged detention periods. Cf. Hiram E. Chodosh & Stephen A. Mayo, The Palestinian Legal Study: Consensus and Assessment of the New Palestinian Legal System, 38 Harv. Int'l L.J. 375, 392 (1997) (arguing that a state's ability to detain defendants operates as an additional measure of coercion to compel confessions).

168 See 1999 Russia Report, supra note 18, at Sec. 1(c).


170 See 1999 Russia Report, supra note 18, at Sec. 1(e); 1998 Russia Report, supra note 18, at Sec. 1(e).

171 See 1999 Russia Report, supra note 18, at Sec. 1(c).
focus, Janos Kis explores political transition from Communism to democracy. These theories are complementary; both offer societal explanations for the success or failure of legal reforms.

A. Sachs' Self-Limiting State

Jeffrey Sachs' 1998 essay provides an economic analysis of factors that support or undermine a country's success in a transition to capitalism. The traditional theory of capitalism, Sachs argues, is a paradox, since it requires a state that is both strong and self-limiting.¹⁷² In most countries of the developing world, the paradox remains unsolved, because the state has not developed the strength to meet even basic needs (including the need for self-limitation).¹⁷³ Russia's situation may be even more disastrous, since its state is neither strong nor self-limiting.¹⁷⁴ In fact, the weakness of the state has perpetuated its tendency to prey on its citizens.¹⁷⁵ Sachs thus suggests a close relationship between the strength of a state and its ability to limit itself. In Sachs' view, poverty and bad government tend to reinforce each other and create a cycle that prevents capitalism from taking hold.¹⁷⁶

The countries that have been successful in completing the economic transition are those that have had, from the start, an essentially law-bound state. Organized groups in society form the base that supports the self-limiting state.¹⁷⁷ Only at this point is the society receptive to market reforms.¹⁷⁸ In addition to Poland, several other post-Soviet states, such as Hungary and Bulgaria, have been successful in achieving the rule of law.¹⁷⁹

Sachs lists the Roman Catholic Church, the Solidarity movement and various peasant movements as sources of discipline on the new Polish government.¹⁸⁰ These groups forced the creation of a self-limited state, in which a market economy could flourish.¹⁸¹ Even groups that opposed capitalist reform often naturally ushered it in by placing a check on the

¹⁷² See Sachs, supra note 26, at 6. The concept of a self-limiting state suggests that the judiciary will play a major role in overseeing government action.

¹⁷³ See id. at 8-9.

¹⁷⁴ See id. at 8.

¹⁷⁵ See id. at 9.

¹⁷⁶ See id. at 7.

¹⁷⁷ See id.

¹⁷⁸ See id.

¹⁷⁹ See Kis, supra note 30, at 307.

¹⁸⁰ See Sachs, supra note 26, at 9; see also discussion supra Section I.A.1.

¹⁸¹ See Sachs, supra note 26, at 9.
power of the state. On the other hand, by the time Communism collapsed in Russia, the long tradition of authoritarian rule (under czarism and later the restrictive Communist regime) had crushed the groups that might have performed this function.

B. Kis' Theory of Coordinated Transition

Janos Kis analyzes the problem from a non-economic standpoint. His theory identifies factors that promote peaceful reform instead of revolution in certain societies. Kis states that dramatic changes took place in Europe in a short period of time, but that these changes were somewhat short of revolution. Kis uses the term "revolution" to encompass the path between reform and revolution that these nations followed and later adopts the phrase "coordinated transition" for clarity.

In Kis' view, both reform and revolution occur in a situation where the government's legitimacy is threatened (what he calls a "legitimation crisis"). Reform preserves the continuity of the government, while revolution subverts it. In a reform process, the government is still the dominant power, while in a revolution, the opposition is dominant.

When a government follows the middle path of coordinated transition, however, the ruling class is divided over the legitimacy of the current regime. In this situation, neither the regime nor the opposition is strong enough to avoid cooperation with the other. An agreement between the two regimes provides a transition scenario. Revolutions and transitions both interrupt continuity. A transition implements dramatic changes but preserves legitimacy by paradoxically allowing society to view

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182 See id.
183 See id. Although opposition groups did exist in Russia, the persecution they suffered at the hands of the repressive government was one of the factors that prevented those groups from uniting. See discussion supra Section I.A.2.
184 See Kis, supra note 30, at 300-01.
185 Id. at 301.
186 Id. at 304.
187 Id. at 316-17.
188 See id. at 317.
189 See id.
190 See id. at 356.
191 See id. at 358.
192 See id. at 319.
193 See id. at 325.
both regimes as legitimate.\textsuperscript{194} Unlike revolutions, transitions are completed through accommodation and compromise.\textsuperscript{195}

Kis draws on experience during the Hungarian transition to reach his conclusions. Through his analysis of the Hungarian process, he develops a set of six factors necessary for the middle path of coordinated transition to succeed. First, Kis argues, the dominant coalition must be split over the issue of legitimacy.\textsuperscript{196} The split creates the conditions that force cooperation between opposing sides, since each side lacks sufficient power to block the other side's alternative.\textsuperscript{197}

Second, both the options of reform and revolution must appear to both sides to be unreasonably risky.\textsuperscript{198} This occurs when the state lacks power either to put down the opposition by force or to implement enforceable reforms through the legal process.\textsuperscript{199} Similarly, the opposition is too weak to overthrow the current regime by force.\textsuperscript{200}

Third, the opposition to the current regime must be credible—that is, it must be organized and command a certain authority within the society.\textsuperscript{201} Again, the opposition groups, even if credible, must still see cooperation as a valid alternative to revolution.\textsuperscript{202}

Fourth, popular mobilization must be high.\textsuperscript{203} However, high popular sentiment also increases the danger of radical breakaway groups that sweep away both bargaining powers and destroy their incentives to negotiate.\textsuperscript{204} Popular mobilization, therefore, must be too high for the current regime to control alone but not strong enough to resist the combined force of the current regime and the opposition.\textsuperscript{205}

Fifth, there must be sufficient agreement on proposals for the transition period and the future that the current regime and the opposition can quickly reach a compromise.\textsuperscript{206} A certain level of agreement is also

\textsuperscript{194} See id. at 314.  
\textsuperscript{195} See id. at 319.  
\textsuperscript{196} See id. at 356.  
\textsuperscript{197} See id. at 358.  
\textsuperscript{198} See id. at 370-71.  
\textsuperscript{199} See id. at 358-59.  
\textsuperscript{200} See id.  
\textsuperscript{201} See id. at 359-60.  
\textsuperscript{202} See id. at 360.  
\textsuperscript{203} See id. at 361-62.  
\textsuperscript{204} See id. at 362.  
\textsuperscript{205} See id.  
\textsuperscript{206} See id. at 371.
necessary to ensure the parties' ability to adhere to the agreement after consensus is reached.207

Finally, the idea of the pacted transition, or a transition achieved through negotiation between the legitimate government and the opposition, must exist in public political culture.208 If the concept of an agreement can be borrowed and need not be invented, the chances of a transition's taking hold are greater.209 The existence of the idea decreases the necessity of political maneuvers and increases the chance that a pact can be completed within a narrow window of opportunity.210

C. The Integrated Framework

Close examination of Sachs' and Kis' theories reveals a common framework. Kis argues that where there is a split in legitimacy between a current regime and strong, credible opposition, there is a chance for a successful coordinated transition. He also notes that there must be sufficient consensus to allow an agreement to be reached. Kis' other two factors deal with the popular consciousness. It is these two factors that lend the strongest support to Sachs' theory. Kis states that high, yet moderated popular sentiment is necessary to compel the old regime to change. He notes also that the idea of transition will be difficult to invent if the concept does not exist in political culture. These observations support Sachs' assessment of the Polish transition.

Sachs argues that opposition groups provided a "check" on the Polish government in the years after the transition. This identifies the role of the opposition not only in negotiating a compromise at the beginning of the transition period but also in raising popular consciousness so that government failure to adhere to the agreement was impossible.211 Furthermore, the fact that these groups remained in existence throughout the Communist period meant that the idea of transition was alive in the

207 See id.
208 See id.
209 See id. at 366-67.
210 See id. at 367.
211 Of course, the Polish government was also incapable in 1988 of controlling the population or of putting down the opposition. "[A] repetition of the scenario of martial law, which had already failed once, was unthinkable as a reaction to the reviving capacity of the society to act." Krzysztof Nowak, Public Opinion, Values and Economic Reform, in The Polish Road from Socialism: The Economics, Sociology and Politics of Transition 127, 142 (Walter D. Connor & Piotr Ploszajski eds., 1992). It was this inability to act that forced the government to negotiate with Solidarity during the Roundtable Talks of 1989. See discussion supra Section I.A1. This scenario conforms to Kis' discussion of coordinated transition. See discussion supra Section II.B.
Polish political consciousness. In Russia, on the other hand, years of authoritarian rule had eliminated not only the opposition groups but also the idea of peaceful political transition. Russia, therefore, had to attempt to invent the concept in order to begin its transition period.

These complementary theories provide a basic analytical structure from which to view the societal factors affecting institutional reform. Section IV will return to examine proposed reforms in light of this framework, in an attempt to determine which Polish reforms might be more easily transferred to the different social culture of Russia. Section III will first analyze each country's experience with past and proposed reforms.

III. EVALUATION OF REFORM STRATEGIES

Regardless of social and cultural differences, Poland and Russia are two nations that once shared a common form of government. They entered the transition period also sharing the same problems in human rights protection. As a result, Poland and Russia have implemented similar reforms. However, as demonstrated above, the results in the two systems contrast sharply. This contrast raises an important question: do societal factors allow a reform to be transferred from one society to another? Section III explores alternative answers to this issue.

This Section will give in-depth treatment to two reforms: the establishment of the office of Ombudsman and the introduction of jury trials in Russia. It also will briefly discuss supporting factors in the reform environment, including the role of the Constitutional Court and international law standards in each country.

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212 Again, although groups such as the refuseniks existed, these groups did not unite and their ideas did not diffuse throughout the USSR. See discussion supra Section I.A.2. The Russian government never needed to cooperate with these groups, and Russia had no living memory of such cooperation.

213 In the context of this Note, the relevant differences are those stemming from the divergent transition paths taken by Poland and Russia in 1989-1991. See discussion supra Section I.A.1-2.

A. Poland

1. The Office of the Ombudsman

Since 1988, Poland has had an active Ombudsman (Commissioner of Human Rights), an independent overseer of human rights violations in the country.\(^{215}\) Polish legislation established the position a year before Poland's independence, during a period of Communist concession to opposition groups.\(^{216}\) The office of the Ombudsman was modeled after the Scandinavian version and promoted by Polish scholars as a civil rights protection measure.\(^{217}\) The introduction of the Ombudsman, as well as several other institutions such as the Constitutional Tribunal, was a credibility maneuver by the Communist government, intended to improve the crumbling image of the regime.\(^{218}\) Ewa Letowska, professor at the Institute of Legal Studies of the Polish Academy of Sciences, was the first Polish Ombudsman.\(^{219}\)

The Polish Ombudsman has extensive jurisdiction to oversee the protection of human rights.\(^{220}\) He investigates the actions of administrative bodies, organizations and institutions.\(^{221}\) He may also inspect the scope of operation of these institutions to determine compliance.\(^{222}\) The Ombudsman is independent,\(^{223}\) reporting only to Parliament;\(^{224}\) however, the Ombudsman's four-year terms do not coincide with those of Parliament.\(^{225}\) He enjoys immunity from legal process\(^{226}\) and cannot accept

\(^{215}\) See 1999 Poland Report, supra note 23, at Sec. 4; 1998 Poland Report, supra note 23, at Sec. 1(c).


\(^{217}\) See Letowska, Basic Rights, supra note 38, at 63.

\(^{218}\) See id.

\(^{219}\) See Holda, supra note 216, at 356. Although the first Polish Ombudsman was female, all subsequent Ombudsmen have been male. For this reason, the male pronoun is used throughout this section.


\(^{221}\) See id.

\(^{222}\) See id.

\(^{223}\) See THE CONSTITUTION OF THE REPUBLIC OF POLAND, supra note 25, at art. 210; see also Letowska, Polish Ombudsman, supra note 220.

\(^{224}\) See id. at art. 210.

\(^{225}\) See Letowska, Polish Ombudsman, supra note 220.
other employment or hold another position while acting as the Ombudsman.\textsuperscript{227}

The Ombudsman may act either on the petition of an individual or \textit{sua sponte}.\textsuperscript{228} In responding to a complaint, he normally addresses himself to the authority against which the complaint is directed and expresses disapproval.\textsuperscript{229} When this action is unsuccessful, the Ombudsman has power to call upon a higher level of authority, request institution of civil, criminal, administrative or disciplinary proceedings, enter extraordinary appeals against court judgments, or apply to the Constitutional Tribunal to control the constitutionality of legislation.\textsuperscript{230} Recent amendments to the Ombudsman Act have broadened the Ombudsman’s basic powers. Although the Ombudsman has always had the right to investigate cases involving human rights violations, he now may examine facilities such as penitentiaries and psychiatric units without prior notification to those institutions.\textsuperscript{231} In addition, the Ombudsman may review files of prosecutors and courts, even where decisions already have been issued.\textsuperscript{232}

Overall, the function of the Ombudsman is that of a "watchdog" since he may "bark... but he may not bite."\textsuperscript{233} In other words, he may criticize authorities and state agencies and bring actions before the Tribunal, but he may not independently take action to remedy abuses. In addition, due to limited resources, the Ombudsman is forced to concentrate on systemic and general problems; he cannot address injustices in each individual case.\textsuperscript{234}

The Communist government in Poland allowed the establishment of an Ombudsman presumably without realizing that the office would provide an effective check on government power.\textsuperscript{235} In fact, the government hand-selected a female with no political affiliation or

\textsuperscript{226} See \textit{THE CONSTITUTION OF THE REPUBLIC OF POLAND, supra} note 25, at art. 211.
\textsuperscript{227} See \textit{id.} at art. 209(2)-(3); \textit{see also} Letowska, \textit{Polish Ombudsman, supra} note 220.
\textsuperscript{228} See Letowska, \textit{Polish Ombudsman, supra} note 220, at 207.
\textsuperscript{229} See \textit{id.}
\textsuperscript{230} See \textit{id.} at 207-08. The Polish Constitution allows the Ombudsman to bring an action before the Constitutional Tribunal. See \textit{THE CONSTITUTION OF THE REPUBLIC OF POLAND, supra} note 25, at art. 191 (1) (1997).
\textsuperscript{231} See Amendments to the Ombudsman Act, \textit{POLISH NEWS BULL., Mar. 22, 2000, available in LEXIS, Country & Region Library, Polish News File.}
\textsuperscript{232} See \textit{id.}
\textsuperscript{233} Letowska, \textit{Polish Ombudsman, supra} note 220, at 209.
\textsuperscript{234} See \textit{id.}
\textsuperscript{235} See Letowska, \textit{Basic Rights, supra} note 38, at 63.
experience, believing it could control the new Ombudsman.\textsuperscript{236} The actual result was unforeseeable, at least to the authorities.

The Polish public had a different view from that of the government and enthusiastically supported the creation of the Ombudsman's office.\textsuperscript{237} In its first year, the office received more than 55,000 complaints.\textsuperscript{238} A 1990 poll showed that the Ombudsman had the highest popularity of any Polish politician.\textsuperscript{239} Ewa Letowska was also aware of the great public anticipation regarding her function. Writing in 1990, Letowska noted how high early Polish expectations were for the Ombudsman to effect change. She wrote that "the [Ombudsman] is expected to effect substantial changes in the law and the functioning of the State, as if he were superior to the authorities which have been critici[z]ed."\textsuperscript{240}

The Polish Ombudsman has been unquestionably active. Constitutional Court statistics reveal that, among all institutions that have the authority to submit petitions, the Ombudsman has submitted the greatest number of Constitutional Court petitions.\textsuperscript{241} In addition, the Ombudsman conducts systematic inspections of prisons. The Ombudsman's comprehensive report has played a part in reducing congestion and providing a more humane prison system.\textsuperscript{242} By 1989 (one year after its creation), the office of the Ombudsman had submitted nine cases to the Constitutional Tribunal.\textsuperscript{243} Of seven completed cases (current at the time of Letowska's writing), the Tribunal ruled in favor of the Ombudsman on five occasions.\textsuperscript{244} Twenty-eight of the thirty-four extraordinary appeals filed by the Ombudsman were also favorably resolved.\textsuperscript{245}

The Ombudsman has argued against the formalistic attitude of the Polish judiciary and urged courts to apply international human rights standards.\textsuperscript{246} In all human rights cases brought by the Ombudsman between 1989 and 1991, the Ombudsman invoked the Covenant on Civil and

\begin{footnotesize}
\footnote{\textsuperscript{236} See id.}
\footnote{\textsuperscript{238} See id.}
\footnote{\textsuperscript{239} See id.}
\footnote{\textsuperscript{240} Letowska, \textit{Polish Ombudsman}, supra note 220, at 209.}
\footnote{\textsuperscript{241} See Letowska, \textit{Basic Rights}, supra note 38, at 64.}
\footnote{\textsuperscript{242} See \textit{Poland Study}, supra note 237.}
\footnote{\textsuperscript{243} See Letowska, \textit{Polish Ombudsman}, supra note 220, at 210.}
\footnote{\textsuperscript{244} See id.}
\footnote{\textsuperscript{245} See id.}
\footnote{\textsuperscript{246} See Letowska, \textit{Basic Rights}, supra note 38, at 64.}
\end{footnotesize}
As mentioned above, many of these cases were resolved favorably based on those conventions. Human rights activist groups and the world community share the optimism with respect to the function that the Ombudsman fulfills in Poland. In 1999, the U.S. Department of State called the Ombudsman "an effective, independent body with broad authority to investigate alleged violations of civil rights and liberties." The State Department had made similar statements in prior years.

Letowska's view is that "every Ombudsman who properly performs [his] duties serves as a check on government abuse...." Thus, even popularly elected regimes may be disturbed by the careful oversight of an Ombudsman. Although the shortsighted Polish Communist government sought to control the Ombudsman, the Ombudsman ultimately was able to exert influence over activities of the Polish government. This optimistic view suggests that, even in a society where the Ombudsman's authority is intentionally restricted, the Ombudsman may make significant contributions to the protection of human rights.

At least one Polish criminal reform scholar identifies the institution of the Ombudsman as a factor contributing to the success of human rights protection in Poland. Jacek Kurczewski praises Letowska's office and states that it was "the principal instrument for the implementation of various rights." Nor has the office weakened since Letowska's departure. Letowska's successor, Tadeusz Zielinski, developed a vastly popular civic rights policy that increased the office's visibility and power. This year, the Sejm selected a new Ombudsman, Andrzej Zoll, with an extensive background in criminal law and legal reform.

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247 See id.
248 1999 Poland Report, supra note 23, at Sec. 4.
250 Letowska, Basic Rights, supra note 38, at 63.
251 See id.
252 See id.
254 See id.
Poland adopted the Scandinavian model to form a very successful Ombudsman's office, thus creating a successful prototype from which other nations could learn. Nonetheless, Letowska expressed the fear that nations with repressive governments might not be able to draw on the Polish experience. One reason for the Polish Ombudsman's success was the element of surprise it contained for the government. The Polish Ombudsman has demonstrated that such an office may pose a threat to unlimited authority. Letowska's concern is that transition governments, informed by the Polish experience, may attempt to strip offices such as the Ombudsman of many essential powers.

It is important then to explore the adaptation of the Sachs and Kis model to the successful Polish experience and identify reasons for Poland's success in light of that framework. Several factors may have contributed to Poland's success with the office of Ombudsman. First, as noted by Letowska, it was the first such institution within the former Soviet bloc, and the element of surprise may have kept the former government from realizing the extent of the Ombudsman's potential power. Second, it was widely supported by popular opinion and, in fact, public expectation exceeded the power actually possessed by the Ombudsman.

In terms of the Sachs and Kis theories, the success of this institution was predictable. The Ombudsman played a role in creating Sachs' law-based state and paved the way for the impending transition to capitalism and democracy. From the beginning, the office of the Ombudsman did not exist in a vacuum. As noted by Sachs, Poland had the advantage of unified opposition groups that eventually could provide a check on the government during the transition period. These groups would have welcomed the Ombudsman as another member of the anti-governmental coalition. The Ombudsman was, in fact, more than a mere member; it was a legally empowered instrument through which the coalition could exert a check on government abuse.

The Ombudsman had the advantage of being the only member of the opposition that possessed legal authority in 1988. Although the Communist government might have hoped to limit the Ombudsman's powers in practice, the fact remained that those powers existed in law. The Ombudsman's legal foundation gave the position a firmer basis than the government had foreseen and, more importantly, made it a more powerful institution than the government was able to control. Thus, the alliance of the Ombudsman with other opposition groups proved to be too strong for

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256 See Letowska, Basic Rights, supra note 38, at 63.
257 See id.
258 See id. at 63-64.
259 The Ombudsman formed an alliance with Solidarity leaders and the Roman Catholic church in fighting for human rights. See discussion supra Section I.A.1.
the Communist government, and it was forced to accept the realization in practice of the powers it had nominally granted the Ombudsman.

The addition of the office of the Ombudsman to the numerous groups forming part of the opposition coalition also gave rise to a situation consistent with Kis' theory of coordinated transition. Before the creation of the Ombudsman's office, the Communist government viewed itself as strong enough to put down the opposition simply by the implementation of several reforms.\textsuperscript{260} The fact that the government allowed the creation of that office demonstrates that it intended to pacify the population while retaining effective control. Despite the government's intention, the Ombudsman ultimately provided one legal mechanism through which the opposition could operate. Soon after the Ombudsman joined the coalition, the government recognized the strength of the opposition and determined that a coordinated transition through cooperation with the opposition groups was the only possibility available.

The creation of the office of the Ombudsman was not the only factor contributing to the increased strength of the opposition in the 1988-89 period. However, due to the office's enthusiastic reception by the public, it must have increased popular mobilization. In addition, it was predictable that the level of mobilization would rise only high enough to allow coordinated transition. The Ombudsman was an instrument of legal authority rather than force. With its powers limited primarily to criticism rather than action, the Ombudsman could not spur the population of Poland to revolution. Nonetheless, the fact that the Ombudsman's function existed in law made that institution more credible and, as a result, lent credibility to the entire opposition movement.

The office of the Ombudsman must, therefore, have increased popular mobilization with respect to the reformist ideas of the Polish opposition. Poland benefited from the fact that Solidarity, the Roman Catholic church and other organizations had already implanted these ideas.\textsuperscript{261} The Ombudsman lent additional legitimacy to the concept of

\textsuperscript{260} In addition to the Ombudsman, these reforms included introducing capitalist elements into the economy and the creation of the PRON. See discussion supra Section I.A.1, see also note 56.

\textsuperscript{261} See discussion supra Section I.A.1. During the Solidarity movement of 1980-1981, the Polish people protested against the repressive Communist government and insisted on the adoption of western democratic institutions. See Brzezinski & Garlicki, \textit{Polish Constitutional Law}, in \textit{LEGAL REFORM IN POST-COMMUNIST EUROPE: THE VIEW FROM WITHIN} 21, 26 (Stanislaw Frankowski & Paul B. Stephan III eds., 1995) [hereinafter Brzezinski and Garlicki, \textit{Polish Constitutional Law}]. Although the Solidarity movement began as a labor movement, one of its goals was to overhaul the criminal justice system. In addition to the labor strikes, a wave of prison protests occurred during 1980-1981. See Holda, \textit{supra} note 216, at 354-55. Although, in 1981, the Communist government imposed martial law and cracked down on protesters, the ideology of the movement nonetheless led to the implementation of reforms in the late 1980s, including the office of the Ombudsman.
western democratization within the general population. The success of the 
office was thus predictable based on its consistency with the previously 
existing societal dynamic in Poland.

2. Supporting Factors in Polish Reform

This Section briefly discusses the role the Constitutional Tribunal 
has played in the transition period in Poland, as well as the contribution of 
international law to the Polish transition. The elements will be 
addressed in terms of how they interact with other factors in the reform 
environment, including the scrutiny of Poland by international 
organizations and groups. The focus here enhances appreciation of how 
Polish reforms have functioned as a whole.

a. The Constitutional Tribunal

Other reforms played a supporting role in the success of the 
Ombudsman. The Constitutional Tribunal, like the Ombudsman, has been 
credited with helping to move Poland toward the ideal of a law-based state. 
The Constitutional Tribunal's function is, however, complementary to that 
of the Ombudsman and it is the effect of these institutions in conjunction 
that contributes to the success of Polish reform.

Like the Ombudsman, the Constitutional Tribunal was created 
under Communist rule, in 1985. Again, it was the first such institution in 
the Soviet bloc and contrary to typical Communist practice. Unlike the 
Ombudsman, the Constitutional Tribunal was encumbered with numerous 
legal limitations that still curb its function. For example, the Tribunal 
could not review many legislative acts (such as local ordinances), nor could 
it apply international law to determine conformity of domestic 
legislation. Most importantly, if a Tribunal decision invalidated a

See HoIda, supra note 216, at 357-58. The Constitutional Tribunal also sprang from the 
demands of the Solidarity movement. See supra, Brzezinski & Garlicki, Polish 
Constitutional Law, at 27.

262 The Tribunal and the role of international law as independent reform factors are 
behind the scope of this Note.

263 See Mark F. Brzezinski & Leszek Garlicki, Judicial Review in Post-Communist 
Brzezinski & Garlicki, Judicial Review]. The Polish Constitution now provides for the 
Tribunal's existence and jurisdiction over certain matters. See The Constitution of the 
Republic of Poland, supra note 25, art. 188.

264 See Brzezinski & Garlicki, Judicial Review, supra note 263, at 25.

265 See id.

266 See id.
Parliamentary statute, the decision was not binding and Parliament had the power to overrule it by a two-thirds majority vote.\textsuperscript{267} Although they established important limits on executive regulations, the Tribunal’s early cases were politically unimportant.\textsuperscript{268} The Tribunal’s function strengthened after the 1989 reforms.\textsuperscript{269} For one thing, the Tribunal became an important vehicle for the Ombudsman (then Letowska) in her attempt to change the system. Letowska and many political theorists of the time opposed quick and radical changes; thus, they used the Tribunal to gradually invalidate old Communist laws.\textsuperscript{270} Since the 1989 reforms also somewhat expanded the Tribunal’s jurisdiction, it began to address more controversial issues\textsuperscript{271} and to review issues involving international law.\textsuperscript{272} Although the Tribunal is still technically forbidden to review Polish law for conformity with international law, the Tribunal has used international law to expand and interpret Polish law.\textsuperscript{273} As mentioned above, the Polish Ombudsman has frequently brought international law issues and human rights conventions before the Tribunal.

The Constitutional Tribunal has further strengthened in function during the past decade. In its recent jurisprudence, the Tribunal has reasoned from unwritten constitutional provisions to establish a prohibition against retroactive laws and a "protection of vested rights" principle\textsuperscript{274} as well as an equality principle.\textsuperscript{275} In addition, the Tribunal limited Parliament’s power to overrule its decisions by holding that if Parliament failed to act within six months, the Tribunal decision automatically became

\begin{itemize}
  \item \textsuperscript{267} See id. at 26.
  \item \textsuperscript{268} See id. at 28.
  \item \textsuperscript{269} See id. at 31; see also discussion regarding Roundtable Talks, supra Section I.A.1.
  \item \textsuperscript{270} See Brzezinski & Garlicki, Judicial Review, supra note 263, at 32.
  \item \textsuperscript{271} See id. at 33.
  \item \textsuperscript{272} See id. at 34.
  \item \textsuperscript{273} See id.
  \item \textsuperscript{274} Id. at 37. In a 1992 judgment, the Tribunal held that laws may not be retroactive, unless the retroactivity is justified by another constitutional principle, such as social justice. Although the Tribunal did not define the concept of social justice, it has since held several statutes in violation of that principle. Id. (citing Judgment K15/91 of Jan. 29, 1992, 1992(I) Orzecznictwo Tryb. Konst. 158 (Poland); Judgment P2/92 of June 1, 1993, 1993 Orzecznictwo Tryb. Konst. 217, 227 (Poland)).
  \item \textsuperscript{275} For example, in 1993, the Tribunal found that an unemployment law provision preventing an unemployed person from receiving benefits if a spouse received twice the average national salary violated the principle of equality. See id. at 43 (citing Judgment K7/92 of Apr. 6, 1993, 1993 Orzecznictwo Tryb. Konst. 75, 81-82 (Poland)). The Polish Constitution does contain an equality principle. See THE CONSTITUTION OF THE REPUBLIC OF POLAND supra note 25, at art. 32.
\end{itemize}
In October 1999, following a 2-year interim period after the entry into force of the new Constitution, all Tribunal decisions became final and binding.\textsuperscript{276} Although the Tribunal has still been reluctant to take on important political issues or to challenge institutions such as the Roman Catholic Church,\textsuperscript{278} it has established several principles important for the protection of human rights and has also expanded its own authority to define such principles.

The Constitutional Tribunal serves an important role in the protection of human rights in Poland.\textsuperscript{279} Specifically, it is the power of the Ombudsman to bring actions before the court that ensures protection, since it is functionally equivalent to bringing a class action.\textsuperscript{280} In the years since the fall of Communism, the Polish Tribunal has enhanced the ability of the Polish Ombudsman to protect human rights.

\textbf{b. International Law and Integrated Polish Reform}

International standards have had some effect in facilitating Poland's protection of human rights through the criminal justice system. When, in November of 1992, Poland ratified the European Convention on Human Rights, scholars viewed the ratification as a positive development since it immediately introduced binding norms into the Polish legal system.\textsuperscript{281} In addition, Poland's membership in the Council of Europe forces it to comply with the standards of the European Convention on Human Rights.\textsuperscript{282}


\textsuperscript{277} See 1999 Poland Report, supra note 23, at Sec. 1(e).


\textsuperscript{279} See Kurczewski, supra note 253, at 132.

\textsuperscript{280} See \textit{id}. Since the Ombudsman addresses problems of a general or systemic nature (see discussion supra Section III.A.1., he protects the rights of citizens even in their absence. Thus, his role may be analogized to that of one who brings a class action to protect the rights of others. Here, the Ombudsman is not protecting any interest of his own but is fulfilling the duties of his position.

\textsuperscript{281} See Brzezinski & Garlicki, \textit{Polish Constitutional Law}, supra note 261, at 48. Other Conventions cited that played a role in reforming Poland's penitentiary laws include the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See Holda, supra note 216, at 364. The Polish Constitution provides that "[t]he Republic of Poland respects international law binding upon it." \textit{The Constitution of the Republic of Poland}, supra note 25, at art. 9.

\textsuperscript{282} See Holda, supra note 216, at 364.
Membership in the Council is becoming increasingly important over time, since it allows petitions against the Polish government to reach the Human Rights Commission and the European Court of Human Rights.\footnote{See Kurczewski, supra note 253, at 133.}

International standards also guide the drafters of Poland's criminal legislation, as evidenced by the elimination of the death penalty from the 1997 code.\footnote{See Kurczewski, supra note 253, at 133.} By increasing protection for defendants' rights and requiring judicial supervision of the parties, Poland strives to comply with international standards.\footnote{See Kurczewski, supra note 253, at 133.}

The fact that the nation is under permanent scrutiny contributes to the development of a rule of law in Poland.\footnote{See also Tadeusz Bojarski, The Problems of Reform of Polish Criminal Law, 2 POLISH LEGAL J. 1, 14 (1997) (noting that the death penalty has not been executed in practice since 1988.) It is noteworthy that the 1969 code abolished life imprisonment as inhumane while allowing use of the death penalty. See Wasek & Frankowski, supra note 214, at 303; cf New Penal Code Ends with Capital Punishment, PAP NEWSWIRE, Sept. 1, 1998, available in LEXIS, Country & Region Library, Poland News File (stating that the new code, while not more lenient on criminals, allows more judicial discretion to impose adequate punishment).} Oversight by committees such as the UN Committee on Human Rights also furthers this end, since Poland must meet the standards of such committees in order to gain acceptance and assistance from the international community.\footnote{Cf. Human Rights Reform by 2003, supra note 126 (recommending additional reforms to combat problems of police brutality and long pre-trial delays).}

No single Polish reform accounts entirely for the success of Poland's transition relative to Russia. The office of the Ombudsman, discussed in part (A)(1) of this Section, depends to a great extent on the strength of other institutions. Specifically, the Ombudsman could not function in the absence of the Polish Constitutional Tribunal, since the Tribunal has often been the instrument wielded by the Ombudsman in vindicating the rights of individuals. In addition, international conventions and standards provide oversight to the system as a whole. Since international instruments signed by Poland create enforceable domestic norms,\footnote{The Polish Constitution cites international agreements as a binding source of law. See THE CONSTITUTION OF THE REPUBLIC OF POLAND, supra note 25, at art. 87(1).} they provide support to both the Ombudsman and the Constitutional Tribunal to justify a strong position on human rights.

\footnote{\textsuperscript{283} See Kurczewski, supra note 253, at 133.}
\footnote{\textsuperscript{284} "Punishments are: 1) fine, 2) restriction of liberty, 3) deprivation of liberty, 4) deprivation of liberty for 25 years, 5) deprivation of liberty for life." KODEKS KARNY (CRIMINAL CODE) art. 32 (Pol.), (unofficial translation by Polish Ministry of Justice, on file with author). See also Tadeusz Bojarski, The Problems of Reform of Polish Criminal Law, 2 POLISH LEGAL J. 1, 14 (1997) (noting that the death penalty has not been executed in practice since 1988.) It is noteworthy that the 1969 code abolished life imprisonment as inhumane while allowing use of the death penalty. See Wasek & Frankowski, supra note 214, at 303; cf New Penal Code Ends with Capital Punishment, PAP NEWSWIRE, Sept. 1, 1998, \textit{available in} LEXIS, Country & Region Library, Poland News File (stating that the new code, while not more lenient on criminals, allows more judicial discretion to impose adequate punishment).}
\footnote{\textsuperscript{285} Cf. Wasek & Frankowski, supra note 214, at 304-305 (discussing the 1993 draft, predecessor to the present code).}
\footnote{\textsuperscript{286} See Kurczewski, supra note 253, at 133.}
\footnote{\textsuperscript{287} Cf. Human Rights Reform by 2003, supra note 126 (recommending additional reforms to combat problems of police brutality and long pre-trial delays).}
protection. The factors mentioned above thus reinforce each other and contribute to the rule of law state that is required for a successful transition.

B. Russia

1. The Office of the Ombudsman

Russia, like other post-Soviet states, has little experience with separation of powers, especially when the issue is oversight of the centralized government. Traditionally, the Procuracy had responsibility for receiving complaints about officials and overseeing human rights protection. The Soviet understanding of the office of Ombudsman was that of an office only superficially independent and largely ineffective. However, between January 1994 and March 1995, Russia experimented with the appointment of a powerful and active Ombudsman, human rights activist Sergei Kovalev. Kovalev's removal from office was followed by a three-year vacancy in the position before, in 1998, a new Ombudsman was appointed.

Demand for an Ombudsman arose in Russia after the success of the institution in Poland (and later, other countries, including Lithuania and Hungary). In November 1991, the Supreme Soviet adopted a non-binding declaration providing for the creation of a "Parliamentary Commissioner for Human Rights." This provision was not incorporated into the Russian Constitution. Rather than immediately establishing the office of Ombudsman, President Yeltsin created an executive commission, the President's Commission on Human Rights. That body, whose membership included numerous human rights activists, had the authority to examine human rights

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289 See Price of Independence, supra note 36, at 1. See also discussion supra Section I.B.2. Under the Russian Constitution, the modern Procuracy is a centralized structure (closely linked to the federal government) in which lower Procurators are appointed by the Procurator General. The Procurator General is appointed and dismissed by the President of the Russian Federation. See Konst. RF (Constitution of the Russian Federation) art. 123 (1993).
290 See Price of Independence, supra note 36, at 1.
291 See id. at iii.
292 See id. at 3.
293 Id.
294 Id.
295 See id.
complaints and publish reports. Kovalev was appointed chair of the Commission.

The 1993 Constitution officially established the office of Ombudsman (to be appointed by the Duma) but did not define its powers beyond stating that the Ombudsman must act "in accordance with a federal constitutional law." The Duma selected Kovalev as the new Ombudsman, but did not immediately enact implementing legislation to establish his position. Yeltsin thus issued a temporary decree under which Kovalev could act while legislation was pending. Kovalev was also to continue as head of the President's Commission. Thus, although Kovalev held two positions in 1994, neither had a legal basis and both depended on a presidential decree.

Immediately upon his appointment, Kovalev effectively protested against human rights violations occurring during the 1993 state of emergency. Scholars, who optimistically viewed the creation of the position as a positive sign in Russia's transition, welcomed these achievements. Kovalev did not, however, achieve success in his protests against Yeltsin's Decree on Combating Organized Crime. Yeltsin refused to rescind the decree, which allowed for the detainment of individuals without charges for up to 30 days.

Conflict with the executive branch increased when Kovalev published a 1994 human rights report criticizing the government for beatings and abuse of detainees as well as other actions. Officials attempted to suppress the report and tensions heightened. Kovalev's strong opposition to the government's actions in Chechnya struck the final blow in the eyes of the government. Kovalev argued against Russian

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296 See id.
297 See id.
300 See id.
301 See id.
302 See id.
303 See id. at 5.
305 See Price of Independence, supra note 36, at 5.
306 See id.; see also discussion supra Section I.B.2.
307 See Price of Independence, supra note 36, at 5.
309 See Price of Independence, supra note 36, at 6.
abuses in letters to Yeltsin and to the international community.\textsuperscript{310} Yeltsin refused to act in response to Kovalev's complaints.\textsuperscript{311}

By the beginning of 1995, Kovalev's outspokenness in revealing atrocities in Chechnya had angered government officials.\textsuperscript{312} Kovalev had already been the target of attacks by numerous officials, who accused him of promoting unrest and inciting anti-government activities.\textsuperscript{313} In March, the Duma removed him from office by vote. Seventy-five percent of the Duma delegates voted in favor of removal.\textsuperscript{314}

In March 1997, the Duma passed implementing legislation establishing the position of human rights Ombudsman.\textsuperscript{315} It selected Duma Deputy Oleg Mironov as Ombudsman in May 1998.\textsuperscript{316} Human rights activists have widely criticized Mironov's appointment, since he is a former member of the Communist party with no human rights expertise.\textsuperscript{317} Those groups have viewed the appointment as part of a political deal-making process involving other Duma committee posts.\textsuperscript{318} Activists also contrast the current Commission with that which worked under Kovalev, stating that the Commission now defends government policies rather than advocating for human rights.\textsuperscript{319}

Notwithstanding these criticisms, Mironov has taken at least several small steps on behalf of human rights since his appointment. In May 1998, almost immediately after taking office, Mironov submitted an inquiry to the Procurator General regarding bribery and embezzlement in the Procuracy.\textsuperscript{320} The new Ombudsman requested documents detailing the number of criminal proceedings filed against Procurators and the number of

\textsuperscript{310} See id. at 7.
\textsuperscript{311} See id. at 8.
\textsuperscript{312} See id. at 9.
\textsuperscript{313} See id.
\textsuperscript{314} See id. at iii. This percentage is calculated based on the total votes cast; 54\% of the entire Duma actually voted for removal.
\textsuperscript{316} See 1999 \textit{Russia Report}, supra note 18, at Sec. 4.; 1998 \textit{Russia Report}, supra note 18, at Sec. 4.
\textsuperscript{317} Mironov did, however, resign from the party and the Duma after the vote, since the law requires that the Ombudsman be nonpartisan. See 1998 \textit{Russia Report}, supra note 18, at Sec. 4.
\textsuperscript{318} See id.
\textsuperscript{319} See id.
In addition, Mironov gave a September speech urging Russia to move forward with abolition of the death penalty. Russia must do so in order to comply with the European Covenant of Human Rights and Liberties, to which it is a signatory. Finally, in March 1999, Mironov asked the Duma to implement legislation decreasing the allowable period of pre-trial detention. The proposal, if adopted, would reduce the period to six months for those convicted of common crimes and nine months for those convicted of violent crimes. The U.S. Department of State notes that Mironov is “working actively” to develop the Ombudsman’s office and to promote human rights. It is yet to be seen whether Mironov, acting alone, can become as powerful a force as Poland’s Letowska in protecting human rights in Russia.

In terms of the Sachs and Kis theories, the failure of the Ombudsman’s office in 1995 was as predictable as the success of the Polish Ombudsman. Nominally, the Russian Ombudsman might have appeared even more promising than his Polish counterpart. After all, Kovalev was a strong human rights activist and a former political prisoner. Letowska had no political experience and was hand-selected by the Soviet regime as one who would be easily controlled. Furthermore, Kovalev was backed by the entire Human Rights Commission, many members of which were also activists.

The Russian institution was not firmly grounded in legal authority, nor was it supported by the societal factors that existed in Poland even prior to 1989. First, by 1994, the Russian government had observed the results of the Ombudsman position in other former Communist states and may have feared an Ombudsman with broad powers. The government had an interest in keeping the Ombudsman in check at least until it could observe his

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321 See id.
323 See id.
325 See id.
326 1999 Russia Report, supra note 18, at Sec. 4. Mironov’s office has grown to 150 employees and Mironov has spoken openly on issues such as socioeconomic rights, racism and anti-semitism. See id.
327 Mironov’s recent speeches indicate that he is frustrated by the lack of cooperation between the presidential administration and the Ombudsman’s office. Mironov claims that, despite Mironov’s desire to cooperate with the government, the administration continues to block his attempts to meet with President Vladimir Putin. See Rights Leader Says Putin’s Administration Interferes, THE MOSCOW TIMES, June 8, 2000, <http://www.moscowtimes.ru/archives/issues/2000/Jun/08/Story5.html>.
328 See PRICE OF INDEPENDENCE, supra note 36, at iii, n.2.
actions. If necessary, it could reel the Ombudsman in and render him ineffective.

Second, the Russian Ombudsman at the time of Kovalev's appointment had no legal authority except that granted by the President. Thus, its function was always tenuous since the office was subject to the President's approval. Despite his designated powers, the Ombudsman had no real power to check the other branches of government. As a result, the office of the Ombudsman failed in practice to create Sachs' self-limiting state.

In addition, the appointment of the Ombudsman in Russia did not coincide with the other social conditions mentioned by Kis. Although Communism had ended, it could not seriously be said that there was a split in the legitimacy of the Russian Regime in 1994. In fact, at the time of Kovalev's appointment, a state of emergency existed in order to suppress Yeltsin's opponents. The Yeltsin faction was still strong enough to put down any other opposition group.\(^{329}\)

Thus, the office of the Ombudsman, even in combination with the Human Rights Commission, was not strong enough to create credible opposition to the Yeltsin government. There was no Solidarity movement in Russia, nor was the church strong enough to ally with the Ombudsman. Although Kovalev unquestionably mobilized the population,\(^{330}\) mobilization did not rise to a level where the dominant party could not contain it. Finally, Kovalev may have been unable to mobilize the population to transition, since the idea of democratic transition was simply not part of Russian culture.\(^{331}\)

By 1991, Russia's opposition groups had been extinguished by centuries of czarist rule, followed by a repressive half-century under the Soviet regime.\(^{332}\) Since the fall of Communism, these groups have remained too weak to act in the face of rampant governmental abuses.\(^{333}\) Russia thus does not have a history of strong governmental opposition. In addition, Russia's opposition groups have not negotiated with the government to solve any legitimation crisis in recent memory.\(^{334}\)

\(^{329}\) This might have been true even had a unified opposition existed, which it did not in Russia. See discussion supra Section I.A.2.

\(^{330}\) In December 1994, a survey conducted in Russia named Kovalev "Man of the Year." A Russian legislator nominated him for the Nobel Peace Prize. See PRICE OF INDEPENDENCE, supra note 36, at 6.

\(^{331}\) See supra note 212; see generally discussion supra Section I.A.2.

\(^{332}\) See Sachs, supra note 26, at 9; see also discussion supra Section I.A.2 (explaining that repression prevents unity among opposition groups).

\(^{333}\) See Sachs, supra note 26, at 9; see also discussion supra Section I.A.2 (stating that opposition groups had become marginalized by the 1990s).

\(^{334}\) See supra note 212.
population cannot be quickly mobilized to support an idea it does not understand.

As noted by the Human Rights Commission, Russia is a society in which secrecy is a serious problem. The Russian government refused to tolerate Kovalev not only because of his disagreement, but simply because he revealed information to the public. Letowska was probably correct in noting that any Ombudsman could provide a check on the government. Even if Kovalev did little more than publicize abuses, he would have fulfilled his function and provided some check on Russian authorities.

The Russian government removed Kovalev when his function of oversight became inconvenient and unmanageable for Russian authorities. Presumably, this could also have happened in Poland; it would be surprising if Communist authorities had not wanted to remove Letowska within a few months of her appointment. In Poland, however, the government could not do so. Letowska's position had a legal basis, and popular mobilization was simply too high for the government to act in blatant disregard of the law.

Kovalev's office, under the social conditions existing in 1994 and under direct governmental control, was unable to serve as an effective guardian of human rights. Section IV will address whether, under the Sachs and Kis theories, any Ombudsman's office can successfully protect human rights in Russia. Before exploring this question, this Note will address the feasibility of jury trials in Russia in light of the Sachs and Kis framework.

2. Jury Trials

The lack of judicial independence is a basic Russian problem and underlies Russia's inability to control abuses by the Procuracy. As mentioned in earlier Sections, the dependence of courts on administrative agencies such as the Procuracy dates to Soviet times. The USSR, partly due to membership of judges and high officials in the Communist party, never had an independent judiciary. Another factor that kept the

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335 See JUVILER, supra note 308, at 150.

336 In fact, popular mobilization was too high for the government to continue in power without cooperation with the opposition. This situation gave rise to the Roundtable Talks. See discussion supra Section I.A.1.

337 Cf. Eugene Huskey, Russian Judicial Reform After Communism, in REFORMING JUSTICE IN RUSSIA, 1864-1996 325, 326 (Peter H. Solomon, Jr. ed., 1997) (calling the Soviet-era court "little more than an extension of executive power").

338 See Savitsky, supra note 34, at 120.

339 See id. at 119.
judiciary crippled throughout Soviet rule was its tight financial ties to political authorities.\textsuperscript{340}

Although Russia has undertaken some reforms to increase judicial power, such as implementing life terms for judges\textsuperscript{341} and somewhat restricting Procuracy power,\textsuperscript{342} many scholars argue that the judiciary can only be strengthened by divorcing it from the Procuracy.\textsuperscript{343} Those scholars argue that jury trials would equalize the balance between the prosecution and defense in criminal trials and prevent the Procuracy from exercising its influence over judges to obtain favorable results.\textsuperscript{344} Jury trials may thus promote the independence that the Russian judiciary so sadly lacks.

Judicial independence is not itself a goal, but a means that allows a court to fulfill its essential functions, including the rendering of impartial decisions.\textsuperscript{345} A reform that fosters judicial independence is successful only if it also promotes essential goals of a criminal justice system governed by the rule of law. This Section evaluates the introduction of jury trials in light of how well juries prevent abuses and protect rights in the Russian criminal system.

Remarkably, the jury trial is not an entirely new reform in Russia. The judicial reforms of the nineteenth century gave czarist Russia limited experience with jury trials.\textsuperscript{346} The juries of that period, although containing a high percentage of illiterate peasants,\textsuperscript{347} were known for their democratic and progressive character.\textsuperscript{348} Implementation of modern jury trials was

\begin{itemize}
  \item \textsuperscript{340} Cf. Huskey, \textit{supra} note 337, at 332 (discussing reforms to decrease judicial financial dependence).
  \item \textsuperscript{341} See Savitsky, \textit{supra} note 34, at 124; see also Huskey, \textit{supra} note 337, at 336. Only about twenty percent of Russian judges had received lifetime appointments in 1998. See Boylan, \textit{supra} note 37, at 1333.
  \item \textsuperscript{343} See \textit{id.} at 359-60. This is one argument for limiting the Procuracy to purely prosecutorial functions.
  \item \textsuperscript{344} See Huskey, \textit{supra} note 337, at 334; see also Boylan, \textit{supra} note 37, at 1343-44 (arguing that the jury trial is a major step that Western and Russian reformers must encourage).
  \item \textsuperscript{345} See Savitsky, \textit{supra} note 34, at 130-131.
  \item \textsuperscript{346} See Alexander K. Afanas'ev, \textit{Jurors and Jury Trials in Imperial Russia, 1866-1885, in RUSSIA'S GREAT REFORMS, 1855-1881} 214, 214 (Ben Eklod et al. eds., 1994) (Indiana-Michigan Series in Russian and East European Studies, Alexander Rabinowitch & William G. Rosenberg eds.).
  \item \textsuperscript{347} See \textit{id.} at 222.
  \item \textsuperscript{348} See \textit{id.} at 228.
\end{itemize}
based on a desire to recapture this period, and drafters of the modern reform project deliberately used the nineteenth-century jury laws as a framework.\textsuperscript{349}

A study of jury trials in Russia requires an understanding of the nature of the proceedings. The current Russian judicial system is based on European continental civil law, with an overlay of Soviet law.\textsuperscript{350} Thus, unlike common law systems, the Russian system is inquisitorial rather than adversarial in nature.\textsuperscript{351} In a traditional Russian trial, the judge plays the dual roles of questioner and fact-finder.\textsuperscript{352} Although advocates may also pose questions, the role of advocates is much more limited in an inquisitorial system.\textsuperscript{353}

Thus, a jury trial in Russia, although otherwise resembling an adversarial jury trial, has necessary differences based on the inquisitorial nature of the proceeding. Since the Procuracy has virtually complete responsibility for developing evidence during pretrial investigation, the defense attorney’s participation in the presentation of evidence is limited.\textsuperscript{354} The jury trial itself makes proceedings more adversarial by equalizing the status of the parties and by emphasizing closing arguments more than would occur in a bench trial.\textsuperscript{355} In addition, the fact that the judge no longer plays dual roles strengthens the defense position considerably.

The Russian jury system, as it presently exists, is somewhat of an anomaly in the degree of discretion it gives to jurors. Jurors reach a specific verdict on a number of questions and then answer an additional question regarding the guilt or innocence of the defendant.\textsuperscript{356} Thus, in theory, a jury can find all elements of a crime satisfied and yet "nullify" its own verdict by finding the defendant innocent.\textsuperscript{357} Jurors may also find that a defendant deserves leniency, which requires a judge to reduce the defendant’s sentence.\textsuperscript{358}

\textsuperscript{349} See Sarah J. Reynolds, \emph{Jury Trials in Modern Russia}, in \emph{Reforming Justice in Russia, 1864-1996} 374, 375 (Peter H. Solomon, Jr. ed., 1997).

\textsuperscript{350} See Boylan, \textit{supra} note 37, at 1330.

\textsuperscript{351} See id.

\textsuperscript{352} This function is increased when, as in 60\% of criminal cases, the Procurator fails to appear. See Shakirov, \textit{supra} note 149.

\textsuperscript{353} See Boylan, \textit{supra} note 37, at 1330.

\textsuperscript{354} See id.

\textsuperscript{355} See id.

\textsuperscript{356} See Reynolds, \textit{supra} note 349, at 380.

\textsuperscript{357} See id.

\textsuperscript{358} Where a jury has requested leniency, the punishment for the defendant may not exceed two-thirds of the maximum penalty for the offense. See \textit{Criminal Code of the Russian Federation}, ch. 10, art. 65(1) (1996), \textit{translated in Criminal Code of the Russian Federation} (William E. Butler ed., trans., 2d ed. 1998); see also id. at 381.
Jury trials were reintroduced in Russia in 1991 on an experimental basis in nine regions. The 1993 Constitution provided the right to a jury trial and required Parliament to pass implementing legislation. Parliament did not do so and, as of 1996, only a few additional regions had adopted jury trials. Even in those regions, jury trials are limited to defendants on trial for the most serious crimes. Thousands of defendants are thus denied in practice a right that exists in the Russian Constitution.

Critics of the jury system cite several bases for their position, including the seriously overtaxed Russian budget. In the nine regions where jury trials have been implemented, jurors are paid relatively generously for their time and expenses. Presumably, this reduces jurors' susceptibility to corruption, but it is also one of the most significant costs of trying a case. The cost to local courts for jurors' salaries alone is equivalent to paying seven judges for each day of trial. The difficulty of financing this type of system probably accounts for the fact that jury trials have not spread beyond the original experimental regions.

In addition, there is inherent distrust for the jury system, especially among government officials. Many fear that a jury system is more likely to release dangerous criminals into the streets. The current Duma supports measures it perceives as tough on crime, and is thus reluctant to approve a measure that would result in more acquittals. Finally, some critics have

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359 See Reynolds, supra note 349, at 376.
360 See Boylan, supra note 37, at 1337.
361 See KONST. RF (Constitution of the Russian Federation) Sec. 1., ch. 2, art. 47(2) (1993); see also id.
362 See Reynolds, supra note 349, at 384. A plan to extend jury trials to twelve additional regions in 1999 failed due to lack of funds. See 1999 Russia Report, supra note 18, at Sec. 1(e).
363 See Reynolds, supra note 349, at 388.
364 The denial of this right to some members of the Russian population may also violate the Equal Protection clause of the Russian Constitution. See Boylan, supra note 37, at 1341.
365 See Reynolds, supra note 349, at 388.
366 Jurors are compensated at a rate of one-half of the judge's daily pay. See id. at 383.
367 See id. at 387.
368 See id.
369 See id.
370 See Boylan, supra note 37, at 1338.
stated that jury trials would lengthen proceedings and increase the possibility of bias by "non-professional" jurors.  

Proponents, on the other hand, argue that jury trials would not only strengthen the judiciary and equalize the balance between the parties in a criminal trial but would have several other positive effects as well. Jury trials might shift the focus from that of a totalitarian state hostile to the individual to once again involving the public in the process of justice. Thus, a jury system might inject a "democratic conscience" into the criminal system.

Jury trial proponents acknowledge that the jury system depends on acceptance and enthusiasm by the public to function effectively. It is unclear what the actual efficacy of jury trials has been thus far. For example, the drafters granted jurors great discretion to "nullify" verdicts or request leniency in order to allow jurors to "send a message" that a law or punishment was unduly harsh. In practice, however, these powers have been used rarely. As of 1996, there had been no reported instances of jury nullifications. Leniency requests also did not occur in the majority of cases. Individuals asked to serve as jurors have reported a high rate of satisfaction with the system, although the high rate of pay may at least partially account for this reaction.

Conviction rates in jury trials have proven to be much lower than those in traditional Procuracy-dominated trials. Nonetheless, few defendants request jury trials, which may reflect either a belief that jury trials are equally repressive or simply a lack of awareness that jury trials are available.

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372 See Smith, supra note 342, at 361.
373 See Reynolds, supra note 349, at 377.
374 See id. at 378.
375 Cf. id. at 379 (stating that, under the czarist system, the jury was considered the "democratic conscience").
376 See id.
377 See id. at 381.
378 See id. at 385.
379 See id.
380 See id. at 387.
381 Acquittal rates in traditional trials are between 0.5 and 1 percent. See Akin, supra note 371. In 1997, juries acquitted 22% of defendants. See <http://www.rusmysl.ru/1991/4255/425518.html> (visited Feb. 27, 2000). According to the U. S. Department of State, the percentage of acquittals was 21.3% in 1999. See 1999 Russia Report, supra note 18, at Sec. 1(e).
382 See Reynolds, supra note 349, at 388.
Certainly there are many ways in which juries might protect the rights of defendants better than the traditional Russian court. For example, juries would acquit a defendant where evidence did not support guilt, instead of sending the case back to the Procuracy for additional investigation. In addition, juries would presumably represent average Russians, often hostile to the Procuracy, rather than high officials with possible ties to that institution. Although this might inject a degree of bias in favor of the defendant into the proceedings, it can be argued that the repressive nature of the former system requires this type of strong counterweight.

Jury trials could not directly protect defendants from pretrial abuses. There are, however, at least two indirect ways in which juries might check this behavior. First, by reducing the power of the Procuracy and strengthening the court's power for judicial review, juries might allow the courts to better supervise Procuracy misconduct. Second, juries could independently police the Procuracy by throwing out cases where evidence was illegally obtained or insufficient. This would provide an incentive to the Procuracy to observe human rights in its investigations, at least where its misconduct could be discovered.

Jury trials have some potential to aid in the protection of human rights. However, this is true only if the underlying theory of reform takes hold successfully in the population. The question is whether Russia can create economic and social conditions in which jury trials will succeed. This paper argues that Russia cannot achieve these conditions in the near future. Section IV will further address this problem.

3. Supporting Factors in Russian Reform

This Section will briefly discuss the role of the Russian Constitutional Court and international standards in Russian reform. As in Section III(A)(2) above, the focus is not on these developments as independent reforms, but on their effect on the transition environment as a whole.

a. The Constitutional Court

Scholars have viewed the Russian Constitutional Court, established in 1991, as effective to some degree. The law creating the Court granted it broad powers to declare acts unconstitutional or to require the institutions

383 Cf. Savitsky, supra note 34, at 132 (arguing that the Court took a dominant position in its first few years of existence).
creating the acts to modify them. The Court’s duties include constitutional supervision of Parliament, the President and executive agencies. The Court may also prevent the ratification of treaties it finds unconstitutional. In addition, an individual may file a petition with the Court after exhausting other domestic remedies. The Court’s decision, based on individual petition, that a law deviates from the Constitution again requires the agency responsible to modify the law in question.

The Russian Constitutional Court thus creates a legal foundation for separation of powers. The government has already bolstered the Court’s legitimacy by recognizing members’ life tenure and not attempting to remove Court members. Questions still remain as to whether the Court will be able to provide a check on the executive and legislative branches when it really counts. The new Constitution allows the president alone to issue binding decrees (although those decrees are still subject to the Constitution). In addition, the fact that the Duma and the President have been able to successfully work together in the past suggests that these institutions together might be able to overpower the Court in a conflict.

The Russian Constitution provides that universally accepted human rights norms take precedence over domestic law and have direct effect in Russia. In its first few years of existence, the Constitutional Court found

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384 The Russian Constitution now provides for the existence of the court and defines its jurisdiction. See Konst. RF (Constitution of the Russian Federation) Sec. 1., ch. 7, art. 125 (1993); see also id.


386 See Konst. RF (Constitution of the Russian Federation) Sec. 1., ch. 7, art. 125 (1993); see also Feldbrugge, supra note 385, at 186.

387 Individuals have the right of appeal to domestic courts and to international bodies after exhaustion of domestic remedies. See Konst. RF (Constitution of the Russian Federation) Sec. 1, ch. 2, art. 46 (1993); see also Savitsky, supra note 34, at 133.

388 See Savitsky, supra note 34, at 133.

389 It is unclear how separate the court will be from the executive branch in practice. One potential problem is that the law creating the court also gave life tenure to all its members, some of whom were nominated by hard-line Communist organizations. See Rein Mullerson, Perspectives on Human Rights and Democracy in the Former Soviet Republics, in Human Rights in Eastern Europe 47, 67 (Istvan Pogany ed., 1995).

390 See Bowring, supra note 304, at 106.

391 See Konst. RF (Constitution of the Russian Federation) Sec. 1, ch. 7, art. 90 (1993); see also id.

392 See Bowring, supra note 304, at 106.

393 "The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those
violations not only of the Russian Constitution but of international human rights norms as well. In a 1992 case, the Court applied the International Covenant on Economic, Social and Political Rights, as well as several International Labour Organisation instruments.

Thus, although the Russian Constitutional Court lacks the support that an Ombudsman might provide (and has provided in Poland), it has shown a desire to play a role in enforcing human rights norms in Russia. The difficulty is the current weakness of the Court acting alone, since it cannot choose its controversies. The Court's attempts to apply binding international law norms in Russia indicate that the Russian Constitutional Court might benefit from cooperation with an Ombudsman, who could bring Russian human rights issues before the Court. The Court might thus have the opportunity to demonstrate its willingness to move toward greater human rights protection in Russia.

b. International Law and Integrated Russian Reform

The binding status of international human rights norms in the Russian Constitution allows a brief analysis of the extent to which international law and international human rights groups have furthered the protection of human rights in Russia. Russia has joined the Council of Europe and is a party to several international human rights instruments, including the European Covenant of Human Rights. Russia is still in the process of fully implementing these norms since, although the Russian Constitution is consistent with instruments like the European Convention, some provisions of Russian legislation still conflict with those documents. Russia has at least attempted to draft federal legislation that would spell out human rights standards in domestic law.

Russia does have a large number of non-governmental organizations, whose work focuses on various issues of economic and

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See CONSTITUTION OF THE RUSSIAN FEDERATION Sec. 1, ch. 1, art. 15(4) (1993); see also id. at 104.

See Savitsky, supra note 34, at 134; see also Bowring, supra note 304, at 104.

See Bowring, supra note 304, at 104.


For example, the Russian police law still permits the use of physical force to stop administrative offenses. In addition, the use of jury trials in only nine regions may violate a provision granting equal protection. See id.

Many of these organizations are chronically short of funds and operate with budgets made up primarily of money from foreign grants. Although such constraints no doubt face NGOs in Poland and many other nations, they have proven to be only one of a series of obstacles facing Russian NGOs.

These organizations complain that, although they want to cooperate with government officials to ensure human rights protection, the government is not willing to engage in dialogue with human rights groups. Although a presidential decree now recommends that regional leaders organize human rights commissions analogous to the presidential commission, the decree still does not promise any dialogue between authorities and organizations representing the Russian people. Thus, Russia may not yet be on the path to Ki’s coordinated transition, since it is only through dialogue and negotiation between opposition and the government that such transition can occur.

To some extent, Russia has demonstrated an increasing desire to comply with international human rights standards. The adoption of international conventions that inject binding norms into Russian law supports that proposition. Nonetheless, progress has been slow and Russia does not yet protect human rights in a manner acceptable to the international community. Section IV will analyze the question of whether the current reforms will be, over time, sufficient to push Russia into compliance. In addition, it will address what further actions can be taken, in light of the Sachs and Kis transition theories.

IV. NEW APPROACHES TO REFORM IN RUSSIA

Poland and Russia, although once under the same central Communist authority, have taken very different transition paths, despite experiments with similar reforms. This Section will apply the Sachs and Kis framework to identify critical lessons derived from the Polish and Russian transition experiences. It will evaluate the relationship between societal factors and the success of reform.

Finally, this Section will draw on the Polish experience to articulate the reforms that might be most successful in protecting human rights in Russia. It will argue that an Ombudsman with a legal basis of power is an institution that might be adapted to achieve some measure of success in

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399 See Juviler, supra note 308, at 170.
400 See id. at 181.
401 See id. at 183.
403 See id.
Russia. The jury trial experiment, on the other hand, might have been unrealistic given the government's inability to fully implement that system legally or financially. In addition, the Polish experience may demonstrate that the jury trial is unnecessary, and that Russia should divert its resources toward less costly reforms.

A. The Office of the Ombudsman

Although Russia and Poland both experimented with an Ombudsman's office early in the reform period, the two nations had very different experiences with the institution. Both offices were created under Communist regimes; yet, Letowska's office was able to gain power and provide an effective check on the government, while Kovalev failed to do so and was removed from office by the government. There are several reasons for the varying results.

First, the Polish Ombudsman was the first such institution in the former Soviet bloc. The Ombudsman thus had the advantage of surprise, since the government was unaware that the Ombudsman might effectively check government function. Second, Poland benefited from a coalition of numerous opposition groups, which existed prior to the formation of the Ombudsman's office. These groups provided support to the Ombudsman in its efforts to check government abuse. Finally, the Polish Ombudsman, unlike the Russian Ombudsman, possessed legal authority. This rendered the position more credible and, given the high popular mobilization in Poland, made the Ombudsman impossible to remove.

The question is whether, given societal conditions, Russia may fashion any Ombudsman's office that effectively safeguards human rights. This Note argues that the achievement of such an institution is possible and that Russia has taken several small first steps toward protecting human rights by recently electing its new Ombudsman.

In 1998, Russia finally completed all the steps necessary to place its new Ombudsman, Oleg Mironov, in office. The process took a full three years after the removal of Sergei Kovalev. Although Mironov has no human rights experience, his position has an advantage over that of Kovalev in that it exists absent a special decree from Yeltsin.

Nonetheless, legality is neither the only nor the primary factor determining the success of a particular reform in a transition country. As the Sachs and Kis theories explain, countries are driven toward peaceful transitions where a repressive government faces strong, credible opposition. Opposition groups mobilize the population and force cooperation between the two regimes. In addition, the existence of strong opposition checks the ruling authority throughout the transition period. The threat of the opposition protects against abuses and excesses.
Thus, the legality of Mironov's position is important only to the extent that it lends credibility and strength to a coalition of human rights opposition groups. It clearly serves these purposes, at least to some degree. The fact that the Ombudsman's position has a legislative basis makes Mironov both more credible and more difficult to remove.

It was not a difficult task for Yeltsin's Duma to remove Kovalev in 1995. In fact, Yeltsin could have removed him without submitting the issue to the Duma, since Kovalev's position was dependent on authority given by the executive branch. Presumably, if Yeltsin had not had Duma support, he would have removed Kovalev in this manner.

On the other hand, if the executive branch desired to remove Mironov or a later Ombudsman, it would need support from the Duma. The Duma could remove the Ombudsman (for a reason specified in the original legislation) or repeal the old law. If the Duma refused to do this, the executive would act in violation of the law by removing the Ombudsman. Such a violation would raise at least some protest from NGOs and other human rights activist groups.

Mironov possesses another advantage over Sergei Kovalev: he took office four years later. In the interim, human rights groups have proliferated and strengthened in Russia. It thus appears that Mironov can align himself with a coalition that is somewhat stronger than the relatively young groups that backed Kovalev in 1994. Kovalev, of course, had a governmental human rights commission made up of strong activists. The problem was that the commission was governmental and under Yeltsin's direct control. An Ombudsman can be more successful if, as in Poland, he can align himself with the population against the government.

Mironov's current position, furthermore, seems to parallel that of Ewa Letowska in 1989. Letowska, like Mironov, had no political experience. Nonetheless, her power to oversee human rights was founded in legislation. It is promising to note that Mironov has taken office in the same legal situation as Poland's Letowska. Mironov's Communist ties, however, may undercut his function by rendering him more subject to governmental influence than was Letowska. Letowska, however, was also selected specifically to serve as a puppet of the Communist party.

Letowska's optimistic view is that any Ombudsman who properly performs his functions can be an effective check on the government. Kovalev provided that type of check during the brief life of his office. Mironov's actions, as well, seem to indicate that he intends to take his

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404 The 1995 draft law on the Ombudsman provided for the election of the Ombudsman by the Duma for a five-year term. Removal of the Ombudsman would require a majority of the Duma members. Unfortunately, the listed grounds on which the Ombudsman could be removed were vaguely stated. See PRICE OF INDEPENDENCE, supra note 36, at 12. The draft law on the Ombudsman was enacted into law in March 1997. See 1997 Russia Report, supra note 315, at Sec. 4.
responsibilities seriously. In the area of criminal procedure, Mironov has taken several important steps, including investigating corruption in the Procuracy and advocating shorter periods of pre-trial detention.

It is true that an Ombudsman acting alone can be only minimally effective. The movement of the Russian Constitutional Court toward applying international human rights norms is consistent with the actions of the Polish Tribunal. That movement is promising and suggests that the Russian Constitutional Court might enhance Mironov's position. The power to bring actions is central to the function of an Ombudsman, and it is doubtful whether Letowska could have been as effective without a Court willing to apply international conventions.

Still, the ultimate success of an Ombudsman depends on the extent to which he can align himself with a credible coalition of opposition. Although such a coalition does not truly exist in Russia today, the increased activity of NGOs and human rights groups suggests that, at the least, ideas of democratic change have begun to take hold in the popular consciousness of Russia. In addition, the Russian Orthodox Church continues to gain strength. Although these groups have not mobilized Russia the way the Roman Catholic church and the Solidarity movement mobilized Poland, it is likely that, over time, popular mobilization will continue to grow. If the Ombudsman remains a part of Russian society, it will participate in and contribute to the change in popular attitude. The international community should encourage the development of human rights activist groups and changes in the public consciousness, while recognizing that a strong opposition coalition will take years to develop in Russia.

Of course, much depends on political events. Russia still has only the seeds of a popular human rights movement; a controversial leader could fragment and destroy the opposition coalition. If, however, Russia continues its slow progress toward human rights awareness, the Ombudsman could contribute positively to that process.

B. Jury Trials

Like the office of the Ombudsman, the jury trial is a reform that might, over time, have the result of shifting the popular consciousness. There are several ways in which the jury trial could do so and, in the process, end the Procuracy's complete control over the criminal justice system. Jury trials might serve a useful purpose in Russia at some point in the future. However, given financial and societal factors, jury trials are inappropriate in Russia at the present time.

First, the financial obstacles to implementing jury trials in all of Russia are enormous. Russian courts are so strained that they cannot pay for basic expenses. Although the Russian Constitution provides that only the federal government should finance the courts, budget cuts over the last
few years have placed many courts in dire straits. About half of all courts are receiving financial aid from local governments and, despite such aid, many courts cannot even pay electricity and telephone bills. It is difficult to contemplate a more expensive reform than the 1991 jury experiment.

As discussed in Section III, one of the largest expenses is paying the salary of the jurors. Generous compensation (currently equal to one-half the daily salary of a judge) is necessary both to ensure that jurors will appear and to reduce susceptibility to bribery. However, the large expense is likely the reason that few regions beyond the original nine have adopted jury trials.

Financial constraints are an insufficient reason to completely reject a reform that has the potential to work effectively. Presumably the current experiment could be modified to make it more economically feasible. Nonetheless, the financial reality of Russia suggests that not all regions can undertake the reform at this time. Furthermore, implementing jury trials in only a portion of Russia seems to violate the Equal Protection Clause of the Russian Constitution.

This argument assumes that in implementing reforms with the goal of achieving a law-based state, reformers should attempt to comply with law. Section IV(A), above, mentions several reasons for ensuring the legality of reforms. Among these reasons are the need for instilling a sense of legitimacy in the population and the increased permanence that reforms gain when founded on a legal basis. Thus, Russian jury trials should be put off until all regions are financially able to undertake the reforms.

In addition, juries might be unable to have any real impact on human rights violations. Pretrial abuses would be beyond the jury’s direct control. It can be argued that juries strengthen the judiciary and allow more stringent review, or that juries can throw out cases where evidence has been illegally obtained. It is the judge, however, who would be directly responsible for either of these effects. A strong judiciary that is unwilling

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405 See 1999 Russia Report, supra note 18, at Sec. 1(e); 1998 Russia Report, supra note 18, at Sec. 1(e).
406 See 1999 Russia Report, supra note 18, at Sec. 1(e).
407 See Reynolds, supra note 349, at 387.
408 "Every citizen of the Russian Federation shall enjoy in its territory all the rights and freedoms and bear equal duties provided for by the Constitution of the Russian Federation." Konst. RF (Constitution of the Russian Federation) Sec. 1, ch. 1, art. 6(3) (1993).
409 The author recognizes that postponing jury trials still would result in violation of Sec. 1, Ch. 2, Art. 47(2), of the Russian Constitution, which provides the right to a jury trial. However, current Russian reality demonstrates that the equal protection clause and the jury trial provision are necessarily inconsistent at this time. The Russian government must choose between these provisions and should elect to repeal the jury trial provision, since Russia is fundamentally unable to comply with such a provision.
to police the Procuracy cannot contribute to human rights reform. The judge, even under the current system, presumably has discretion to throw out a case on insufficient or illegally obtained evidence. If the judge fails to do so, juries still have the option of simply acquitting the defendant. This assumes that juries understand the importance of procedural safeguards, which may be a questionable proposition in Russia.

More important are the societal factors that underlie a reform and allow it to function effectively. A reform such as the introduction of jury trials relies on the presence of certain concepts in the popular consciousness. For several reasons, Russia has not developed a popular consciousness that would allow jury trials to work effectively.

First, Russia's tradition does not support the concept of a state ruled by law. Even if it did, it would not support the notion of public participation in enforcing the law. Russia's regime has been totalitarian in nature for seventy years. Although Russia did have jury trials during the czarist period, there are few that could remember or revive the ideas of that period. This means that the idea of negotiated transition is not present in the Russian popular culture, and must be invented from scratch before change can be effected in Russia.

Russian juries thus might be unprepared for their responsibilities. Since citizens have had so little participation in criminal law, they are likely to be unfamiliar with concepts of guilt and burdens of proof. It will be difficult for jurors to understand these concepts even when explained by the judge. In a nation that has not been ruled by law, juries are much less likely to appreciate the significance of law and conform their decisions to legal principles. In the most obvious scenario, jurors might be vulnerable to outside influences.

The popular consciousness that has developed over the Communist and post-Communist period is likely to lend certain elements to the decision-making process of a Russian jury. Fear is an element that may produce varying effects. For example, general fears of the rising crime rate and demands for justice may lead a jury to convict on insufficient evidence. Such an outcome is quite likely in a nation that has continually maintained a repressive penal attitude. On the other hand, fear of crime must be balanced against distrust of government agencies and the likelihood of acquittal based merely on anger at the government. Finally, specific fear for the well-being and safety of one's family and friends also exists in Russia, and it is likely that Russian juries will not convict a defendant that they believe has powerful and dangerous connections. It is not clear that these dangers will be reduced or eliminated by maintaining the present

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410 This means, in terms of the Sachs and Kis theories, that Russia does not have the concept of a law-based state present in the popular consciousness. See discussion supra Section II.B.

411 See discussion supra Section III.B.2.
system of trial by judge. Still, it may be quicker and easier to educate judges to the concept of rule of law than the general population. It will certainly be less expensive.

Although Poland has not yet implemented jury trials and shows no sign of doing so, it could be argued that this reform would have a greater potential for success in Poland. Unlike Russia, Poland's notions of democracy and public participation in law were not completely suppressed throughout the Communist period.\footnote{See discussion supra Section I.A.1.} The fact that a Solidarity movement could emerge and demand a voice in the system demonstrates this.

As Sachs and Kis point out, the fact that the concept of a transition governed by law existed in the Polish consciousness meant that Poland did not have to invent these notions from scratch. Poland could have relied on a citizenry that welcomed the chance to shape the rule of law to support the introduction of jury trials. The fact is that Poland did not implement jury trials. It is true that Poland had no prior model to draw on and that Russia's previous experience with jury trials presumably made that proposal more attractive. Nonetheless, Poland probably had more resources than Russia and social conditions more appropriate to jury trials. Despite these factors, Poland undertook a reform program without jury trials.

The absence of jury trials does not appear to have crippled Poland's transition. As discussed in earlier Sections, Polish judges render justice independently and without illegal influence. Although Poland still has long periods of pretrial detention, judges review detention orders and enforce time limits. In addition, torture does not occur and confessions are not coerced during pretrial detention.

The fact that Poland can protect basic human rights in the absence of jury trials suggests that Russia might better divert its resources toward reforms that would be less costly and more effective. Funds might be better used to implement reform within the judiciary itself; for example, those funds could provide education to ensure that judges are capable of applying rules of law.\footnote{In October 1999, then-Prime Minister Putin signed a decree establishing the Academy of Justice, Russia's first judicial training institution. See 1999 Russia Report, supra note 18, at Sec. 1(e).} The Russian judiciary could also benefit from restructuring to reduce its political and financial dependence on the executive branch.

Jury trials are unquestionably one mechanism for bringing the public into close involvement with the law, and this is a desirable effect. If, however, jury trials are implemented in the hopes of cultivating notions of law in the popular consciousness, the reform seems to be premature. Jury trials rely on a population which already understands the rule of law, and in which notions do not have to be invented. Once those concepts are in
place, jury trials may serve a very positive function in Russian criminal law. For the present, there are more efficient ways to educate the population.

V. THE FUTURE PROSPECTS OF CRIMINAL JUSTICE REFORM

The Sachs and Kis framework suggests that Russia has many battles yet to fight. Societal, more than legal, conditions have impeded Russia thus far in completing its transition and protecting human rights at a level acceptable to the world community. Poland, galvanized by its strong non-governmental groups, has advanced farther. This comparison illuminates steps the international community can take to encourage the reform process in both countries.

Joining international conventions and applying international standards in domestic law are small but positive steps for Poland and Russia. Other nations should encourage progress by overseeing human rights and ensuring increased compliance with conventions over time. The activity of foreign human rights organizations, especially in Russia, should continue. The international community is an external force that, in collaboration with local groups, may exert a positive influence over the government. International organizations should also be willing to assist local groups when necessary, to facilitate communication with the government and to develop strategies for improving human rights protection. The international community can thus promote the development of internal checks on government abuse and encourage the growth of civic society.

Throughout the process, societal factors should be emphasized and reform programs should be tailored to build on concepts already present in society. Social factors, rather than the structure of institutions, determine the success or failure of transitions. The Sachs and Kis theories provide more than a mere justification for predictions about the success or failure of transitions. Such a function would not be useful, since it would simply force a conclusion about the likelihood of implementing a reform program effectively. Instead, the theories provide a context in which to place proposed reforms to evaluate the potential of each reform individually. By examining each reform within its societal framework, we view the broader range of factors that will actually affect the reform's success. Reforms that build on conditions already present in society will be successful, while those that make false assumptions about a society's capabilities will not. The Sachs and Kis framework reminds us not to hastily transfer a reform from one society to another without an analysis of societal factors.

These observations are pertinent not only to reforms in Poland and Russia, but to reform programs occurring in the proliferation of new republics in our modern world. We live in an era of emerging and
reemerging nations, as well as an era of transition and reform. It is tempting and often instructive to draw on the experiences of other nations. The comparison of reforms in Russia and Poland demonstrates that reforms that are carefully adapted to the social climate are more likely to be effective. This experience provides a useful context for evaluating the success and failure of reform.