



# THE JUDICIAL ROLE IN PRISON REFORM: COMPARATIVE ANALYSIS OF THE UNITED STATES AND RUSSIAN FEDERATION

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### **ABSTRACT**

The treatment of prisoners in a democratic society is an effective measure of that society's commitment to human rights due to the fact that democratic institutions of elected representation often do not serve prisoners as a constituent group to which elected officials may be held responsible. The American reform of correctional institutions from the 1960-1980's is a fruitful example of judicial intervention to secure the rights of prisoners. This paper seeks to apply a similar action on the part of the judiciary to the Russian context, to ascertain its applicability and feasibility, where prison reforms would serve to solidify human rights and the authority of the judiciary in the fledgling democracy.

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## LIST OF ABBREVIATIONS

**Arbitrazh:** A branch of the federal court system in Russia whose subject-matter jurisdiction relates to economic disputes, separate from the Courts of General Jurisdiction

**CPT:** The Council of Europe Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

**CAT:** The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, investigations and compliance with this convention is conducted by the Committee Against Torture

**ECHR:** European Court of Human Rights, a Council of Europe Body which hears complaints of alleged violations of the European Convention of Human Rights and Fundamental Freedoms

**GUIN:** (Glavnii upravlenie ispolneniya nakazanii) Former Russian Department of Corrections, now under the Ministry of Justice

**ICCPR:** The International Covenant on Civil and Political Rights

**MVD:** (Ministerstvo Vnutrennikh Del') Russian Police Service and Ministry of Internal Affairs

**Procuracy:** Official state prosecutorial office in Russia

**SIZO:** (sledstvenniy izolyator) Russian pre-trial detention facility

## 1 INTRODUCTION

Prison conditions are a unique and telling manner by which to judge a democratic society for several reasons. The treatment of criminals as a social group often rouses anger and hatred of both crime and those convicted. It is for this very reason that Franklin Zimring and Gordon Hawkins called the treatment of criminal offenders the “weakest link” in the assessment of limitations on state power.<sup>1</sup> It is the “weakest link” because the treatment of criminal offenders is often the least attractive means by which to limit coercion on the part of the state over individual citizens, due primarily to the fact that criminals are, unlike other underprivileged social groups, some of the most feared and hated members of society. The authors note a general consensus among members in a democratic society that imprisonment constitutes the most severe deprivation of liberty that is tolerated by society at large as both legitimate and constitutional. The notion that prisoners have had some agency or choice in placing themselves in this sector of society exacerbates what little incentive may have existed for providing liberties and rights to this particular group. The notion that prisoners constitute the “weakest link” between citizens and limitations of state power makes this the most important frontier in marking the discernable limits of the exercise of state power in society. Democratic societies and institutions, touting the protection of rights and liberties of the individual, can be effectively measured by this “weakest link,” in their commitment to upholding the basic liberties of even the most unattractive group in society for whom to lobby for such rights.

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<sup>1</sup> Franklin E. Zimring and Gordon Hawkins. “Democracy and the Limits of Punishment.” The Future of Imprisonment. Oxford University Press. New York, New York. 2004. Pages 157-196.

## 1.1 *The American Model of Judicial Policy-Making*

In one of the most remarkable displays of judicial muscle, the determination of rights and liberties belonging to prisoners was asserted in the United States beginning in the 1960's through the late-1980's by the federal judiciary. What began in the 1960's, following the "hands off" era in prison systems regulation, was an important and fundamental break with both the historical judicial policy regarding prisons systems and the relationship between the judiciary and the legislature in the establishment of a judicial policy limiting constitutional norms in prisons. The federal judiciary heard complaints of prisoners in federal prisons and began by redressing individual complaints before the court. As complaints multiplied, Malcolm Feeley and Edward Rubin describe the ensuing result:

The decisions of the federal judiciary have established a comprehensive code of detailed rules and regulations that governs every prison in America, a code that is reflected in state statutes, administrative regulations and internal prison rules that is understood by virtually every lawyer and corrections commissioner, and that is monitored by compliance officers in every state department of corrections.<sup>2</sup>

What began as piecemeal reform from individual complaints led to the formulation of a broad and expansive policy mandated by their interpretation of constitutional norms, of limits on the treatment of prisoners.<sup>3</sup>

In both seeking to limit inmate insurrection and determine the limits of the constitutional governmental authority, the federal courts detailed mandatory treatment under the U.S. Constitution in areas such as the provision of mental and physical health care in prisons, the use of force and punitive measures and general conditions of confinement in various institutions, including situations of overcrowding. This example from American jurisprudence provides several key aspects by which to

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<sup>2</sup> Malcolm M. Feeley and Edward L. Rubin. Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons. Cambridge University Press, Cambridge, U.K. 1998. Page 15.

<sup>3</sup> Ibid. Page 15.

formulate a model for a similar kind of reform. The nature of prison reform, as noted above, is not particularly conducive to the traditional legislative processes, as prisoners do not generally amount to a constituent group to which legislators can be held responsible, and the role of correctional institutions as penal measures often hinders any concerns over prisoners' rights. In this sense, this can be seen as an applicable standard of *minimum* constitutional guarantees of citizens in that society, which, as the example of the United States shows, may require the action of the judiciary.

## 1.2 Application to Russian Context

The importance of prison reform in Russia is indisputable. The State Department of the United States issued a report in 2008 stating that:

Prison conditions were harsh and frequently life threatening... As of November, 891,700 persons were in the custody of the criminal justice system, an increase of 3,600 from 2007. This number included 8,800 juveniles, 784 children under age 14, and 68,200 women. Conditions in SIZO pretrial facilities remained extremely harsh and posed a serious threat to health and life. Conditions within different SIZOs varied considerably. Health, nutrition, and sanitation standards remained low. Poor ventilation was thought to contribute to cardiac problems and lowered resistance to disease. Overcrowding was common, and the Federal Prison Service reported that approximately 158,000 suspects were being held in pretrial detention facilities designed to house 130,000.<sup>4</sup>

Additionally, Amnesty International also reported in 2008 that

Riots in several prison colonies were reported. Prisoners were protesting against ill-treatment and violations of their rights, such as denials of family visits and receipt of food parcels, and the frequent use of punishment cells for minor violations of prison rules. Similar reports were received from prison colonies in Krasnodar, Sverdlovsk and Kaluga Regions. The media reported that three prisoners died as a result of the suppression of a riot in Sverdlovsk Region.<sup>5</sup>

<sup>4</sup> "2008 Human Rights Report: Russia" 2008 Country Reports on Human Rights Practices. U.S. Department of State, Bureau of Democracy, Human Rights and Labor. Published February 25, 2009. <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119101.htm#> Accessed March 11, 2009.

<sup>5</sup> "Human Rights in the Russian Federation" Russian Federation Amnesty International Report 2008. <http://www.amnesty.org/en/region/russia/report-2008> Accessed March 11, 2009.

Fulfilling these minimal constitutional guarantees is a particularly important concern in the case of Russia for a number of reasons. First, the role of the fledgling judiciary is often called into question as the burgeoning authority of the legislature and executive begins to flourish, stemming any judicial autonomy arising from decisions issued by the Constitutional and Supreme Courts contrary to legislative or executive policies and calling into question the separation of powers and other basic tenets of democracy. The Constitutional Court has sordid history at its initial inception in 1991, under the Constitution of 1978, where the Court often decided cases ignoring the Constitution outright, preferring instead a mere accordance with its own political will. The Court's subsequent dissolution and re-formation in 1994 under the Constitutional Law on the Constitutional Court left it largely de-politicized, and therefore more legitimate, although it tends to show great deference to the executive.<sup>6</sup> Despite several provisions in 1994 Federal Constitutional Law and those implemented to secure regional compliance with Constitutional Court decisions providing for the authority of Constitutional Court decisions, Alexei Trochev writes: "The persistent noncompliance with and frequent delays in the implementation of its decisions of federal and regional authorities alike worry the justices, in particular, about the weakening of the Court's public image."<sup>7</sup>

Secondly, there are notable implications in considering the courts' ability to assert prisoners' constitutional rights, for the "Rights and Liberties of the Man and Citizen,"<sup>8</sup> the second chapter in the Constitution of the Russian Federation. In order to carry some weight as limitations on government power, as opposed to paper-bound

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<sup>6</sup> Leigh Sprague. "The Russian Constitutional Court." *The Journal of East European Law*. Vol. 4. 1994. Pages 339-356.

<sup>7</sup> Alexei Trochev. "Implementing Russian Constitutional Court Decisions." *East European Constitutional Review*. Vol. 11 No. 1, Winter/Spring 2002. Page 96.

<sup>8</sup> Translation of the Chapter heading found at the Constitutional Court's official electronic copy of the Constitution in English, found at <http://constitution.ru/en/10003000-01.htm> accessed on 3/11/09.



provisions, lacking in any ability to be asserted against government infringement, the courts must be able to assert these rights in the most deplorable human rights circumstances: in prisons.

The following inquiry of this paper shall attend to the question, “What indicates that the Russian courts may have the authority to assert prisoners’ challenges to conditions of confinement through their interpretation of torture provisions?” The investigation of which will provide insight into the power of the courts to enforce constitutional rights contrary to government policy and add teeth to the heavily borrowed<sup>9</sup> and recently transposed rights provisions. Though the problems that plague Russian prisons are manifold, ranging from length of pre-trial detention periods to life-sentences and the death penalty, several of which amount to torture under the Russian Constitution, this paper will deal exclusively with the conditions of Russian prisons and detention facilities and torture under the Constitution of the Russian Federation and its binding international agreements.<sup>10</sup>

### **1.3 Format for the Analysis of the Applicability to the Russian System**

I shall draw from the lessons of the American judicial reform and apply useful considerations for the reform Russian penitentiary system. Although it should be noted that there are several crucial differences between the American and the Russian system, not the least of which are the differences between the wording of the Eighth Amendment in the U.S. Constitution and Article 21 of the Constitution of the Russian

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<sup>9</sup> The rights found in the second chapter of the Constitution of the Russian Federation are a near verbatim recitation of the rights found in the Universal Declaration of Human Rights.

<sup>10</sup> The Criminal Procedure Code of the Russian Federation of 1996, mandates pre-trial detention periods of two to three months, however the Procurator, Deputy General Procurator and General Procurator may extend these periods, leaving the accused behind bars upwards of two to three years. V. A. Chetvernin writes: “So the extended periods of detention awaiting trial already themselves constitute torture.” *Konstitutsiya Rossiskoi Federatsii: Problemnii Komentarii (Constitution of the Russian Federation: Problems and Commentary.)* Tsentr Konstitutsionnykh Issledovani, Moskovskogo Obshchestvennogo Nauchnogo Fonda, Moscow, Russia. (1997). Page 150. (Self-translation).

Federation and Article 3 of the ECHR. Additionally, the authority of the decisions of the embryonic Russian courts are often called into question politically by other branches of government and regional governments who choose not to enforce the Courts' rulings. The Russian judiciary may by no stretch of the imagination be called 'activist,' and taking the hard-line policy used by the U.S. Federal court system in the penitentiary reform cases requires a level of legitimacy and authority that is simply non-existent in the Russian system. These limitations, along with others, shall be formally addressed below in assessing the limitations of the applicability of the American model.

What can be drawn from the U.S. example, however, is the evolving of the prohibition against torture, cruel and unusual punishment to cover prisoners' challenges to conditions of confinement.<sup>11</sup> I look into at the role of the Eighth Amendment in the U.S. jurisprudence because this provision is most simply paralleled with that of the prohibition against torture in provisions of the Constitution of the Russian Federation and binding international law, unlike other rights in the U.S. used to assert change on the penitentiary system, such as substantive due process, which do not exist in the Russian legal system.

Beginning with the evolution of the jurisprudence of the federal courts resulting in substantial prison reform, I shall delve into Eighth Amendment requirements for conditions in federal prisons in the United States. I will then address the ability for such interpretations to be made to the Russian legal system given the Constitutional Courts' ability to formally make law in two ways, that is through

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<sup>11</sup> The Eighth Amendment to the U.S. Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

“negative legislation,”<sup>12</sup> meaning to invalidate existing norms and policies that do not conform with the Court’s interpretation of higher ranking norms, and to interpret Article 21 as to mandate certain minimum standards in the penitentiary system.<sup>13</sup> Following that will be a discussion on the European Convention on Human Rights and Fundamental Freedoms, and the European Court of Human Rights jurisprudence on Article 3, which condemns prison conditions as torture and serves to support initiatives of domestic courts. Although these serve as notable benchmarks as enforceable<sup>14</sup> interpretations on standards of violations of Article 3 in prisons, I shall focus more directly on domestic decisions as it is more salient for the purpose of solidifying Constitutional liberties and asserting the authority of the courts.

By seeking to implement both the domestic Constitutional Law requirements of Article 21 on the American model, defining the exact nature of the requirements thereof through individual Constitutional complaints, reinforced with the jurisprudence and definitions of torture in prison conditions in the European Court of Human Rights, (hereinafter, the ECHR), I hypothesize that Russian Courts could reach a similar solution to the often neglected and difficult political problem of prison reform as was concluded in the U.S. through the mid-1980’s.

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<sup>12</sup> Burnham and Gennady Danilenko. Law and the Legal System of the Russian Federation. 3<sup>rd</sup> Ed. Juris Publishing, Inc. 2004. Page 17.

<sup>13</sup> In the Russian legal system, William Burnham and Gennady Danilenko identify the hierarchy of federal norms structured as follows: 1) the Federal Constitution, 2) international treaties 3) federal constitutional laws, 4) federal statutes 5) Federal presidential decrees and regulations 6) national custom. William Burnham and Gennady Danilenko. Law and the Legal System of the Russian Federation. 3<sup>rd</sup> Ed. Juris Publishing, Inc. 2004. Page 45.

<sup>14</sup> Under the Russian Constitution, “generally recognized principles and norms of international law and the international treaties of the Russian Federation shall constitute an integral part of the legal system.” International treaties, including the European Convention on Human Rights take precedence over national law in the event of conflict. Constitution of the Russian Federation, Article 15(4) accessed at <http://constitution.ru/en/10003000-01.htm> on 03/08/09.

## 2 CONSTITUTIONAL CHANGE IN THE FEDERAL PRISON SYSTEM: THE U.S. MODEL

While it is generally accepted that prisoners may acceptably be forced to cede some of their claims to personal liberties in a modern democracy, for example the freedom of movement, the mark of a rights-based democracy is the limitation from curtailing all of the rights afforded to members of that society. The question of *which* rights may legitimately be limited during incarceration is one of particular relevance for rights concerns in general, as it may be viewed to define the absolute limits of state power over its subjects.

### 2.1 The “Hands-Off” Era

Historically, prior to the 1960’s the United States the courts had deferred to state legislative policy on all matters relating to inmates challenging the conditions of their imprisonment. This was what has come to be widely known as the “hands-off” period in judicial history; it is known so due to the absolute nature of judicial restraint and deference to state legislative policy in prison standards. The demonstrations of this particular era can be found in the federal courts’ treatment of prisoners. In 1871 a Commonwealth of Virginia court noted that a prisoner “has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state.”<sup>15</sup> While dubbing prisoners “slaves of the state” is an extreme example, this forfeiture of personal liberties was by and large the view of the judiciary, even through 1948, when Justice Murphy stated: “Lawful incarceration brings about the necessary withdrawal

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<sup>15</sup> *Ruffin v. Commonwealth of Virginia* 62, Va. 790 (1871).

or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.”<sup>16</sup>

In 1956, the Seventh Circuit Court of Appeals dismissed a case brought by George Atterbury, in which he alleged that he had been “cruelly and violently beat[en] and assaulted with a dangerous weapon inflicting physical injuries.”<sup>17</sup> His claims extended to months in solitary confinement without blankets or clothes, food deprivation for upwards of five days and the denial of mail that had been sent to him. Judge Duffy noted in the dismissal of this case that federal courts have “an extremely limited area in which they may act pertaining to treatment of prisoners confined in state penal institutions.”<sup>18</sup> Citing various precedents, the Court found that question of state penitentiaries managed under state laws did not fall under the supervisory jurisdiction of the federal courts, including a Supreme Court precedent in *Price v. Johnston*, which states: “Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.”<sup>19</sup> *Atterbury* exemplifies the degree of restraint exercised by the courts during the “hands-off” era, that is the extreme level of deference to state legislatures and prison administrators often left prisoners constitutionally unprotected in the face of violence and maltreatment.

## 2.2 Judicial Initiative and the Process of Reform

The standards required under the Constitution and the role of the courts in determining such a policy began to undergo a fundamental and groundbreaking

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<sup>16</sup> *Price v. Johnston* 334 U.S. 266 (1948).

<sup>17</sup> *Atterbury v. Ragen* 237 F. 2d 953. Paragraphs 1-7.

<sup>18</sup> *Ibid.* Paragraph 7.

<sup>19</sup> *Price v. Johnston* 334 U.S. 266. Paragraph 285.

change, beginning with two Supreme Court decisions in *Jones v. Cunningham*<sup>20</sup> and *Cooper v. Pate*,<sup>21</sup> in 1963 and 1964, respectively. Prisoners began to use *habeas corpus* suits to challenge their conditions of imprisonment, not solely the legality of the imprisonment itself. Following these decisions in the mid- to late-1960's, federal courts heard hundreds of cases relating to racial segregation,<sup>22</sup> prison discipline and punishment<sup>23</sup> and freedom of religion.<sup>24</sup> In 1965, the Eighth Circuit Court of Appeals found that the justiciable basis for prisoners' claims against institutional treatment:

...will ordinarily involve regulation, discipline or discrimination of such a character or consequence as to shock the general conscience, or to be intolerable in fundamental fairness, and so to amount to illegal administration of prison sentence.<sup>25</sup>

These decisions, though establishing a vague standard, gave the first indication that the solidified "hands-off" doctrine began to soften and the courts began shifting the conditions and treatment of prisoners in correctional institutions from non-justiciable questions of legislative and prison administration, to the pivotal boundaries of constitutional guarantees.

Gradually also throughout the individual states, beginning with Arkansas, the Courts began to implement a broader policy of reform. In Arkansas, for example, in *Holt v. Sarver*<sup>26</sup> the Federal District Court for the Eastern District of Arkansas, found the prison system as a whole violated the Eighth Amendment's cruel and unusual punishment provision. With additional federal courts in other states also making similar rulings, either through constitutional violations of whole prison systems or

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<sup>20</sup> *Jones v. Cunningham*. 372 U.S. 236 (1963).

<sup>21</sup> *Cooper v. Pate* 378 U.S. 546 (1964).

<sup>22</sup> *Lee v. Washington* 390 U.S. 333 (1968).

<sup>23</sup> *Jordan v. Fitzharris* 257 F. Supp. 674, N.D. Ca. (1966) and *Howard v. Smyth* 365 F.2d 428 4<sup>th</sup> Circuit (1966).

<sup>24</sup> *Cruz v. Beto* 405 U.S. 319 (1969).

<sup>25</sup> *Carey v. Settle* 351 F.2d 483 (8<sup>th</sup> Circuit 1965). Paragraph 8.

<sup>26</sup> *Holt v. Sarver* 300 F. Supp. 825 E.D. Ark. (1969).

individual institutions, the courts began to implement a general policy for reform of the prison systems as a whole. Conducting a study on the impact of this court ordered reform on state budgetary allocation, William Taggart states:

By the end of 1983...the prison systems in eight states had been declared unconstitutional, twenty-two states had facilities operating under either a court order or consent decree, and another nine states were engaged in litigation.<sup>27</sup>

The widespread nature of this sort of reform, paired with the detail and extent of the positive actions mandated by the court on the part of the state, make this undoubtedly one of the most revolutionary periods in modern judicial history.

### **2.3 The Eighth Amendment and Prison Reform**

The role of the Eighth Amendment was fundamental in allowing courts to define Constitutional standards of correctional facilities, giving them the ability to mandate detailed and nuanced criteria for compliance. In challenging prison conditions under the Eighth Amendment, the courts were able to mandate rules and standards derived from literature on corrections, sociology and criminology, through interpreting the Constitution. Malcolm Feeley and Edward Rubin write, “The Eighth Amendment was relevant to the prison conditions cases, however – not as a source of standards, but as a basis for judicial jurisdiction.”<sup>28</sup> The Eighth Amendment prohibits “cruel and unusual punishment” and these claims have related to the provision of health care in prison, including medical, dental and psychiatric care, the use of force and seclusion as punitive or disciplinary measures, and general conditions of confinement, including overcrowding.

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<sup>27</sup> William A. Taggart. “Redefining the Power of the Federal Judiciary: The Impact of Court Ordered Prison Reform on State Expenditures for Corrections.” *Law & Society Review*. Vol. 23, No. 2. (1989) Pages 241-271.

<sup>28</sup> Malcolm M. Feeley and Edward L. Rubin. Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons. Cambridge University Press, Cambridge, U.K. 1998. Page 14.

### 2.3.1 *The Medical Treatment and Healthcare of Prisoners*

The Supreme Court in 1976, in *Estelle v. Gamble* found that insofar as a prisoner was receiving medical treatment in the prison facility, violations of the Eighth amendment consisted of “deliberate indifference to serious medical needs.”<sup>29</sup> Justice Marshall, in delivering the opinion of the Court, specified that not every claim to inadequate medical treatment amounts to “cruel and unusual punishment,” but rather, lower courts defined it as those that exhibit a deliberate indifference to a “serious medical need,” or one that is visible or obvious to the layperson<sup>30</sup> which can be either physical or psychological.<sup>31</sup> As Sheldon Krantz and Lynn Burnham point out in The Law of Sentencing, Corrections and Prisoners Rights, negligence alone does not contravene the Eighth Amendment, instead, the prison officials must have acted more than negligently, with “deliberate indifference.”<sup>32</sup>

The degree to which withholding treatment may be said to be “deliberately indifferent” depends on a refusal or intentional delay on the part of prison personnel to withhold medical treatment.<sup>33</sup> On the other hand, however, the courts have maintained the prisoners’ rights to refuse medical treatment, unless the treatment may result in alleviating a mental disorder “the result of which constitutes a likelihood of serious harm to himself or others and/or is gravely disabled,”<sup>34</sup> allowing prison officials to administer antipsychotic medication against the prisoner’s will if he poses a danger to himself or others.

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<sup>29</sup> *Estelle v. Gamble* 429 U.S. 97 (1976).

<sup>30</sup> *Hampton v. Holmesburg Prison Officials* 546 F.2d. 1077 and 1081, ( 3<sup>rd</sup> Circuit 1976).

<sup>31</sup> *Meriwether v. Faulkner* 821 F.2d. 44 (4<sup>th</sup> Circuit 1977).

<sup>32</sup> Sheldon Krantz and Lynn S. Branham. The Law of Sentencing, Corrections and Prisoners’ Rights. 4<sup>th</sup> Ed. West Publishing Co., St. Paul, MN. 1991. Page 470.

<sup>33</sup> *Toombs v. Bell* 798 F.2d 297 (8<sup>th</sup> Circuit 1986).

<sup>34</sup> *Washington v. Harper* 110 U.S. 1028 (1990).



### 2.3.2 *The Use of Force and Disciplinary Procedures and the Eighth Amendment*

The use of force in disciplinary measures and protecting inmates is also limited by the Eighth Amendment through the interpretation by the federal courts to proscribe certain types of punishment. In 1958, the Supreme Court held in *Trop v. Dulles* that the prohibitions of cruel and unusual punishment applied when the punishment “may be imposed, depending on the enormity of the crime,” and that the Eighth Amendment itself “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>35</sup>

In a 1968 case, *Jackson v. Bishop*, the Eighth Circuit Court of Appeals began questioning disciplinary practices in state prisons. The court held the use of the whip in Arkansas penal institutions was unconstitutional. In this decision, the court reiterated the fact that it would not accept that a state was “too poor” to provide for alternative methods of punishment, and found that the whip frustrated correctional and rehabilitative goals.<sup>36</sup> Judge Blackmun delivered the opinion and noted that “corporal punishment is easily subject to abuse in the hands of the sadistic and the unscrupulous.... [it] generates hate toward the keepers who punish and toward the system that permits it.”<sup>37</sup> This case served to initiate judicial findings of institutional practices contravening the Eighth Amendment in the treatment of prisoners by prison officials asserting discipline. This was later reinforced and extended to a broader principle of constitutionality in both *Furman v. Georgia* and *Gregg v. Georgia* where the Supreme Court found that the Eighth Amendment prohibited “wanton and

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<sup>35</sup> *Trop v. Dulles* 356 U.S. 86 (1958).

<sup>36</sup> *Jackson v. Bishop* 404 F.2d 571 (8<sup>th</sup> Circuit 1968)

<sup>37</sup> *Ibid.* Paragraph 46.

unnecessary inflictions of pain,” or those punishments that were “grossly disproportionate to the crime,” citing *Trop v. Dulles*.<sup>38</sup>

This standard was applied more rigorously and given further meaning in *Whitley v. Albers* in 1986 where the Supreme Court found that shooting an inmate to quell a riot did not violate the Eighth Amendment as ‘unnecessary and wanton pain.’<sup>39</sup> Though it was more difficult in this case to discern a standard of necessity and wantonness, as Justice O’Connor delivering the majority opinion noted, as disturbances such as riots in prisons inherently pose a danger to inmates and prison staff, which requires a great degree of deference to prison administrators’ discretion at the time of the incident. On the other hand, the Court required that officials maintain a “good-faith effort to restore prison security,” as opposed to acting “maliciously and sadistically for the very purpose of causing harm.”<sup>40</sup> In 1987 two courts, one D.C. Circuit Court and the 4<sup>th</sup> Circuit Court of Appeals, found that the Eighth Amendment also encompasses the protection of inmates from violence committed by other inmates.<sup>41</sup> The federal courts’ treatment of the Eighth Amendment standard for disciplinary measures markedly evolved since the early 1960’s, from a complete deference to prison officials and legislators in *Atterbury*, to the determination of unconstitutionality of entire practices, such the use of the whip and protection of inmates from harm incurred by other inmates.

### 2.3.3 “Totality of Conditions” and Judicial Policy-Making at its Strongest

<sup>38</sup> *Furman v. Georgia* 408 U.S. 238 (1972). Paragraph 392-393. *Gregg v. Georgia* 428 U.S. 423 (1976) Paragraph 173. See also Note 28.

<sup>39</sup> *Whitley v. Albers*. 475 U.S. 312 (1986). Paragraph 312-313.

<sup>40</sup> *Ibid.* at 313.

<sup>41</sup> *Morgan v. District of Columbia* 824 F.2d 1049 (D.C. Circuit 1987) *Pressly v. Hutto* 816 F.2d 977 (4<sup>th</sup> Circuit 1987).

The federal courts in the U.S. also began to apply the Eighth Amendment to a general “totality of conditions” of confinement. Among these cases was a landmark class action suit brought by Arkansas prison inmates in *Holt v. Sarver*.<sup>42</sup> As Malcolm Feeley and Edward Rubin describe, in this case Judge J. Smith Henley found that the conditions of isolation, overcrowding to the extent that three or four prisoners were assigned to a single-occupancy cell, unsanitary bedding and the infestation of pests as well as other sanitation issues amounted to a violation of the Eighth Amendment. He enumerated several “suggestions” that the Corrections officer should follow, in order to comply with the Constitution, but later found that though the Prison Administrator had complied with most of the orders, the prisons themselves were still lacking adequate conditions of the facilities to meet Eighth Amendment compliance, and Judge Henley ordered a second set of hearings. Notably, Feeley and Rubin observe, *Holt II* does not deal specifically with the individual circumstances as they were addressed the way that the first *Holt v. Sarver* case did, but rather addressed the totality of conditions, condemning the entire state’s prison system as unconstitutional and issuing sweeping reforms to expedite change.<sup>43</sup>

In 1974 prison inmates brought a similar suit against the Corrections Board Commissioner, which found the entirety of Alabama state correctional facilities unconstitutional in *Pugh v. Locke*.<sup>44</sup> In holding the conditions of the entire state’s prison facilities unconstitutional, the District Court Chief Judge ordered the corrections system to comply with minutely detailed standards within the facilities

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<sup>42</sup> *Holt v. Sarver* 300 F. Supp. 825 (1970)

<sup>43</sup> Malcolm M. Feeley and Edward L. Rubin. Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons. Cambridge University Press, Cambridge, U.K. 1998. Page 51-71.

<sup>44</sup> *Pugh v. Locke* 406 F. Supp 321. (1974)

and took it upon the court to monitor the implementation of these regulations.<sup>45</sup> The Court found such conditions as the security of prison population, which found the 10% of the prison population labeled psychotic or potentially violent interspersed throughout the prison, electrical wiring, plumbing, ventilation, sanitation and the presence of pests in or near food preparation areas, personal hygiene of inmates, and decrepit facilities to be at a level that contravened the Eighth Amendment. Furthermore, the Court held that prison personnel had a significant effect on “rampant violence and jungle atmosphere.”<sup>46</sup> Ira Robbins and Michael Buser, commenting on this case, assert, “Thus, *Pugh*’s significance, like *Holt II*’s, is with its uniquely far-reaching and extensive holding that the confinement conditions of the aggregate prison population in a given state could violate the Eighth Amendment.”<sup>47</sup> Though the decision itself calls into question the doctrine of federalism insofar as federal courts enumerate in minute detail the requirements for the administration of state prisons, as well as questions of the expertise of the Court to implement such standards as Constitutional. The Court’s response to such challenges relates the severity of the deprivations:

“[C]onstitutional deprivations of the magnitude presented here simply cannot be countenanced, and this Court is under a duty to, and will, intervene to protect incarcerated citizens from such wholesale infringements of their constitutional rights.”<sup>48</sup>

The decision in *Pugh v. Locke* marks the importance of constitutional standards weighed against other considerations, including concerns for the authority of federal courts over state institutions, or instability in prison administration, in the face of

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<sup>45</sup> Defendants were ordered to report within six months concerning the implementation of their standards. *Pugh v. Locke* 406 F. Supp at 332.

<sup>46</sup> Ibid. at 321.

<sup>47</sup> Ira Robbins and Michael B. Buser. “Punitive Conditions of Prison Confinement: An Analysis of *Pugh v. Locke* and Supervision of State Penal Administration Under the Eighth Amendment.” *Stanford Law Review*. Vol. 29, No. 5. May 1977 Page 893.

<sup>48</sup> *Pugh v. Locke* 406 F. Supp. 328.

flagrant legislative inefficacy, which was evinced by the abhorrent and inhumane conditions of the Alabama and Arkansas prison facilities.

An additional decision was held against the Mississippi State Penitentiary by the Fifth Circuit Court of Appeals in a 1974 Mississippi case, *Gates v. Collier*<sup>49</sup> finding the totality of the prison conditions unconstitutional under the Eighth Amendment, including the “Trusty System” in which certain prisoners were accorded a higher rank in the institution’s imposed hierarchy system, which allowed them to inflict punishment and discipline on other inmates.<sup>50</sup> Additional conditions amounting to a violation of the Eighth Amendment included the segregation of African-American and white inmates, sanitary conditions and the disposal of human waste, a failure to provide adequate medical care to the inmates, mail censorship and inadequate protection from violence inflicted by other inmates.<sup>51</sup> Four years later, the Supreme Court heard *Hutto v. Finney* in which appellants challenged an original finding by the District Court, where inmates in an Arkansas’ penitentiary brought a suit against the State Department of Corrections challenging the institution of extended isolation, or disciplinary measures requiring thirty days or more of solitary confinement, calling the totality of conditions in Arkansas’ prisons “a dark and evil world completely alien to the free world.”<sup>52</sup>

In 1981, four years after *Hutto*, a federal Court of Appeals found the totality of conditions in the “Old Max” Prison in Colorado contrary to the Eighth Amendment protections in *Ramos v. Lamm*.<sup>53</sup> Judge Holloway writes for the Court, “we conclude that the areas of shelter, sanitation, food, personal safety, and medical care are the

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<sup>49</sup> *Gates v. Collier* 502 F.2d 1291 (1974).

<sup>50</sup> *Ibid.* At 1354.

<sup>51</sup> *Ibid.* at 1318-1419.

<sup>52</sup> *Holt v. Sarver*, 309 F.Supp. 362, 381 (Eastern District Ark.1970)

<sup>53</sup> *Ramos v. Lamm* 639 F.2d 559 (1981)

core areas in any Eighth Amendment claim.”<sup>54</sup> It is because of this particular concept, that Eighth Amendment claims arise out of the presence of such conditions, that the controversial and detailed injunctive remedies were issued, thrusting the federal judiciary to the forefront of prison administration decisions. In order to comply with such orders, the Courts issued minimum standards, including square footage, hot and cold running water in the cells and the removal of open sewage, to name a few examples.

## 2.4 Recent Developments

To the extent that the previous cases of the 1960-1970’s marked a fundamental break with the tradition of the “hands-off” era, the 1980’s marked a winding down of the judicial overhaul of the penitentiary system. In 1979 the Supreme Court showed the first signs of the waning of judicial policy-making in *Bell v. Wolfish*,<sup>55</sup> where the Supreme Court reversed a lower court decision that had found “double-celling” inmates, or housing two inmates in a single-occupancy cell, as well as conducting unannounced searches and cavity searches after visitation hours without probable cause, or withholding mail for a reason other than the restricting expression, unconstitutional. In delivering the opinion of the Court, Justice Rehnquist admonished the lower courts, saying:

In recent years, however, these courts largely have discarded this "hands-off" attitude and have waded into this complex arena. The deplorable conditions and Draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems. But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations.<sup>56</sup>

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<sup>54</sup> Ibid. at 583.

<sup>55</sup> *Bell v. Wolfish* 441 U.S. 520 (1979).

<sup>56</sup> Ibid. at 562.

In 1981, hearing *Rhodes v. Chapman*<sup>57</sup>, the Supreme Court reiterated that the Eighth Amendment prohibits conditions of punishment that “deprive inmates of the minimal civilized measure of life’s necessities,” including those “totally without penological justification,” but again, however, did not find a violation of the Eighth Amendment in the practice of “double-celling” inmates. As Feeley and Rubin note, “*Chapman* certainly did not end the judicial reform process, but it suggested that the movement had passed its apogee.”<sup>58</sup>

## 2.5 Partial Reform: What the Courts Could Not Achieve

Though the federal courts were able to establish significant minimum standards to counteract the abhorrent practices in prisons during the “hands off” era, it cannot be asserted, however, that the courts were at all flawless or exhaustive in their reform. There has been an undeniable decline in prisoners’ rights litigation, which Feeley and Rubin attribute possibly to the fact that the very worst conditions being removed, thereby shifting further reform to the administrative arena.<sup>59</sup> Their discussion of the value of judicial policy-making ultimately rests on the often conflicting and controversial underlying values of the purpose and institution of prisons. Though Feeley and Rubin assert that the source of the prisoners’ rights movement, judicial policy-making, is both prevalent and useful as a tool for social reform, other scholars are not convinced. Marc Miller, in his review of Feeley and Rubin’s book, observes that federal courts have failed to provide a similar policy for public defense counsel.<sup>60</sup> Though he disputes the prevalence of judicial policy-making, he does extol the virtues thereof in calling for similar action in the question

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<sup>57</sup> *Rhodes v. Chapman* 452 U.S. 337 (1981)

<sup>58</sup> Malcolm M. Feeley and Edward L. Rubin. Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons. Cambridge University Press, Cambridge, U.K. 1998. Page 48.

<sup>59</sup> *Id.* Page 47.

<sup>60</sup> Miller, Marc L. “Wise Masters.” *Stanford Law Review*. Vol 51, No. 6. Pages 1751-1816 (July 1999).

of public defense counsel, saying: “If courts don’t fix incompetent systems of public defense, who will?” None of the aforementioned scholars advocate unwarranted judicial activism in areas where their competence is questionable (even in prison administration, for example), but the resistance of other public bodies to address these problems provides a strong incentive to provide recourse from the courts.

While the federal courts of the United States were able to restrict the use of certain types of punishment, including the whip, they did not remove the death penalty. Additionally, Feeley and Rubin also note that many of the attorneys affiliated with the prisoners’ rights movement, sought to drive up the costs of imprisonment through litigation, forcing states to seek alternatives to incarceration. The authors conclude that this failed miserably in spite of their efforts, as costs escalated, so too did prison populations rise exponentially.<sup>61</sup> Lynn Branham also observes in her article “Out of Sight, Out of Danger?: Procedural Due Process and the Segregation of HIV-Positive Inmates,” that though the federal courts implemented a comprehensive policy on the Constitutional requirements and limitations of the medical treatment of prisoners, they did not provide a solution for how or whether to segregate HIV-positive inmates, or to disclose their status as such.<sup>62</sup> It is clear from these limitations on reform, that the contemporary prison system remains fraught with problems; the courts were not exhaustive in their remedies. The implementation of the reforms that did occur from the 1960’s through the 1980’s, however, was nothing short of remarkable as members of the judiciary sought to defend encroachment of prisoners’ constitutional rights from irresponsible legislators and prison administrators.

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<sup>61</sup> Ibid. Page 376.

<sup>62</sup> Lynn Branham. “Out of Sight, Out of Danger?: Procedural Due Process and the Segregation of HIV-Positive Inmates.” *Hastings Constitutional Law Quarterly*. Vol. 17. Pages 293-98, 332, 340-42. (1990), as quoted by Sheldon Krantz and Lynn S. Branham. The Law of Sentencing, Corrections and Prisoners’ Rights. 4<sup>th</sup> Ed. West Publishing Co., St. Paul, MN. 1991. Page 479-487.



## 2.6 Judicial Achievements: Formulating a U.S. Model for Reform

The courts were able to achieve the extension of several fundamental constitutional rights, including the freedom of speech, religion and due process guarantees to prisoners, although those rights inexorably contain limitations that do not govern the exercise of the same rights of individuals who are not incarcerated. In so doing, the federal courts were able to put into action a minimum guarantee of rights under the Constitution, afforded to all people, including prisoners, where no other official body was willing to act. Feeley and Rubin write on the very purpose of judicial policy-making:

Judicial policy making begins with the perception of a problem and the identification of a goal. This is generally motivated by a moral imperative of some sort, an insistent belief that some observed condition violates a well-recognized, important social norm.<sup>63</sup>

The importance of defining these standards is in defining the very limits of the relation between a state and its citizens, as reflected in The Future of Imprisonment,

The strategic role of the criminal offender is in defining the absolute minimum obligation of state to citizen... Assuring the human dignity of the murderer and the rapist is not a strategy for expanding the entitlements of school children and senior citizens; instead it is a strategy to prevent the erosion of citizens claims against the government, to prevent regressions applied to the least popular of dependent populations, which might thereafter be applied more broadly.<sup>64</sup>

By observing the incremental yet broad reforms implemented by the judges of the federal courts in the U.S., useful limitations on the “wanton or unnecessary infliction of pain,” or the “deliberate indifference to serious medical needs,” emerge from the jurisprudence. In this sense, the ability to reform prison conditions through judicial intervention on the basis of basic minimum rights guarantees in the Russian

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<sup>63</sup> Malcolm M. Feeley and Edward L. Rubin. Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons. Cambridge University Press, Cambridge, U.K. 1998. Page 351.

<sup>64</sup> Franklin E. Zimring and Gordon Hawkins. “Democracy and the Limits of Punishment.” The Future of Imprisonment. Oxford University Press. New York, New York. 2004. Page 177.

Federation is an effective and momentous opportunity for securing the very frontier of human rights in Russia.

### 3 PROSPECTIVE PRISON REFORM IN THE RUSSIAN FEDERATION

The importance and effects of prison reform are no less significant in the Russian Federation than in the United States. Defining the boundary or limitations of power that the state may exert over the citizen is fundamental in securing meaningful human rights that may be asserted against undemocratic claims to power. The current situation of overcrowding and deteriorating conditions in Russian prison facilities and SIZOs has been well documented in the most recently published CPT<sup>65</sup> and CAT<sup>66</sup> reports, detailing the disappearance of detainees from SIZOs in the Northern Caucas regions, the widespread overuse of the “special means” or disciplinary measures including the use of rubber batons, handcuffing and physical force.<sup>67</sup> In 1995, the Human Rights Committee, the United Nations Human Rights body established under the International Convention of Civil and Political Rights, noted that in regards to prison conditions in Russia it: “deplores the cruel, inhumane and degrading conditions that persist in many of the detention centers and penitentiary facilities and condemns the use of food deprivation as punishment.”<sup>68</sup> Applying a similar model of the Constitutional Court interpreting the articles proscribing the use of torture, inhuman

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<sup>65</sup> The most recently published CPT report was in 2001. “Report to the Russian Government on the Visit to the Russian Federation Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).” 2 to 17 December 2001. [http://www.cpt.coe.int/documents/rus/2003-30-inf-eng.htm#\\_Toc18909698](http://www.cpt.coe.int/documents/rus/2003-30-inf-eng.htm#_Toc18909698) Accessed 14 March 2009.

<sup>66</sup> “CAT: Concluding Observations and Recommendations.” UN Committee Against Torture 4 November 2006. <http://www.fidh.org/CAT-Concluding-observations-and>. Accessed 14 March 2009.

<sup>67</sup> See Report to the Russian Government on the Visit to the Russian Federation Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).” 2 to 17 December 2001. Footnote 2.

<sup>68</sup> United Nations Human Rights Committee Addendum to the Fourth Periodic Reports of States Parties Due in 1993, Russian Federation, 22 February 1995. <http://www.unhcr.org/refworld/docid/3ae6b0374.html>. Accessed 23 March 2009. Found in William Burnham and Gennady Danilenko. Law and Legal System of the Russian Federation. 3<sup>rd</sup> Ed. Juris Publishing, Inc., Huntington, NY. 2004. Page 243.

or degrading treatment or punishment as to encompass these situations, analogous to the American judicial decisions, would give immediate recourse to those inmates for whom remain only bleak prospects of legislative reform to the Codes of Criminal Procedure and Penal Enforcement and enforcement by prison administrators.

### **3.1 Limitations on the Applicability of the U.S. Model**

In attempting to apply the American model of judicial interpretation of the torture, cruel and unusual punishment provisions in order to reform minimum standards of prison conditions, there arise a number of difficulties which merit consideration. The differences existing between any two legal systems, based on common or civil law traditions, present problems in attempting any mode of comparison. Additionally, differences between the Eighth Amendment and binding torture provisions in Russia, including the European Convention of Human Rights and Fundamental Freedoms and Article 21 of the Constitution of the Russian Federation will inevitably result in certain divergences between the courts' interpretations of these provisions. The legal tradition of enforcing human rights also depends substantially on the independence and authority of the judiciary as well as the tradition of the respect for human rights in that particular political culture, which differs greatly in Russia as opposed to the United States. Keeping these considerations in mind while attempting to assess the efficacy of judicial restrictions on prison conditions will allow a more accurate prediction of feasibility and potential problems that may arise from this model.

#### *3.1.1 Differentiating Between Legal Systems*

First, in attempting to graft the U.S. federal courts' actions interpreting the Eighth Amendment to an entirely different legal system presents a number of

problems. Historically, imperial Russia followed the Civil law tradition, receiving Roman Law texts through Germanic and Byzantine influence, as well as Canon law at the advent of Christianity. Burnham and Danilenko write that while the Soviet legal system preserved much of the characteristics of civil law systems, including the sources of law arising out of codes, rather than judicial decisions, as well as other institutions and methods of adjudication, the Soviet system as a whole was unique and separate from its Western European counterparts.<sup>69</sup> Examples of these differences include economic relations, which were governed by entirely different rules, virtually eliminating private ownership. The rule of law was also subordinate to the notion of utopianism, meaning that the law would eventually die out, and the Communist party would govern, relying much less on force of law, than on persuasion.<sup>70</sup>

Contemporary Russian legal institutions are unable to shed this legacy, as Burnham and Danilenko note:

The Soviet and imperial past have left their marks on Russia's legal system. This legacy affects not only the content of legal institutions and rules, but also underlying attitudes about the nature and significance of law and the way it should be reformed and enforced.<sup>71</sup>

Much of these differences arising out of the Soviet legacy lead scholars, including Burnham and Danilenko to agree on a separate "Slavic" legal family, sharing similar characteristics as their Western European counterparts, operating within the traditional civil law family, as opposed to a full return to the civil law tradition. The most salient feature of this legal system, in trying to apply the U.S. model of judicial reform of prisons, stems from the fact the judiciary is not formally considered to be a source of law, but bound to simply applying existing law. As Burnham and

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<sup>69</sup> William Burnham and Gennady Danilenko. Law and Legal System of the Russian Federation. 3<sup>rd</sup> Ed. Juris Publishing, Inc., Huntington, NY. 2004. Pages 1-6.

<sup>70</sup> Ibid. Pages 1-6.

<sup>71</sup> Ibid. Page 6.

Danilenko discuss, this view is contested, and the ability of the Constitutional Court to interpret legislation for compliance with Constitutional norms as well as to “negatively legislate,” gives the court the ability to make formal law, that is, “for a system that does not recognize *stare decisis*, these provisions on the effect of Constitutional Court decisions – comes quite close to it.”<sup>72</sup>

### 3.1.2 *Phraseology of the Constitutional Articles*

Another point of differentiation when comparing the U.S. judicial reform of prisons and its applicability in Russia is the wording of the Eighth Amendment to the U.S. Constitution and Article 21 of the Russian Constitution, as well as other binding sources of international law, which prohibit torture, enforceable in the Constitutional and Supreme Courts. The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>73</sup>

Article 21 of the Constitution of the Russian Federation, on the other hand, reads:

1. Human dignity shall be protected by the State. Nothing may serve as a basis for its derogation. 2. No one shall be subject to torture, violence or other severe or humiliating treatment or punishment. No one may be subject to medical, scientific and other experiments without voluntary consent.

By simply assessing the wording of the two provisions, it is clear that the Russian Article 21 proscribes torture and humiliating treatment on the basis of the respect for human dignity. V. N. Topornina comments on the importance of this foundation:

In the first portion of Article 21 of the Constitution the word “nothing” is semantically loaded. No crime leading to incarceration in a prison or a colony, social disadvantage or poverty... nothing may allow for the derogation of the dignity of the person.<sup>74</sup>

<sup>72</sup> Ibid. Page 72.

<sup>73</sup> Taken from the Cornell Law School Legal Information Institute, Electronic copy of the United States Constitution, Bill of Rights.  
<http://www.law.cornell.edu/constitution/constitution.billofrights.html> Accessed 20 March 2009.

<sup>74</sup> V. N Topornina, Ed. *Konstitutsiya Rossiskoi Federatsii: Nauchno-Prakticheskii Kommentarii* (*Constitution of the Russian Federation: Academic Commentary*). Yurist', Moscow, Russia. Page 188 (1997). (Self-translation).

The importance of the principles from which the Eighth Amendment and Article 21 of the Russian Constitution find their source, greatly influences the interpretation of these freedoms by the judiciary. The Eighth Amendment has also been interpreted as drawn from the concept of dignity, though it is not explicitly mentioned in the article. To draw one example, the Eighth Amendment only proscribes ‘cruel and unusual punishment,’ leaving those claims arising out of conditions in jails, or other pre-trial detention facilities including holding cells, unprotected by the Eighth Amendment.<sup>75</sup> In the Russian system however, Article 21 claims can extend to the pre-trial detention facilities (SIZOs), and other detention facilities, including psychiatric institutions and holding cells as the wording encompasses both violent and humiliating “treatment” or punishment. Additionally the phrase “*torture, violent or humiliating treatment or punishment*” may limit the judicial interpretation of what constitutes a violation under Article 21 to those actions explicitly performed to humiliate or cause harm to an individual, whereas “cruel and unusual” has been interpreted broadly by the U.S. Supreme Court to include punishment that is so disproportionate to the crime that it “shocks the conscience,”<sup>76</sup> allowing it to eventually lead to broad interpretations for prison reform.

### 3.1.3 *The Conception of Human Rights and their Legitimacy*

Additionally, the concept of human rights and their importance in Russian society is notably different from that in the United States, which may in turn, affect the feasibility to find a violation and assert such rights in the face of widespread and flagrant maltreatment by officials. Suren Avanesyan chronicles the advent of a

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<sup>75</sup> Sheldon Krantz and Lynn S. Branham. The Law of Sentencing, Corrections and Prisoners’ Rights. 4<sup>th</sup> Ed. West Publishing Co., St. Paul, MN. Page 462 (1991).

<sup>76</sup> *Jones v. Cunningham*. 372 U.S. 236 (1963).

comprehensive human rights system at the fall of the Soviet Union. Looking to implement a minimum set of human rights standards to build from the poor Soviet model, reformers of Soviet law, starting from the late-1980's, began to implement instruments of international law; Avanesyan writes:

While it was perhaps inevitable that these reformers would look to international law as a model for reform, it was nonetheless remarkable that the international human rights standards were borrowed in their entirety and incorporated in to the post-Soviet legal order.<sup>77</sup>

In borrowing much of the standards of reform, Avanesyan makes note that Chapter Two of the Constitution of the Russian Federation, the “Rights and Freedoms of Man and Citizen” is an “almost word-for-word recitation of the Universal Declaration of Human Rights.”<sup>78</sup> One of the principal difficulties in implementing these recently grafted rights and freedoms is the psychology of Russian citizens and officials governing and operating the institutions of the state. Lacking a sufficient rights-consciousness, that is, a sufficient understanding of how to assert one's rights against infringement or the philosophy or need for these rights, often creates problems in implementation. Rein Mullerson, Professor of International Law at King's College in London and former UN Human Rights Committee Member, wrote in 1992,

I have no serious doubts that most of the current Russian leaders (naturally, not all) are generally committed to human rights and democracy, though they may often have rather vague ideas of what it means and of how to achieve it in the circumstances.<sup>79</sup>

Explaining that the respect for human rights is tantamount to respect for the law, Mullerson asserts that there has always been a lack of respect for the law in Russia. As a mechanism of repression under Bolshevik governance, the judiciary was ill-

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<sup>77</sup> Suren Y. Avanesyan. “Constitutional Protections for Human Rights in the Russian Federation.” *The Journal of East European Law*. Vol. 6, No.4. Pages 437-356. (1999) At 440.

<sup>78</sup> Ibid. Page 447.

<sup>79</sup> Rein Mullerson. “Perspectives on Human Rights and Democracy in the Former Soviet Republics.” Human Rights in Eastern Europe. Edward Elgar Publishing Limited, Brookfield VT. Pages 47-87. (1992) At 68.



equipped to address the problems of its citizens, and the law itself was considered an instrument of the state, as opposed to a mechanism by which to limit its power.<sup>80</sup> The United States Constitution, having been established for centuries, has at its inception in both the Declaration of Independence, the Constitution of the United States and Amendments thereto, held these rights to be “self-evident”<sup>81</sup> and integral to the foundation and formation of government. It is this contrast that may present difficulties for the Russian courts to go against other branches of government in effort to secure the rights of its citizens, where the correlative American Courts may find incentive to act in the absence of administrative or legislative policy changes.

It is worth noting that in the latest Constitution, of 1993, social and economic rights, as Burnham and Danilenko dub “interpreted as a general directive to the legislature to enact legislation setting up welfare programs,”<sup>82</sup> are expounded in great detail and precision, as “those rights, which were routinely abused by the Communists.”<sup>83</sup> In this sense, the Rights and Freedoms of Man and Citizen in Chapter Two and other rights provisions, including international norms in the Russian constitution are both a literal grafting<sup>84</sup> of international norms into the Russian system and a reaction, to use a term of a former professor, Marilyn McMorrow, “to memories of recent abuses.” This situation is both peculiar and important as Russia begins to

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<sup>80</sup> Id. Page 70.

<sup>81</sup> The Declaration of Independence reads “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights...” This sentence is used here simply as an example of the American rights-consciousness at the very foundation of the country. The Declaration can be viewed at The National Archives Website at: [http://www.archives.gov/exhibits/charters/declaration\\_transcript.html](http://www.archives.gov/exhibits/charters/declaration_transcript.html) (Accessed 3/23/2009).

<sup>82</sup> William Burnham and Gennady Danilenko. Law and Legal System of the Russian Federation. 3<sup>rd</sup> Ed. Juris Publishing, Inc., Huntington, NY. 2004. Pages 171.

<sup>83</sup> Suren Y. Avanesyan. “Constitutional Protections for Human Rights in the Russian Federation.” *The Journal of East European Law*. Vol. 6, No.4. Pages 447, (1999).

<sup>84</sup> The Russian Constitution establishes international law as a direct and enforceable source of law, notably in Article 15(4), the 1993 Constitution “generally recognized principles and norms of international law and the international treaties of the Russian Federation shall constitute an integral part of its legal system.” I shall expound on the role of international law later in discussing the role of the European Court of Human Rights.

enact and assert non-domestic norms to remedy residual abuses and those arising out of the recent transition to democracy. The role of the Constitutional Court adding force to the rights provisions is of critical importance. As Bill Bowring wrote of this very question in 1994, just one month after the passage of the law structuring the most recent Constitutional Court, “A Constitutional Court is a centerpiece of the new constitutional order, essential for the vindication of human rights.”<sup>85</sup> Although, while there may be effective rights existing in Constitutional and international norms, which may be asserted in fully functional and independent courts, it may not suffice for the authoritative transplantation and maturation of these rights in Russian society.

#### 3.1.4 *The Authority of the Judiciary*

Lastly, there are substantial differences between the role of the judiciary vis-à-vis the U.S. government, and that of the judiciary of Russia in relation to its respective government. This section shall inquire into the limitations posed by the role of the judiciary in Russia and analyze the prospects for reform of prison conditions by the Constitutional Court of Russia. These limitations arise not only from the fact that within the common law system, the U.S. court jurisprudence is a formal source of law, whereas the Russian judiciary serves officially only to interpret existing law, but also from the fact that the role of the judiciary as an institution, operating alongside other branches of government is substantially less authoritative in Russia.

Residual principles retained from Soviet legal structures also include a lack of separation of powers, operating as a unity of state power under the Communist Party, as Burnham and Danilenko write, the judiciary acted subordinate to the parliament

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<sup>85</sup> Bill Bowring. “Human Rights in Russia: Discourse of Emancipation or Only a Mirage?” Human Rights in Eastern Europe. Edward Elgar Publishing Limited, Brookfield VT. Pages 87-109 (1992) At 106.

and executive.<sup>86</sup> Though the 1993 Constitution established the judiciary as a separate and independent branch, there have remained questions of competence of the judicial bodies. They also note the importance of an independent judiciary, “One of the lessons of Russia’s Communist past is that constitutional and legislative guarantees of human rights are meaningless if there is no enforcement mechanism.”<sup>87</sup> The authors describe the remnants of a cultural legacy of Soviet-era conduct toward the judiciary carried on by the populace and government officials, hindering the development of a rule of law state and independence of the judicial branch.<sup>88</sup> I shall delve more deeply into the independence of the Constitutional Court, as it is most salient for the discussion of the viability of the judicial reform of prisons.

### **3.2 The Role of the Constitutional Court in Prospective Reform**

Though the Constitutional Court has a sordid history in overreaching its bounds and making decisions on allegedly political motives, since its recreation in 1993, the Court has shown significant restraint and gained increasing authority as arbiter and interpreter of the Constitution. The Constitutional Court is now well-poised to establish reforms to prison conditions through its interpretation of Article 21 of the Constitution and relevant binding international norms, should it so choose. Though it may require substantial action on the part of the legislature and prison administrators to create and fund, as well as enforce, a relevant legal code resulting from decisions establishing a minimum standard of treatment. However, the current trends in international human rights bodies and domestic judicial reform indicate a probability of success in enforcing minimum penitentiary standards.

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<sup>86</sup> William Burnham and Gennady Danilenko. Law and Legal System of the Russian Federation. 3<sup>rd</sup> Ed. Juris Publishing, Inc., Huntington, NY. 2004. Page 6.

<sup>87</sup> Ibid. Page 234.

<sup>88</sup> Ibid. Page 50.

Since the inception of the new constitutional order in 1993 in Russia, there have been strong attempts by reformers to restructure the judiciary, creating strong and independent courts.<sup>89</sup> One important mechanism by which reformers sought to create a strong and effective judiciary was in creating the Constitutional Court of the Russian Federation in 1991. Designed to align the new democratic norms with existing international and Soviet laws, which remained in force insofar as they complied with the legislation and Constitution of the new democratic government, until new norms were passed to replace them, the Constitutional Court engendered a great deal of controversy. Leigh Sprague writes of the Court, “The establishment of the Constitutional Court of the Russian Federation has been one of the most important yet contentious reforms of Russia’s recent democratic transition.”<sup>90</sup> At its original establishment, the Court replaced the Committee of Constitutional Oversight of the USSR, and as Sprague points out, the Constitutional Court lacked a functional framework in which to operate. As the Court began to address a greater quantity of questions at its own initiative, the judicial body became ever more politicized. The ensuing struggle for legitimacy that arose from the Court’s increasing politicization, culminated with its decision to overrule Boris Yeltsin’s decree outlawing the Communist Party. Yeltsin then issued a separate decree suspending the Court’s activities altogether. In 1993 with the Constitutional Crisis in which Yeltsin dissolved the legislature using military force, the Court was also dissolved. A new Constitutional Court was established in 1993, considerably more restrained and less politicized than its predecessor. In 1994, a new law was created detailing the structure

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<sup>89</sup> “Judicial System of the Russian Federation and the Supreme Court of the Russian Federation.” Verkovnii Sud Rossiskoi Federatsii. <http://www.supcourt.ru/EN/supreme.htm> Accessed 03/20/2009.

<sup>90</sup> Leigh Sprague. “The Russian Constitutional Court.” *Journal of East European Law*. Vol. 4. Pages 339-356, at 339. (1998).

and organization of the new court, rendering it operative, although restrained, to take on Constitutional questions.<sup>91</sup>

Constitutional Court decisions have the authority of law, according to Burnham and Danilenko, who state that they “are now regarded formally as sources of law.”<sup>92</sup> The Court does this in two ways, by nullifying legislation that it declares unconstitutional, which the authors dub as the ability to “negatively legislate,” and by interpreting the Constitution in court decisions. Both of these aspects will be important in considering the prospect for implementing a minimum standard of treatment in state correctional facilities. The Supreme Court also has the power to invalidate administrative regulations by declaring them unconstitutional,<sup>93</sup> giving it the effect of applying precedent, although it would fall under the jurisdiction of the Constitutional Court to hear complaints of the individual citizens under Article 125(4) of the Constitution, thus making broad standards of penal reform more likely to be heard by the Constitutional Court.

### *3.2.1 Independence and Impartiality of the Courts*

In 2004, Peter Solomon, Jr. published a study on the independence and impartiality of Russian courts by analyzing cases in which the government or one of its officials was a party.<sup>94</sup> Having amassed provisions for securing independence, such as life tenure in office, financial stability and control over their own activities through recent judicial reform, it was nonetheless not entirely clear that the judges themselves actually acted impartially. Solomon examines a particular facet of judicial

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<sup>91</sup> William Burnham and Gennady Danilenko. Law and Legal System of the Russian Federation. 3<sup>rd</sup> Ed. Juris Publishing, Inc., Huntington, NY. 2004. Pages 68-70.

<sup>92</sup> Ibid. Page 17.

<sup>93</sup> Article 253 of the Civil Procedure Code of the Russian Federation.

<sup>94</sup> Peter H. Solomon, Jr. “Judicial Power in Russia: Through the Prism of Administrative Justice.” *Law & Society Review*. Vol. 38, No. 3. Pages 549-582 (September 2004).

power, namely, administrative justice, or the cases in which individuals may challenge official actions in court, asserting that it “makes a useful focus for an inquiry about judicial power.”<sup>95</sup> Though his study addressed courts of general jurisdiction and did not relate to the judgments of the Constitutional Courts or high-stakes decisions in the *arbitrazh* courts, his findings suggest an overall progression toward the independence and impartiality of the judges. He writes:

The statistical data on the outcomes of cases in the late 1990s indicate that for every type of complaint against officials the complainants stood a good chance of victory, and in many instances victory was probable. For general complaints, the rate of success stood around 80%; for complaints in the military, 87%; for tax cases involving firms, around 70%, and individuals, 95%; and for electoral disputes, 48%.<sup>96</sup>

Solomon warns that while individual rates of success, if too high (which he noted may be well above 50%) may indicate an aversion to use the courts as a method of recourse for complaints of official activity unless their cases were sufficiently strong, the Russian attitude toward courts were “ambivalent at best.”<sup>97</sup> However, looking at the generally high success rate of individuals in administrative cases may help to legitimize the courts in the eyes of the public over time. Though the courts, including the Constitutional Court, often had trouble enforcing their decisions,<sup>98</sup> due to power struggles, a Constitutional law was passed in 2001 that allowed proceedings to be brought in ordinary courts for the enforcement of Constitutional Court decisions.<sup>99</sup> Solomon concludes that since the fall of the Soviet Union, the subsequent decade saw a substantial increase to the administrative caseload of the courts, in which a sizeable

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<sup>95</sup> Id. Pages 550-551.

<sup>96</sup> Id. Page 572.

<sup>97</sup> Id. Page 572.

<sup>98</sup> Ibid. 573-574.

<sup>99</sup> Federal Constitutional Law No. 4-FKZ, *Sobranie* 2001, No. 51, item 4824 (December 15, 2001) Amendment to Article 87 of the Constitutional Law, “On the Constitutional Court.”

number were decided in favor of the individual complainant, which is likely to result in a greater degree of legitimacy and independence of the judiciary.

Vanessa Baird and Debra Javeline published a similar study in 2007 measuring the “persuasive power” of high courts in Russia.<sup>100</sup> Baird and Javeline claim that one measure of an effective judicial system and the rule of law is “whether the highest court in the land has the power of moral suasion, or the ability to persuade the public to accept judicial opinions.”<sup>101</sup> In seeking to determine the efficacy of the Russian Constitutional and Supreme Courts, Baird and Javeline issued questionnaires to over 6,000 urban Russian citizens in 2003, 2004 and 2005, measuring their first baseline attitudes toward a “widely disliked” group, Jehovah’s Witnesses, and then their rate of acceptance of differing decisions issued by the Supreme Court, the Constitutional Court and the Duma, the lower house of the legislature. Their findings reflect the ability of the high courts to persuade, particularly in the direction of intolerance toward granting rights to Jehovah’s Witnesses, noting that while approximately 25% of respondents could be persuaded in the direction of granting more rights, nearly twice that amount could be persuaded by decisions restricting the rights of that group. This reinforced the notion that the Russian high courts do have an increasing ability to persuade through judicial decisions, although it is difficult to determine the full extent of the courts’ legitimacy in the eyes of the public from the wide range findings of this limited study.

### 3.2.2 *Advantages of the Russian Constitutional Court*

Unlike the U.S. judicial system, where constitutional questions are under the authority of all levels of federal courts, the Russian system, much like the German,

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<sup>100</sup> Vanessa A. Baird and Debra Javeline. “The Persuasive Power of Russian Courts.” *Political Research Quarterly*. Vol. 60, No. 3. Pages 429-442. (September 2007).

<sup>101</sup> *Id.* Page 429.

has a centralized system for constitutional questions, giving the Constitutional Court a distinct advantage over the U.S. federal court system in implementing a broad range of minimum standards for correctional facilities. This monopoly of interpretation, coupled with the fact that the Constitutional Court has seen no qualms with issuing decisions establishing a judicial remedy in lieu of Federal Code, evinces a greater likelihood that the Court would be willing to entertain individual complaints of Prisoner's in order to fortify their rights with a minimum standard of treatment.

In the *Procuracy Officers Case*<sup>102</sup> the Court found that while the Labor Code determined that employment disputes within the Procuracy office should be addressed not in court, but by superior authorities, the Constitution under Article 46, providing for "judicial protection of rights and freedoms," allowed the Court to insert itself into labor disputes, effectively striking down the relevant provision within the Labor Code. Enforcing a decision establishing a minimum standard of treatment would require similar action on the part of the court, striking down existing Criminal Procedure and Enforcement Code and asserting judicial protections of rights as a basis and justification for instituting its own remedy in lieu of existing federal Code, something the Court has previously shown itself willing to do. As Leigh Sprague wrote even in 1999 (prior to former President Putin's judicial reforms giving the Court greater authority, especially in the area of enforcement of its decisions):

The Court has come to play an important though still controversial role in the formation of the embryonic Russian state... That the Court is now seen by many Russians as a legitimate arbiter of constitutional questions is a testament to its importance and shows how far the Court has moved beyond its controversial predecessor.<sup>103</sup>

The recent trends of the growing authority of the Constitutional Court as well as the ongoing reforms on the part of the government have helped the fledgling Court assert

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<sup>102</sup> Ruling No. 7-P, VKS 1994, No 2/3 p. 24 (April 16, 1993).

<sup>103</sup> Ibid. Page 338.



itself against historically powerful and often antagonistic legislative and executive branches. Compounded with recent case law from the ECHR, which has evolved to require certain minimum standards of treatment under Article 3 of the Convention, given its place in domestic Russian law, the Court may be eager to demonstrate its authority and commitment to human rights in this manner.<sup>104</sup>

### 3.2.3 *Alternatives to the Judiciary*

Russian prisoners may also have other legal methods of recourse in addressing their human rights complaints. The Office of the Commissioner for Human Rights, or Ombudsman, was established in 1997 for the very purpose of hearing complaints of human rights violations and issuing remedies to these violations. Burnham and Danilenko also state that individuals can even address the Commissioner if they are dissatisfied with a court ruling or administrative agency.<sup>105</sup> The Commissioner, however, is bound to a very limited set of remedies, the authors highlight the limitations of the Commissioner, having no power to issue binding decisions on state entities, “the Commissioner must rely on the traditional weapons that are always at the disposal of human rights organizations: publicity and campaigns of shame.”<sup>106</sup> The deplorable prison conditions in Russia is already a well-known issue, publicized continually by both CPT and CAT<sup>107</sup> investigations, non-governmental organizations including Amnesty International<sup>108</sup> and Human Rights Watch,<sup>109</sup> Suren Avanesyan writes of this topic:

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<sup>104</sup> Article 3 of the Convention states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

<sup>105</sup> William Burnham and Gennady Danilenko. Law and Legal System of the Russian Federation. 3<sup>rd</sup> Ed. Juris Publishing, Inc., Huntington, NY. 2004. Page 235.

<sup>106</sup> Ibid. Page 235.

<sup>107</sup> *Supra* notes 63 and 64.

<sup>108</sup> *Supra* note 5.

‘As for the prohibition against cruel or degrading treatment or punishment,’ Russia is constantly in violation of this provision of the Constitution. The inhumane and overcrowded conditions found in Russian prisons have already become mundane news to the western reader.”<sup>110</sup>

It is evident from these accounts, as well as highly publicized cases in the ECHR, that the campaigns of shame and publicity have only a limited effect in securing basic human rights for prisoners.

There has been some attempted reform to reduce the level of overcrowding in the legislative arena, however, with far-reaching effects. Initially, with the transfer of the GUIN from the MVD to the Ministry of Justice in 1998 saw an increase of spending per prisoner annually from around \$700 USD to nearly \$1,100 USD in 2002.<sup>111</sup> This augmentation of the penitentiary budget also began the investment in pharmaceuticals to treat the rampant spread of tuberculosis type 1, as type 2, which rapidly spread among HIV-positive prisoners, was resistant to all pharmaceuticals. In 2002, with the passage of a new Criminal Code and Code of Criminal Procedure, reports surfaced of a 20% drop in Russia’s prison population, which at that time equated to approximately 200,000 Prisoners. Although the reports could not conclusively attribute the rapid decline in prisoners directly to the new law, it was known that there had been a significant decrease in criminal activity and under the new law, theft, which then accounted for 40-50% of all registered offences, became an administrative rather than grave offense, having a maximum six year sentence of

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<sup>109</sup> Human Rights Watch Reports on the Russian Federation, <http://www.hrw.org/en/publications/reports/209/> Accessed 3/23/3009.

<sup>110</sup> Suren Y. Avanesyan. “Constitutional Protections for Human Rights in the Russian Federation.” *The Journal of East European Law*. Vol. 6, No.4. Page 449. (1999)

<sup>111</sup> “Situation in UIS after Transfer to the RF Ministry of Justice.” Tsentr Sodeistviya reforme ugolovnogo pravosudiya. [http://www.prison.org/English/rpsys\\_4.htm](http://www.prison.org/English/rpsys_4.htm) Accessed 6 March 2009, and Anna Zakatnova. “Tyuremnaya Reforma Opyat’ Otkladivaetsya: Pravozaashchitniki gotovy borot’sya s karatel’noi yustitsiei.” *Nezavisimaya Gazeta*. 27 December 2001.

imprisonment.<sup>112</sup> While these mechanisms of reform are welcome accomplishments in establishing a minimum guarantee of human rights for prisoners, they are certainly not exhaustive. As stressed in the introduction, relying primarily on legislative reform of prison conditions relies upon a body held almost wholly unaccountable to the prison population (as they do not form a significant constituent group) to make unpopular decisions and budgetary allocations for one of the most hated groups of society. Due to the unique nature of the problem of prison conditions and legislative accountability, the democratic process is often most well served by the intercession of the judiciary in establishing human rights guarantees.

### **3.3 The Role of International Law and the European Court of Human Rights in Domestic Constitutional Jurisprudence**

International law plays an integral role in the Russian domestic legal system. As the Russian Federation was transitioning to a democracy, directly incorporating international law aided in securing the rule of law and a smooth transition. Article 15(4) of the Russian Constitution reads:

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 envisaged by law, the rules of the international agreement shall be applied.<sup>113</sup>

Burnham and Danilenko emphasize that the wording of this article also allows for the domestic force of law not simply of treaties and agreements, but “universally recognized norms,” meaning also customary international law.<sup>114</sup> The Constitutional

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<sup>112</sup> “Russia’s Prison Population has Reduced by 20%.” And “Problemy Stanovleniya Pravooshchitnogo Soobshchestva v Rossii” Tsent Sodeistviya reforme ugovnogo pravosudiya. [http://www.prison.org/English/rpsys\\_1.htm](http://www.prison.org/English/rpsys_1.htm) and <http://www.prison.org.navy.ponyat/prav.shtml#a5> respectively, Accessed 6 March 2009.

<sup>113</sup> Article 15(4) of the Constitution of the Russian Federation. Constitutional Court’s official electronic copy of the Constitution in English, found at <http://constitution.ru/en/10003000-01.htm> accessed on 3/11/09.

<sup>114</sup> Id. Page 26.

Court regularly applies these norms over contrary domestic law. In one case, *In Re Belichenko*<sup>115</sup> the Court heard a case of three defendants who were acquitted in a jury verdict of the Moscow Regional Court. The Criminal Procedure Code contained a clause in Article 5(9), allowing a second prosecution as they had only been acquitted. The Court held that the jury's verdict of acquittal was final, though the Constitution under Article 50(1) provides that no person may be *convicted* twice of the same crime, Article 14(7) of the ICCPR stated that no person may be liable to be tried or punished for a second time for the same crime. In this case, the Court applied the international law doctrine over domestic law, where the Constitution was silent.

The European Convention on Human Rights and Fundamental Freedoms, as well as the jurisprudence of the ECHR is also an important source of law that is regularly applied by the courts. In *The Complaint of Moskalev, et al, Concerning the Violation of Constitutional Rights by Article 239-1(7) of the Criminal Procedure Code of the Russian Federation*<sup>116</sup> the Constitutional Court held that the particular provision in Article 239-1(7) of the Criminal Procedure Code, which allowed for the extension of pre-trial detention taking into account the seriousness of the crime alleged, the courts must take into account the ECHR jurisprudence and Article 5(3) and 5(4) of the ECHR, providing a reasonable time of detention before trial. The Constitutional Court regularly observes the rulings of the ECHR in implementing its interpretations of the Constitution, as exemplified above.

The ECHR has heard a substantial number of cases arising out of Article 3 violations (the provision prohibiting torture) from the Russian Federation in relation

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<sup>115</sup> *In Re Belichenko*. VKS 1998, No. 1, Page 47. (January 29, 1997).

<sup>116</sup> *The Complaint of Moskalev, et al, Concerning the Violation of Constitutional Rights by Article 239-1(7) of the Criminal Procedure Code of the Russian Federation*. Determination NO. 164-O, VKS 2003. No. 1 (May 15, 2002).

to prison conditions. In one of the most notable cases, *Kalashnikov v. Russia*<sup>117</sup> in which the applicant challenged the conditions and length of his pre-trial detention and length of the proceedings against him. The applicant, Valeriy Yermilovich Kalashnikov, was held in a Magadan SIZO for five years from June 1995- June 2000 on allegations of embezzlement, the conditions of which were found to violate Article 3. The applicant recounted sleeping in shifts with other inmates due to a level of overcrowding in which the detainees did not have enough beds (around one square meter of floor space per inmate), the sanitary conditions were abhorrent, cells infested with pests causing the applicant to suffer significant resulting health problems. Detainees with syphilis and tuberculosis, skin diseases and fungal infections were housed together in small cells with other inmates, and the toilet was not separated from the cell with other inmates.

The ECHR has held that for prison conditions or treatment to amount violation of Article 3, it must reach a minimum level of severity, depending on the circumstances of the case<sup>118</sup> and that the suffering extend beyond the reasonable amount of suffering that will be incurred with any deprivation of liberty.<sup>119</sup> The level of overcrowding in *Kalashnikov* was enough for the Court raise an issue under Article 3,<sup>120</sup> the ECHR has also found violations of Article 3 from much larger cells than those in *Kalashnikov*, due to inadequate ventilation and lighting.<sup>121</sup> In a 2005 case, *Khudoyorov v. Russia*,<sup>122</sup> the applicant challenged the conditions of his detention in a central Moscow SIZO under the Convention the ECHR again held that the lack of

<sup>117</sup> *Kalashnikov v. Russia*. No. 47095/99, paragraph 97. (2002)

<sup>118</sup> *Valašinas v. Lithuania*, no. 44558/98, paragraphs 100-101, (2001).

<sup>119</sup> *Valašinas*, cited above, paragraph 102; *Kudła v. Poland*. No. 30210/96, paragraph 94, ECHR (2000)

<sup>120</sup> *Id.* Paragraphs 96-97.

<sup>121</sup> *Peers v. Greece*. No. 28524/95, paragraphs 70-72, (2001)

<sup>122</sup> *Khudoyorov v. Russia*. No. 6847/02, 8 November 2005.

space was the focal point of the violation (around 2-3 square meters of floor space per inmate) compounded with the lack of privacy, unsatisfactory heating, lighting and unsanitary conditions of the cells led to a violation of Article 3.

In similar case in 2006 in *Mamedova v. Russia*<sup>123</sup> the ECHR found a violation in SIZO 33/1 in the Vladimir region, in which detainees were afforded less than two square meters of floor space, the Court found,

That the applicant was obliged to live, sleep and use the toilet in the same cell with so many other inmates was itself sufficient to cause distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and arouse in her the feelings of fear, anguish and inferiority capable of humiliating and debasing her.<sup>124</sup>

Additionally, in more recent cases the Court has reached similar findings of a violation of Article 3, arising out of the conditions of confinement, ranging from overcrowding, to inadequate lighting, ventilation, sanitation, safety and security.<sup>125</sup>

Reading these cases alongside U.S. federal court cases such as *Holt v. Sarver*, or *Pugh v. Locke*<sup>126</sup> it is evident from these findings that the recent Article 3 jurisprudence in relation to prison conditions from the ECHR very closely mirrors the “totality of conditions” rulings of Eighth Amendment violations in the United States. In one case heard by the Human Rights Committee issuing a 2002 view brought by Yekaterina Lantsova, the denial of medical care of a prisoner in Moscow’s Motrosskaya Tishina detention center led to the detainee’s (the applicant’s son) death.<sup>127</sup> The Committee found a violation of Article 6 of the ICCPR based on the conditions and lack of medical treatment in the facility. The fact that the

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<sup>123</sup> *Mamedova v. Russia*. No. 7064/05, 1 June 2006.

<sup>124</sup> *Id.* Paragraph 65.

<sup>125</sup> See also *Labzov v. Russia*. No. 62208/00, paragraph 44. 16 June 2005; *Novoselov v. Russia*. No. 66460/01, paragraph. 2 June 2005; *Mayzit v. Russia*. No. 63378/00, Paragraph 39. 20 January 2005, and cases as recent as 19 March 2009, *Lyubimenko v. Russia*. No. 6270/06

<sup>126</sup> See *supra* notes 41 and 43, respectively.

<sup>127</sup> *Lantsova v. Russian Federation*, Communication no. 763/1997. 26 March 2002.

Constitutional Court continues to cite the ECHR, the European Convention on Human Rights and the ICCPR, as well as the significant amount of publicity arising from these controversial decisions, indicates the growing pressure on the Constitutional Court to give meaning to the rights-based treaties to which Russia is a party.

## 4 CONCLUSION

Recent developments in judicial reform in Russia indicate tentative but considerable movement toward judicial independence. Several articles have been published recently identifying the extent of prior government interference with judicial decisions to secure favorable rulings under President Putin. The Washington Post published recent and detailed testimony from a senior judge from the Arbitrazh court, stating, “the testimony by such a senior judge was cause for some cautious optimism that calls by Russia’s new President, Dmitry Medvedev, for an independent court system might actually be genuine.”<sup>128</sup> Reuters also reported in December 2008 a speech by President Medvedev before a congress of Russian judges on efforts to reform the Russian justice system to make decisions in favor of its citizens.<sup>129</sup> These developments, coupled with the case law of the ECHR supporting violations of Article 3 of the Convention from prison conditions evinces the greater possibility of achieving judicial reform of prison conditions on the American model.

While there are admittedly a number of limitations on the applicability of the American model of Eighth Amendment jurisprudence encompassing prisoners’ rights to establish a minimum standard in conditions of confinement, there are also a number of useful tools and lessons that may be drawn from this example. Firstly, the U.S. has shown the Eighth Amendment to be an effective basis for judicial jurisdiction, which may likewise be done with Article 21 of the Russian Constitution. Though it may seem only natural that deprivations of life’s very necessities for prisoners, including medicine, adequate food or sanitation standards, would violate

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<sup>128</sup> Peter Finn. “Hopes for Court Reform Stir in Russia: Judges Testimony Describing Political Pressure Seen as Hint of Medvedev’s Intent.” The Washington Post. 9 June 2008. Page A11.

<sup>129</sup> “Medvedev Urges Court Reform to Restore Judicial Faith.” Reuters. 2 December 2008.



the Constitutional provisions proscribing torture or ill-treatment, the Court facing a strong executive and legislative branch, lacking a history for providing individual rights to society's most unpopular group, may find it more difficult to implement these reforms than it seems upon first sight. The Russian Constitutional Court is well equipped, in this sense, to establish such a standard in the context of prison conditions, as it has a monopoly on the interpretation of the Russian Constitution.

Secondly, while the Russian Constitutional Court will need to implement its own findings of violations that derogate from human dignity and torture, violence or humiliating treatment under Article 21, the findings on the use of force, physical and mental healthcare and the totality of conditions in U.S. case law provide useful examples of minimum standards asserted under Constitutional provisions prohibiting cruel and unusual punishment or torture. Noting the progressions made by the federal courts of the United States will provide a useful benchmark for the application of a similar standard in Russia.

Thirdly, while the ECHR has developed a rich body of case law in interpreting the analogous Article 6 of the Convention from which the Constitutional Court may build, bringing Russian domestic law into line with the Council of Europe, the U.S. example beginning from the 1960's shows an incremental assertion of the Eighth Amendment against various prison conditions. Evolving from the initial findings of a violation of the Eighth Amendment in the most abhorrent practices, such as the use of the whip, to the eventual condemning of entire state penal systems. This serves as a practical example of making the assertion of such rights more palatable for the legislative and executive branches, including prison administrators, which will increase the likelihood that those standards will actually be enforced, either through fiscal provisions or changes in the administration of prisons.

The ability for the judiciary to secure prisoners' rights in the Russian Federation implicates not only the commitment of the new democracy to uphold human rights both set forth in its Constitution and in accordance with its treaty obligations, but also the role of the judiciary vis-à-vis the other branches of government. Without a true separation of powers, indicative of judicial independence, the democratic country becomes simply a misnomer for an authoritarian regime with a democratic façade. While the ECHR has detailed a number of violations of the Convention's torture provision in Russian prison systems and detention facilities, the model of U.S. federal courts asserting the Eighth Amendment to establish a minimum standards provides a more useful example, as those courts too were answerable to federal and state governments and prison administrators, responsible for enforcing their decisions. Utilizing the lessons from U.S. Eighth Amendment jurisprudence, it is possible too for the Constitutional Court of the Russian Federation to eliminate the most abhorrent conditions of Russian detention and correctional facilities using Article 21 as a basis for their jurisdiction.

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