The State of Democratization in Post-Soviet Russia: The Role of the European
Court of Human Rights and the Growth of Rule of Law

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This research seeks to understand the role of rule of law within the process of democratization in Russia. While the literature concerning theories of democratization and the process of democratization is robust, there is not enough work done on the specific role of the rule of law within this process. In particular, this thesis focuses on how external actors to Russia can influence the growth of rule of law and potentially act as a mechanism for furthering the transition to democracy in Russia. As such, this work looks at the role of the European Court of Human Rights in the process of the growth of rule of law by looking at three case studies: Alekseyev v. Russia, Kiyutin v. Russia, and Konstantin Markin v. Russia.

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Table of Contents

II: Abstract

III: Acknowledgments

IV: Table of Contents

1-10: Chapter One: Introduction

11-15: Chapter Two: Methodology

16-48: Chapter Three: Literature Review

49-77: Chapter Four: The Importance of the Rule of Law to Democratization

78-92: Chapter Five: Case Study #1: Alekseyev v. Russia, case number: 4916/07, 25924/08, & 14599/09

93-110: Chapter Six: Case Study #2: Kiyutin v. Russia, case number: 2700/10

111-125: Chapter Seven: Case Study #3: Konstantin Markin v. Russia, case number: 30078/06

126-134: Chapter Eight: Conclusion

135-141: Reference List

Chapter One

Throughout the past sixty years the world has undergone several cycles and transitions to democracy. There are however, some significant differences in the transition from communism to democracy in Eastern Europe and the transitions that occurred in Latin America and Central Europe. Many of the regimes that emerged after the fall of the Soviet state had electoral systems but could not be considered democratic regimes. This occurred in many post-Soviet countries such as, Ukraine, Belarus and Russia, where competitive elections co-existed along with substantive abuse of democratic principles, as evidenced by cases of election fraud (among many examples)¹. These are examples of regimes in which democratic institutions have been created or already exist and permit meaningful competition for power, however the political arena is so heavily weighted in favor of those already in power that the regime cannot be labeled democratic.² Russia is still transitioning towards becoming a democratic state. It can be argued that in recent years the Russian state has moved towards authoritarianism than towards democracy; while certain democratic institutions have developed, several are not effective or have not developed and maintained democratic values at their core, this is evidenced by the undemocratic practices of the judicial system in Russia, which will be explored through the case study section.

In order to understand the process of democratization and the state of democracy in Russia further, this thesis will analyze the role of rule of law within democratization. Rule of law and the judicial system are core components of a democratic state, and in Russia they represent a set of institutions that have developed with the intention of

¹ Steven Livitsky and Luncan Way, "International Linkage and Democratization", *Journal of Democracy*, 16, 3 (2005): 23

² Ibid

creating democratic norms, but have not maintained democratic values at their core. They can be described as nominally democratic. In particular, this thesis will analyze to what extent external actors or regional actors can play a part in democratizing these types of institutions, and specifically how external actors can divorce the rule of law away from the power of the political incumbents and towards more democratic values. This paper will focus on the role of one regional institution and how this institution (rather than larger international institutions) can impact democratic change in Russia. It will focus primarily on the role of the European Court of Human Rights and the potential effects it can have on the domestic institution, the Constitutional Court of the Russian Federation.

The characteristics of these nominally democratic institutions highlight how the transitions in Eastern Europe have resulted in significant differences in the patterns of transition to democracy than in other regions. The degree of change in post-Soviet states was significant and had a wide scope; as both the political, economic, and social systems endured significant shifts, and changes in these systems in turn interacted with changes in the social structures.³ One significant factor was that post-Soviet states had to define or re-define their territory as well as social and cultural boundaries, in addition to building new institutions.⁴ These rapid changes in the political, social, and economic structures are crucial to the process of democratization, as rapid transitions to market economies would involve some short-term social hardship in exchange for long-term benefits.⁵

Economic reform in Russia was a particularly important factor in the transition from communism to democracy since President Yeltsin initiated some particularly strong

³ Leszek Balcerowicz, "Understanding PostCommunist Transitions" in *Democracy After Communism* 2002, ed. Larry Diamond and Marc Plattner (The John Hopkins University Press: Baltimore), 64

⁴ Ibid

⁵ Andrea Chandler, *Democracy, Gender, and Social Policy in Post-Communist Russia* (Palgrave MacMillan, 2013): 36

top-down economic reforms.⁶ These reforms in Russia became known as “shock therapy”, which drew on the neo-liberal economic reforms that had been used in Poland and resembled the ‘structural adjustment programs’ which had been used in ‘developing states’, including countries in Latin America in the 1980’s and 1990’s.⁷ These types of reforms contradicted President Yeltsin’s promises of more inclusive reforms, and were carried out in a top-down fashion through the state apparatus of the new Russian Federation despite the fact that drastic market changes had dramatic consequences for the citizens such as, the breakdown of the social welfare system.⁸ Furthermore, an economic crisis between 1992 and 1993, along with the collapse of the Soviet state significantly weakened the new Russian state.⁹ Finally, there was a general lack of violence in the political and economic transitions in the Central European states, compared to the violent upheavals and conflicts that had occurred in other Eastern European states such as the former Yugoslavia.¹⁰ Although many competitive authoritarian regimes changed and democratized after the Cold War, others such as: Russia, remained authoritarian and stable, stable in the sense that the regime did not move towards democracy, but rather, it persisted in its status as an authoritarian regime.¹¹

Rupnik has identified three different patterns of transitions to democracy in post-Soviet states. Rupnik’s third and final pattern characterizes Russia. Russia itself presents a significant example of unique patterns and characteristics of democratic transition in

⁶ Ibid 35

⁷ Chandler, *Democracy, Gender, and Social Policy*, 35

⁸ Ibid, 36

⁹ Ibid

¹⁰ Balcerowicz, “Understanding PostCommunist Transitions”, 64

¹¹ Livitsky and Way, “International Linkage and Democratization”, 23

post-Soviet states¹². The transition in Russia affects many former Soviet states, according to Rupnik the fate of Ukraine, Belarus, and Moldova will to a large extent depend on what happens in Russia.¹³ The fact that the democratic transition in Russia affects so many other states makes democratization in Russia particularly unique.¹⁴ Rupnik describes Russia as “in search of a post-imperial identity and teetering on the brink of economic disaster”.¹⁵ With the recent political crisis and violence in Ukraine and the influence of Russia during this crisis, the point is further emphasized that the fate of Ukraine, Belarus and Moldova depend on the state of Russia.¹⁶ The recent referenda in Crimea, and the role of the Russian oil and gas industry illustrate how the process of democratization in Russia impacts several other countries in the region. The post-Soviet Russian government had two competing agendas in the aftermath of the fall of the Soviet Union, the first was the desire to change social benefits so that they could be more equitable, and the second was to decrease social spending due to the growing economic crisis and fiscal pressures.¹⁷ As Chandler notes the contradictions between these two agendas and objectives of the new government would soon become apparent to Russian citizens and to policy makers and citizens abroad.¹⁸ In the interim, Russian reformers could hope that an end to Communist party privilege and to the end of inefficiencies of state economic planning would benefit society.¹⁹ The question now becomes how far has

¹² Rupnik, “The Post-Communist Divide”, in *Democracy after Communism*, 2000, ed. Larry Diamond and Marc Plattner (The John Hopkins University Press: Baltimore): 103

¹³ Ibid

¹⁴ Rupnik, “The Post-Communist Divide”, 103

¹⁵ Ibid

¹⁶ Rachel Denber, “Fanning the Flames of Ukraine’s Disarray” *Human Rights Watch*. May 22, 2014. <http://www.hrw.org/news/2014/05/22/fanning-flames-ukraine-s-disarray>

¹⁷ Chandler, *Democracy, Gender, and Social Policy*, 35

¹⁸ Ibid

¹⁹ Ibid

the Russian state gone in the process of the democratic transition and how have democratic principles become integrated into the new political system?

Lilia Shevtsova describes the system in Russia as a ‘bureaucratic quasi authoritarian’. She argues that certain democratic elements persist, but the government does its best to manipulate them.²⁰ In addition to this definition of Russia as a ‘bureaucratic quasi-authoritarian regime’, Russia has also been classified by theorists as a hybrid regime.²¹ To be more specific, a hybrid regime such as Russia will have a set of institutions where some elements of democracy have been lost and new elements of authoritarianism have been acquired.²² Furthermore, Levitsky and Way argue that a significant aspect of hybrid regimes is the characteristic that there are “incumbents who routinely abuse state resources, deny the opposition adequate media coverage, harass opposition candidates and their supporters, and in some cases manipulate electoral results”.²³ Morlino notes that “a hybrid regime is always a set of ambiguous institutions that maintain aspects of the past, in other words, it is a corruption of the proceeding regime, lacking as it does one or more essential characteristics of that regime, but also failing to acquire other characteristics that would make it more fully democratic or authoritarian”.²⁴ This characteristic is applicable to other post-Soviet states, as Ryabov notes, the political systems of countries with origins within the former USSR are

²⁰ Lilia Shevtsova, “Russia’s Hybrid Regime” in *Democracy after Communism*, 2000, ed. Larry Diamond and Marc Plattner (The John Hopkins University Press: Baltimore): 243

²¹ Leonardo Morlino, “The Two Rules of Law between Transitions to and Quality of Democracy” in *Rule of Law and Democracy: Inquiries into Internal and External Issues* eds by Leonardo Morlino and Gianluigi Palombella (Brill: Boston, 2010): 44

²² Ibid

²³ Ibid

²⁴ Ibid

frequently described as hybrid.²⁵ This means that these states are based on incompatible principles, such as: a one party system and elections, paternalism, freedom and authoritarianism, market principles and dirigisme. Furthermore, some common themes in post-Soviet regimes/hybrid regimes include the issue of regimes emerging around a cult of personality.²⁶ In post-Soviet states such as, Russia, Georgia, Belarus, Azerbaijan, Armenia etc, the weakness of political institutions is related to the fact that political regimes in these states have grown out of a “cult of personality”, in which there is an imbalance of power in favour of presidential control.²⁷ In addition the power and functions of parliament are limited or are the rubber stamp of approval on the decisions of the executive.²⁸ The rise of clientalism in post-Soviet Russia highlights the bureaucratic quasi-authoritarian structure of post-Soviet Russia²⁹. Ryabov argues that “clientalism as a key characteristic of the Russian state is an trait of post-Soviet state social systems that are linked to their institutional weakness, and is due to the fact that power relations in these states are built upon dependence and this destruction of institutional ties within the state apparatus has led to relations between officials being built on a personal basis”.³⁰ These issues have been particularly important during the period following the Yeltsin era when Putin rose to a significant position in Russian politics. After the Yeltsin era, Putin implemented “subordination and subjection”.³¹ There are some differences between the bureaucratic quasi-authoritarianism in Latin America

²⁵ Andrei Ryabov, “Democratization and Modernization in the Context of the Transformation of Post-Soviet States” in *Democracy versus Modernization: A Dilemma for Russia and the World*, ed. Vladislav Inozemtsev and Piotr Dutkiewicz (Routledge, 2013): 150

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

³⁰ Ibid

³¹ Shevtova, “Russia’s Hybrid Regime”, 243

and Russia. In Russia, the government is still weak and incapable of accomplishing its main goals; Rupnik argues that the Russian government strives for illusory stability, which rests on expectations and hope.³²

Despite the complex and complicated details surrounding the transition to democracy in Russia, after the collapse of the Soviet Union in 1991 Russia's post-communist market reforms process were considered shaky, but the basic principles of a liberal democracy were generally upheld or developed during the Yeltsin era.³³ Various scholars have questioned the setbacks that have occurred in Russian democracy since the ascension of President Putin to power in 1999.³⁴ What is crucial to note is that since Putin's ascent, the discrepancies between the letter of the law and the government's behavior have widened since the end of the Yeltsin period.³⁵ It could be argued that this indicates a movement away from democratic principles during the Putin era that were desired in the beginning of the post-Soviet period and Yeltsin's regime.³⁶ To further emphasize the authoritarian nature of the Russian state under Putin, Chandler argues that:

Russia began its third decade of post-Soviet transition as a system closer to authoritarianism than it had been ten years earlier, albeit with some democratic elements. The government's expansion of its claims over social policy reflected the impulse to assume a paternalistic form of state control over its citizens.³⁷

The impacts of the Putin era and leadership on the Russian democratic transition are described by scholar Shevtsova, who argues that:

The Russian regime rests mainly on the bureaucracy, which has been the gravedigger of all attempts at modernization in Russia, and on the military and

³² Ibid, 244

³³ Chandler, *Democracy, Gender, and Social Policy*, 1

³⁴ Ibid

³⁵ Rupnik, "The Post-Communist Divide", 250

³⁶ Ibid

³⁷ Chandler, *Democracy, Gender, and Social Policy*, 168

security services, which even in their currently somewhat parlous condition add a not of intimidation if not brute force to political life in Russia.³⁸

From 2005 onwards, a paradoxical trend developed in Russia, as the system became more authoritarian the more individual citizens used their remaining democratic avenues more in order to demand a more equitable society.³⁹ Chandler argues that even though the transition from communism brought difficult social consequences to Russian society, it also enabled new forms of participation as well as new ways of influencing the legislation for the populous at large. Furthermore, in the Putin era as the power of the opposition leaders declined, ordinary citizens could push for change in “limited but unpredictable ways”.⁴⁰ It will be argued further on that one of the ways that Russian citizens pushing for change is by taking individual cases to the European Court of Human Rights and through the Constitutional Court of the Russian Federation⁴¹(CCRF), and pushing for changes within the Russian law. As a consequence of this trend, the role of the law and the development of an effective rule of law are crucial to the process of democratization in Russia.⁴² The CCRF was created to play a significant role in the protection of the rights of the Russian citizens, this protection of civilian rights and in particular marginalized people’s rights is significant to the creation and transition to a healthy democratic state.⁴³

These judicial bodies are crucial to the push for democratization in Putin’s Russia.

As the power of the president increases and the opportunities for democratic participation

³⁸ Lilia Shevtova, “Russia’s Hybrid Regime”, 242

³⁹ Chandler, *Democracy, Gender, and Social Policy*, 152

⁴⁰ Ibid

⁴¹ For the remainder of this paper, this will be referred to as the CCRF.

⁴² The relationship between the development of rule of law and democratization will be explored further in chapter three.

⁴³ Shevtova, “Russia’s Hybrid Regime” 242

weaken (such as the limited role of the political opposition in Russia, elections fraud, and the limited scope of political participation for ordinary Russian citizens), Chandler argues that more and more frequently citizens have been able to turn to judicial bodies in order to be able to assert their perceived social and political rights.⁴⁴ The growing awareness of the powers of the European Court of Human Rights and the judicial processes that are available for Russia citizens to access is growing amongst ordinary Russians, and thus emphasizes the need for the study of the role of the ECHR in the process of democratization in Russia.⁴⁵

In order to understand the role of the rule of law and the role of the European Court of Human Rights⁴⁶ in the process of democratization in Russia, this thesis will examine three cases that have been sent to the ECHR. Furthermore, this thesis will analyze to what extent the work of the ECHR can impact the development of the rule of law in Russia and in essence the process of democratization. This research will discuss the case of Alekseyev v. Russia, Kiyutin v. Russia, and Konstantin Markin v. Russia. This analysis seeks to explore the research question: can the European Court of Human Rights act as a mechanism or catalyst for the implementation of democratic principles into the Russian judicial system towards the creation of an effective rule of law, and as a by product contribute to the process of democratization in Russia? This thesis will argue that overall the relationship between the ECHR and the CCRF can be a limited tool for the growth of the rule of law in Russia and can have a limited impact on the process of democratization in Russia which can be seen with the analysis of the three case studies.

⁴⁴ Chandler, *Democracy, Gender, and Social Policy*, 152

⁴⁵ Chandler, *Democracy, Gender, and Social Policy in Post-Communist Russia* (Palgrave MacMillan, 2013): 152

⁴⁶ For the remainder of this thesis the acronym ECHR will be used to discuss the European Court of Human Rights, this is an acronym commonly used in the literature.

In addition this thesis will propose that the true potential for democratic change lies in the implementation of the democratic values espoused by the CCRF and the ECHR into the decisions of the lower regional courts of Russia, and within the ECHR to demand and enforce systemic changes upon the Russian state. Finally, it will be argued that small, positive democratic change has occurred as global human rights norms have penetrated Russian society to some degree⁴⁷, and Russian citizens are accessing the judicial system (particularly through the ECHR) in order to protect their rights. In essence, the key to the democratic change through the ECHR is to direct the Russian state towards implementing systemic changes rather than purely monetary compensation to applicants. This thesis will begin with a literature review of the current body of democratization theory, and will continue with a discussion of the importance of the rule of law to the process of democratization and how the rule of law has developed and continues to develop in Russia. The second large section of the paper will analyze three case studies.

⁴⁷ This idea will be discussed further in the case studies. For the observation that these global human rights norms have penetrated Russian society refer Andrea Chandler, *Democracy, Gender, and Social Policy in Post-Communist Russia* (Palgrave MacMillan, 2013).

Chapter Two: Methodology

This chapter intends to provide a brief description of the methodology that this thesis utilizes in the analysis of the rule of law and democratization in Russia. This thesis has been segmented into two distinct parts. The first will provide an in-depth theoretical discussion, and the second will present an analysis of several case studies, and each section contains three to four chapters. This work begins with a literature review of some of the seminal theories of democratization. While this body of literature is robust, there appears to be a gap in the literature. Several scholars focus on theories of modernization, economic growth, and the aspects of transitions from authoritarian regimes towards more liberal democracies. However, it can be argued that these theories do not discuss to a great extent the importance of the development of an effective and democratic rule of law and judicial systems within the process of democratization. This research will be framed with the use of the contemporary theories and studies of Russian democratization with the work of Piotr Dutkiewicz, Richard Sakwa, Jacqueline Waylen and Remmer. These works provide a contemporary analysis to the discussion. The third chapter of the first section describes the rule of law and the role that it plays in democratization.

The second section of this work provides an analysis of three judicial cases that have been taken to the ECHR. The first analysis will focus on the case of *Alekseyev v. Russia*. This case is important to this thesis because it is related to Article 11 of the European Convention of Human Rights, which deals with the freedom of assembly. This is a critical freedom and issue and value of democracy and democratic regimes. This case is important to this thesis as it is relatively recent and the judgments from the ECHR are critical to the advancement of LGBTQ rights in Russia. In addition, after the Russian

legislator introduced several anti-LGBTQ pieces of legislation that violated the rights of Russian citizens who identify as LGBTQ the discussion of the Alekseyev v. Russia case is extremely poignant and timely with regards to the discussion of the development of an effective rule of law in Russia. Furthermore, the protection of marginalized individuals is a crucial component to democracy and particularly to civil and political rights.

The second case used will be the case of Kiyutin v. Russia. This case is related to Article 8 (the article related to the right to privacy) and Article 14 (right to equal protection under the law) of the European Convention of Human Rights. This case is important to the study of the rule of law in Russia for two reasons: it deals with the issue of migrant rights in Russia. Secondly it deals with the stigma and subsequent criminalization of HIV and AIDS and those who are diagnosed with HIV/AIDS in Russia.

The final case is the case of Konstantin Markin v. Russia. This case is significant to this study because as Chandler notes “that if an ordinary soldier who is raising three children in the interior of Russia is able to find the resources to be able to apply to the ECHR and to know about the process for this, then it suggests that an awareness of global human rights norms have penetrated Russian society more deeply than researchers had previously believed”.⁴⁸

All of these cases were chosen because they deal with cases that seek to improve human rights in Russia and give marginalized individuals in Russia more of a voice and rights, and deal with extreme human rights violations that have occurred and are still occurring in Russia today. The protection and enhancement of human rights in a given state is a crucial component to the development of an effective rule of law that provides

⁴⁸ Andrea Chandler, *Democracy, Gender, and Social Policy*, 154

not only equality but also equity⁴⁹ to all Russia citizens; furthermore, enhancing and protecting human rights within a given state is critical to the development and consolidation of democracy in a state. Three case studies were chosen in order to be able to analyze a variety of human rights issues that have arisen in Russia and have been sent to the ECHR. In addition, since this work only addresses one region as a case study, the variety of judicial cases adds to the theoretical depth of this research and additions that can be made to the literature.

It has been argued by several scholars of comparative politics that only using one case study or one region of study does not allow for an in-depth analysis of a particular trend or does not lead to potential theories of causation or patterns of democratic transition. With the study of theories of democratization there are several studies that have compared the transition to democracy in Latin America to the transition to democracy in Russia. As such, research projects that focus on democratization in Russia by using comparative analysis with large-N case studies already exist. The goal of this thesis is to deepen the study of democratization in Russia. This thesis is only analyzing one state in order to present a very detailed discussion of the aspects of democratization in Russia, particularly the role of the rule of law within the process of democratization. This can further add to the comparative literature in which Russia is referenced as a case study. A study using multiple countries would not be able to discuss and analyze in depth particular details of the democratization process in each state. It could only focus on broader generalizations or use statistics. With the use of one country as a case study and three judicial cases the researcher is able to analyze details of Russian rule of law,

⁴⁹ Equity refers to the quality of being fair and impartial, and equality refers to the state of being equal, particularly in status, opportunities and rights.

Russia's relationship with the ECHR, and how the judgments from the ECHR can potentially impact human rights in Russia.

Russia was chosen as the primary case for the study of democratization for several reasons. While there has been a significant amount of literature around the democratization of Russia, (as noted in chapter three) there has not been a significant amount of research regarding the specific role of the rule of law within the process of democratization within Russia. It is taken as a fact that the law is not working in Russia, yet it is not always considered within the theorization of democratization. In addition, the use of recent case studies adds to the theory of democratization. Russia is an important case study as it has shown how modernization theories are not always applicable to post-Soviet states or do not show a complete picture of democratization in those states. It shows the importance of history and the particular historical patterns of a given state, and it shows what different regional and international factors can influence the democratization of a state. As a case study, Russia challenges several of the key theoretical assumptions of the seminal theories of democratization, as it has not shown any of the same patterns or trends as other states that have democratized such as Poland, Hungary, Italy, or Germany etc. The rise of authoritarianism, cult of personalities in politics, and clientalism⁵⁰ are all crucial aspects to the current state of democratization in Russia, and as such make the study of Russia unique and must be taken into consideration. Furthermore, the drastic and extreme move towards authoritarian tendencies and characteristics in Russia demonstrates a challenge to the theories of

⁵⁰ Ryabov, "Democratization and Modernization in the Context of the Transformation of Post-Soviet States" 150

democratization and to the democratic transition in Russia. All of these facets are key additions to the literature of democratization.

This thesis' research methodology is qualitative in nature and focus, meaning that qualitative research methods using mainly secondary research materials such as books, journal articles, and some primary documents were used. Furthermore, quantitative methods of gathering and calculating statistics were not used. In addition to case study analysis, this thesis will use both primary and secondary documents. Court documents and official documents from the European Court of Human Rights and the United Nations will be used along with theoretical readings, and secondary sources. This thesis aims to provide additions to the literature by focusing on crucial details to the study of the transition to democracy in post-Soviet Russia. Furthermore, this research aims to provide additions to the democratization literature by providing an analysis and discussion of the role of the rule of law in the transition to democracy in Russia. The following section of this thesis will provide a literature review of the seminal theories of democratization, and the fourth chapter will provide a discussion of the role of the rule of law within the process of democratization.

Chapter Three: Literature Review-Theory

This chapter provides a critical analysis of the salient literature of theories of democratization. The body of literature regarding democratization is extensive, and explores various transitions to democracy in different regions around the world. This chapter will be divided into three sections: section one will discuss some of the classical literature of democratization and theories of liberal democracies; the second section will discuss democratic transitions and consolidations in the 1980 & 1990's, the roles of civil society, gender, and international actors in the process of democratization. The final section will discuss theories based upon case study analysis from: Latin America, Russia, and Africa. Understanding the concept and definition of democracy is key to the analysis of theories of democratization. Haslam, Schafer and Beaudet put forth a substantive definition of democracy, which looks at the substance of democracy rather than only looking at the procedures of a given state within their democratic processes.⁵¹ This thesis will be based on this definition of democracy. This understanding of democracy emphasizes: socio-economic factors, cultural issues, and citizenship.⁵²

The cultural-substantive definition of democracy is that there is a certain universal dimension that is understood worldwide, should nevertheless incorporate local meanings of the term. Furthermore, the socioeconomic aspect of the definition holds that a country may be democratic in terms of electoral procedures, yet may not be democratic if it exhibits socio-economic inequalities⁵³

In addition, given that several of the theorists mentioned the concepts of the transition to democracy and the consolidation of democracy discussed in the section below. The notion of democratic transition refers to the transition from an authoritarian or

⁵¹ P. Haslam and J. Schafer, Introduction to International Development: Approaches, actors, and issues. (Oxford University Press: Oxford, 2009): 289

⁵² P. Haslam and J. Schafer, Introduction to International Development, 290

⁵³ Ibid

totalitarian regime towards a democratic regime, and incorporates the various stages in between the two ends of the spectrum.⁵⁴ In addition, the concept of democratic transition proposes that democracy exists on a spectrum, and as such takes into account the reality that a state may exhibit some democratic tendencies but not others and that a state may be democratic during one year or era but may slide back towards an authoritarian regime or tendencies later (as seen with contemporary Ukraine and Russia).⁵⁵ As a concept in democratization theory, the consolidation of democracy refers to a more permanent state of democracy in a given regime. Robert Dahl argues that: “the consolidation of democracy is perhaps the most difficult stage in the initial plunge towards democratization. Democratization is far from linear or even monatomic movements towards an ideal political system.”⁵⁶ This thesis ascribes to the definition of consolidation laid out by Andrea Schedler who argues that: “a regime is consolidated when it is likely to endure, and when we may expect it to last into the future”.⁵⁷ With these notions in mind, the following section will begin by briefly discussing the classical theories of democratization.

Early Theories of Democratization

In the last forty years, the international system and states around the world experienced transitions from authoritarian and totalitarian regimes to democratic regimes. A series of democratic transitions began with changes from authoritarian regimes to democratic regimes in Latin America during the 1970’s and 1980’s, and was followed by a wave of transitions in the former Soviet Union after the fall of Communism in the early 1990’s.

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ Robert Dahl 1971, as cited in Gibson, Dutch and Tedin, “The Democratic values and the transformation of the Soviet Union”, *The Journal of Politics*. (1992): 363

⁵⁷ Andreas Schedler, “Measuring Democratic Consolidation”. *Comparative International Development*, 36. (2001): 66

The movement from authoritarian or totalitarian regimes to [what has traditionally been conceived of as] democratic regimes spurred the theorization of the processes of democratization and was a catalyst for the development of theories of democratic transition and consolidation. The uneven nature of the process of consolidating recent democratic transitions, and the diverse experiences of states reminds theorists of the difficulty and complexity of democratic transitions. This complexity and diversity spurred the development of multiple strands of theories of democratization. This collection of works has subsequently been affected and altered by the multiple regime changes throughout history, and by the stark differences between these regime changes. In light of this extensive body of literature, the first section of this chapter will discuss the works of five prominent traditional democracy theorists. Furthermore, after examining these theories it is possible to understand where the gaps are within the theory and to develop and build upon these existing ideas. This chapter will discuss David Held's work "Prospects for Democracy", Karen Remmer's work "New Theoretical Perspectives on Democratization", Robert Dahl's *Polyarchy*, Seymour Lipset's "Social Requisites of Democracy", and Guillermo O'Donnell's "Illusions about Consolidation".

One key theme these authors referenced above is the discussion of the concept of democracy and how it should be defined. This section will discuss the various definitions of democracy that these scholars put forth, and brief critiques of the theories will be proposed. The authors begin their discussions primarily with a deconstruction of the notion of democracy and the definition of it as a concept. The definition and the concept of democracy is an extremely contested issue in Political Science, as it contains multiple layers and characteristics. Democracy is a fairly recent phenomenon in light of the length

of modern history, and it takes on various different shapes and forms within multiple regions and countries. Many of the scholars within the traditional theories of democratization have put forth crucial definitions that have been used as the starting point for further research by other scholars. These definitions lay as landmarks and pathways for further thought into the process of democratization.

Seymour Lipset in his early work “Social Requisites of Democracy” argues that within a complex society, democracy is a political system that allows for constitutional opportunities for changing the governing officials⁵⁸. He notes that democracy is a social mechanism for the resolution of the problem of decision-making amongst conflicting interest groups in society, which can allow for the largest portion of the population to influence these decisions through their ability to choose among alternative contenders for political office.⁵⁹ This definition of democracy is dated and only considers the procedural aspects of democracy (i.e. it only discusses aspects such as voting systems or democratic offices such as members of parliament etc.) rather than some of the core elements of the substantive definition of democracy (aspects such as cultural rights, citizenship etc.). Due to the time period of his writing, Lipset’s understanding and definition of democracy is immersed in early twentieth century political theory, and thus provides more of a Western hegemonic and Eurocentric understanding of democracy. Due to this grounding in European culture and Western ideals, this definition is difficult to apply to case studies outside of Europe and North America, as in Eastern Europe and other regions development occurred in dramatically different manners than the patterns of Europe or North America.

⁵⁸ Lipset, “Some Social Requisites of Democracy”, *American Political Science Review*, 53 no. 1 (1959): 71

⁵⁹ Ibid

Larry Diamond addresses this issue in his work: “The Globalization of Democracy”, where he argues for a non-ethnocentric definition of democracy⁶⁰.⁶¹ This diverges from Lipset’s earlier definition. This could also be a reflection of the era in which Diamond was writing. His work was published in 1993, which falls directly after the dissolution of the Soviet Union, and after several transitions to democracy in Latin America. Diamond builds off a definition created by incorporating his work with Linz and Stepan’s⁶². They argue that:

Democracy is a system, which embodies three core characteristics: extensive competition among individuals and groups, a highly inclusive level of political participation in the selection of leaders and policies, and a certain level of civil and political liberties⁶³

When compared to Lipset’s definition of democracy, Diamond, elaborates on the definition by including a distinction between civil and political rights⁶⁴. The distinction between these two different sets of rights is crucial to this thesis work as a whole, as the emphasis on civil and political rights links rule of law to the process of democratization as noted by Morlino⁶⁵.

This definition set out in Diamond’s work fails to distinctly discuss how political and civil liberties are guaranteed within a state, and he fails to elaborate on what exactly it means to have certain political and civil liberties, such as “freedom of speech”.⁶⁶ For example, does he refer to ‘freedom from’, such as freedom from hate speech (for example), or ‘freedom to’ such as freedom to say what you please?

⁶⁰ Diamond’s work has been included in this section and in the second section, because he directly discusses the concept and definition of democracy in his work “The Globalization of Democracy”, and it is pertinent to contrast this with earlier theories of democracy.

⁶¹ Larry Diamond, “The Globalization of Democracy”, in *Global Transformation and the Third World* ed. Barry Schutz and R. Dorr (Rienner Publishers, 1993): 39

⁶² Ibid

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Morlino, “The Two rules of law between Transitions to and Quality of Democracy”, 51

⁶⁶ Larry Diamond, “The Globalization of Democracy”, 39

Held's work builds off of previous theories of democratization and analyzes different models of democracy. In the work "From City States to a Cosmopolitan Order", Held discusses five central issues of democratization. First he discusses the development of different models of democracy, then he considers the application of these models of democracy, and he explores the meaning of democracy in the context of the enmeshment of states and societies in regional and global orders, and finally he looks at the scope of democracy in relation to the system of international governance.⁶⁷ All of these issues are becoming increasingly important.⁶⁸ He begins by noting that the notion that liberal democracy as the agent of progress combined with capitalism as the only viable economic system is problematic in many respects.⁶⁹ He argues that in order for democracy to truly flourish in society, it must be reconsidered in the literature and policy as a two sided phenomenon, on the one hand it must be concerned with the reform of the state, and on the other hand it must be considered as the restructuring of civil society.⁷⁰ Held's theory is extremely useful as it deconstructs the liberal traditional understanding of democracy and the Westphalian order. Furthermore, it is important as it investigates the links between democracy, globalization, and international governance.

Lipset explores two principle characteristics of social systems within democratization, economic development and legitimacy.⁷¹ A crucial point in Lipset's theory is his critique of the theoretical components of the modernization theory of democracy. He argues that factors such as: higher levels of education, higher levels of income, urbanization, industrialization (the percentage of employed men and women in

⁶⁷ David Held, *Prospects for Democracy* (Stanford University Press: Stanford, 1993): 14.

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ David Held, *Prospects for Democracy*, 24.

⁷¹ Lipset, "Some Social Requisites of Democracy", 71

agriculture), have been argued to indicate the greatest potentials for democratization within a state.⁷² Lipset challenges this traditional assertion by noting that Germany and France were one of the most educated and “advanced” nations in the world, and they were not able to stabilize their democracies for quite some time.⁷³ He argues that “the high correlation between socioeconomic factors and democracy which appears in the data, must be presented between democracy, and other institutional characteristics of societies, and that this correlation must not be overly stressed since unique events may account for the persistence or failure of democracy”.⁷⁴ This assertion takes into account the individual histories and events of particular states that undergo transitions to democracy. This is crucial to the thesis presented in this paper, as the historical background of various ethnic groups and the particular history of Russia, and the historical impact of the Soviet Union are important to the study of democratization in Russia. Although, he challenges this traditional assumption, he does note the importance of education in the process of democratization.⁷⁵

Lipset argues that the relationship between education and democracy should be explored further, since an entire philosophy of democratic government has seen within increased education the spread of the basic requirements for democracy.⁷⁶ This argument does not support the “optimistic liberal notion” that an increased middle class, higher education, and an increase in wealth will mean a spread of democracy or the stabilization of democracy.⁷⁷ Russia is a perfect counter example to the modernization thesis, as it

⁷² Lipset, “Some Social Requisites of Democracy”, 75

⁷³ Ibid, 79

⁷⁴ Ibid, 75

⁷⁵ Ibid, 79

⁷⁶ Ibid

⁷⁷ Ibid

experienced an economic and socio-economic downfall during its transition to democracy rather than economic and socio-economic growth⁷⁸.

This critique of the theory of democratization through modernization is crucial to the larger piece of research mentioned in the introduction for a few key reasons. After the collapse, the Soviet Union actually experienced a rapid decrease in socioeconomic factors (such as population growth, the growth of the middle class, the educational system etc.) during its transition to democracy.⁷⁹ These events and economic and social conditions pose significant challenges to the traditional theory of modernization and social requisites of democracy. Lipset's understanding of political structures and social structures and his critique of modernization theory can be important to the analysis of the former Soviet Union.

Dahl's theories and definitions laid out in his work *Polyarchy* have been referenced and used throughout most traditional theories of democratization. Dahl makes the argument for polyarchies over less democratized regimes.⁸⁰ Dahl designates three paths towards polyarchies: liberalization that precedes inclusiveness, inclusiveness that precedes liberalization, and the shortcut (a closed hegemony which abruptly transforms into a polyarchy by the sudden grant of universal suffrage and rights of public contestation).⁸¹ Dahl summarizes his chapter in eight key points in his conclusion⁸². He argues that:

polyarchy occurs when changes have come about due to a civil war or revolution, in which a large segment of the population who uphold the legitimacy of the old

⁷⁸ Chandler, *Democracy, Gender, and Social Policy*, 46

⁷⁹ Ibid

⁸⁰ Robert Dahl, *Polyarchy; Participation and Opposition*, 31

⁸¹ Ibid, 34

⁸² Ibid

regime or deny the legitimacy of the new are defeated but nonetheless incorporated as citizens in a new regime.⁸³

This argument could be useful in the study of Russian democratization with the background of the Russian revolution, the tensions that arose during the Yeltsin era, and the tensions that arose during the transition to democracy in 1991.

There are some weaknesses of Dahl's theory that makes it difficult to apply to the study of Russian democratization. Primarily, Dahl's work is that his study of regime transformation to polyarchies, he only focuses his examination on Western and European democracies such as the study of the French Revolution and Weimar Germany (with the exception of Israel).⁸⁴ Since the Soviet Union was still an authoritarian state during the time of his writing it would have been impossible for him to include this case study, and since he only looks at Europe and Israel as case studies, this leaves his theory somewhat ethnocentric in nature.

In his work, O'Donnell debates with Dahl's (1970) theory of polyarchies. One important focus of O'Donnell's work is that along with several other scholars adopts Dahl's definition of democracy, but also makes important additions to Dahl's conceptualization of democracy.⁸⁵ O'Donnell argues that the definition of polyarchy laid out by Dahl is problematic for several reasons.⁸⁶ According to O'Donnell, the definition is generic and lackluster particularly with regards to the issue of contextual freedoms and certain institutional features (for example parliamentarianism or presidentialism).⁸⁷ He

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ Guillermo O'Donnell, "Illusions about Consolidation in *Consolidating the Third Wave Democracies: Themes and Perspectives*, eds. Larry Diamond (John Hopkins Press: Baltimore, 1997): 41

⁸⁶ O'Donnell, "Illusions about Consolidation", 42

⁸⁷ Ibid

also makes an important point that this definition of polyarchy does not address the issue of the degree to which governments need to be accountable to citizen's between elections, and to what extent the rule of law extends over the geographic and social terrain of a particular country.⁸⁸

O'Donnell also delves into the traditional conceptualization of democratic consolidation.⁸⁹ These are crucial components to the theorization of democratization as democracy exists on a spectrum and it is important to recognize this and to take it into account. He examines the definitions of democratic consolidation set forth by Juan Linz and Adam Przeworski, and considers them key components to the study of democratization. O'Donnell points to several quandaries in the current paradigm of democratic consolidation. This is extremely important to this larger body of work as it allows for more case studies (such as the Russian case study) to be analyzed within this framework. O'Donnell argues that the notion that Przeworski and Linz set forth [which defines consolidation as the state of which democracy becomes "the only game in town"], as ambiguous.⁹⁰ This analysis by O'Donnell points to a significant gap in the traditional theories of democratization and consolidation. He argues that if the main criteria for democratic consolidation or institutionalization is a fit between actual behavior and formal rules, this leaves the question of states, such as Japan and Italy.⁹¹ These countries represent states that have long standing polyarchies but particularism is rampant.⁹²

⁸⁸O'Donnell, "Illusions about Consolidation", 42

⁸⁹Ibid, 43

⁹⁰Ibid, 47

⁹¹ Ibid

⁹² Ibid

O'Donnell argues that due to these conceptual quandaries it is difficult to be able to specify when a democracy has become consolidated.⁹³ One particularly important aspect to O'Donnell's work is how he deconstructs some of the typical indicators of consolidation.⁹⁴ The five key indicators are: alternation in power between rivals, continued widespread support and stability during times of economic hardship, successful defeat and punishment of rebels, regime stability when faced with a restructuring of the party system, and finally, the absence of a politically significant anti-system party or social movement.⁹⁵ Russia could be an excellent example of this. O'Donnell debunks these indicators by using them as a means of analyzing the transitions in Latin America. He argues that within this framework Latin American polyarchies would be considered more consolidated simply because they have endured more "severe tests" than the transitions in the Southern European region.⁹⁶ O'Donnell argues that these indicators are ambiguous and do not produce the results that the authors were hoping for.⁹⁷

In her work "New theoretical perspectives on Democratization", Remmer makes several key assertions concerning the current theories of democratization and challenges some of the main issues within the traditional theories of democratization⁹⁸. She notes that despite the variance across multiple regime changes, the body of democratization theory remained fixated on a small number of factors.⁹⁹ This is especially important as the study of Russia challenges many of the core concepts of traditional theories of

⁹³ O'Donnell, "Illusions about Consolidation", 48

⁹⁴ Ibid

⁹⁵ Ibid

⁹⁶ O'Donnell, "Illusions about Consolidation", 49

⁹⁷ Ibid

⁹⁸ Remmer, "New Theoretical Perspectives on Democratization", *Comparative Politics*, 28, no. 1 (1995): 103

⁹⁸ Ibid

⁹⁹ Ibid

democratization, as noted previously. According to Remmer, many of the leading concepts in comparative politics remained focused on the failures of modernization theory, the prevalence and political domination of authoritarian regimes, and the failures of the post colonial period.¹⁰⁰ This caused stagnation within the theoretical development of comparative politics, and more specifically theories of democratization.¹⁰¹ The drastic regime changes in Eastern Europe brought about an enlightenment within democratization theory, such that the transformation of the global political, economic, and security systems meant that many facts could no longer be ignored or written off as temporary, or unimportant.¹⁰² Remmer has identified three key challenges to the understanding of current phases of democratization.¹⁰³ To begin with, comparative theory in itself continues to be created from the standpoint of domestic politics, however, democratization in the 1980's and the 1990's demonstrated an international phenomena with direct and strict domestic implications.¹⁰⁴ Second, the variety of conditions, such as socioeconomic structures, patterns of state-society relationships, transitional paths, and historical traditions have been associated with recent transitions to political democracy.¹⁰⁵ This has in turn invalidated the older theories and has complicated efforts amongst theorists to synthesize and generalize theoretical concepts.¹⁰⁶ The final challenge is that in most regions of the world political democracy has replaced authoritarian regimes under conditions of severe economic decline.¹⁰⁷ After reviewing Remmer's work, it is clear that she has identified some theoretical gaps in the literature, and provides alternative

¹⁰⁰ Ibid

¹⁰¹ Ibid

¹⁰² Remmer, "New Theoretical Perspectives on Democratization", 104

¹⁰³ Ibid, 105

¹⁰⁴ Ibid

¹⁰⁵ Ibid

¹⁰⁶ Ibid

¹⁰⁷ Ibid

explanations for democratic transition and consolidation. This critique is crucial to this thesis as it allows for the theoretical space for the study of case studies such as post-Soviet Russia.

Inquiries and deconstruction of the traditional theories has allowed for theorists to discover some of the gaps and ambiguities within this body of literature. The following section will discuss some of them.

Gender, Civil Society, International and Domestic Factors & Democratization

This section will expand upon early theories by discussing works that touch upon the role of civil society, gender, and the role of international actors within the study of democratization. This section will discuss the works of Marcia Weigle, Georgina Waylen, Jane Jacquette, and Larry Diamond, and Arturo Valenzuela. These pieces of work as whole fill in some of the gaps of the traditional literature and expand the body of work by including analysis into issues such as gender, civil society, and the role of international actors. These theories are particularly important to this thesis as they address the aforementioned issues. In addition, some of these theorists deal with the role of international actors, and this thesis focuses specifically on the role of external actors in the process of democratization.

Weigle provides key insight into the importance and role of civil society actors in the process of democratization particularly in post-Soviet Russia. Weigle demonstrates the importance of civil society to democracy by quoting Philip Oxhorn, who notes that it is possible for transitions to democracies from authoritarian rule to take the wind out of the nascent civil society's momentum.¹⁰⁸ Weigle outlines the definition of civil society to

¹⁰⁸ Marcia Weigle, *Russia's Liberal Project: State-Society Relations in the Transition from Communism* (Pennsylvania State University Press: University Park PA, 2000): 333

be: “non-state activities, organizations and social relationships taking place in the public sphere. Civil society is independent of the state but is also the foundation of state power”.¹⁰⁹ During the Soviet regime, tens of thousands of “informal” groups arose during the Gorbachev era to form what Russian scholars deemed an “informal movement”.¹¹⁰ These informal movements contributed to the demise of the communist regime, however, after the transition Weigle argues that this promise of democratic renewal was overshadowed by elite negotiations and corruption.¹¹¹ This is a particularly important point with the rise of Putin and his attacks on NGOs, activists and other civil society groups.

Weigle posits that the transition in Russia demobilized civil society groups in Russia in three ways: first, the tendency for groups who focused on the role of the Soviet state as a means of injustice dissipated, second, there was a draining of activists from the sphere of civil society to that of political society, and the final reason is the program of market oriented economic reforms, which lead to a reconfiguration of social structure and the interests of independent group activism.¹¹² The demobilizing of Soviet Russia’s civil society after the collapse of the Soviet Union meant that individuals and groups no longer had an organized sphere in which they could articulate and reconcile their interests on the bases of established laws and norms.¹¹³ In addition, this dismantling of civil society groups makes it even more difficult for civil society to re-mobilize, making it even more difficult for those groups to fight for civil rights in contemporary Russia.

¹⁰⁹ Weigle, *Russia’s Liberal Project: State-Society Relations in the Transition from Communism*, 339

¹¹⁰ Ibid, 337

¹¹¹ Ibid

¹¹² Weigle, *Russia’s Liberal Project: State-Society Relations in the Transition from Communism*, 335

¹¹³ Ibid

Within the literature of civil society groups in post-communist Russia, the demobilization has been viewed as undemocratic, and as a betrayal of the ideals on which the anti-communist movement was based, as such civil society has come to be seen within Russian social science literature as an essential component to the consolidation of democracy in post-communist Russia.¹¹⁴ Weigle argues that the prerequisites for civil society formation in post-communist Russia can be summed up into a threefold classification: the development of a political culture and value system that is conducive to trust and social integration, the structural role for civil society in the polity as independent of the state, and as the foundation of the state, and finally, the ability for individuals to organize and mobilize resources in order to pursue interests in public life.¹¹⁵ The only difficulty with this reading is that it was written before the second Chechnyan war, before the Pussy Riot case, and prior to the Putin regime. This means that the chapter did not take into consideration that the Russian regime could backslide towards authoritarian values, as depicted with these examples.

Jacquette and Waylen discuss the importance of the inclusion of gender and women's movements into theories of democratization. Waylen in her article "Democratization: Conceptualizing Gender Relations in Transition Politics", notes a significant gap in the traditional literature of democratization, by identifying that orthodox Political Science literature has not mentioned the issue of gender or to be specific the significant role of women and women's movements in the process of democratization.¹¹⁶ Jacquette notes that without a clear understanding of the role that

¹¹⁴ Weigle, *Russia's Liberal Project: State-Society Relations in the Transition from Communism*, 342

¹¹⁵ *Ibid*, 351

¹¹⁶ G. Waylen, "Women and Democratization: Conceptualization Gender Relations in Transition Politics" *World Politics*, 46 (1994): 327

women play in historical changes such as transitions to democracy, the meaning of the historical changes cannot be fully understood.¹¹⁷ Traditional literature looks at top down measures, which focuses primarily on the actions and decisions of political leaders within democratic transition.¹¹⁸ Waylen argues that the exclusion of gender partially stems from the definition of democracy commonly used in the literature.¹¹⁹ As such the definition as laid out in early theories of democratization are insufficient for describing the transitions to democracy in Eastern Europe.

While the traditional definitions of democracy are critical to the creation of the foundation of democratic theory, it is crucial to incorporate gender issues as it has been argued that the vitality of gender movements are important indicators of the extent to which democratic institutions are working on the ground and to what extent these institutions impact the lived reality and experiences of marginalized groups in Russia.¹²⁰

In her article, Jaquette explores some of the key issues within women's movements during democratization, including, the issue of globalization, the modernization thesis, and fractures within feminist movements¹²¹. Of particular importance is the discussion of gender quotas; Jaquette notes that in some countries with elections, gender quotas have led to women being elected who are neutral, or sometimes even hostile towards feminist issues.¹²² In sum, the works of Waylen and Jaquette are crucial to this thesis, as they have expanded the theoretical framework of traditional theories of democratization by arguing for the inclusion of gender into theories of

¹¹⁷ Jane Jaquette, "Women and Democracy: Regional Differences and Contrasting Views" *Journal of Democracy*, 12 no. 3 (2001): 111

¹¹⁸ Waylen, "Women and Democratization: Conceptualization Gender Relations in Transition Politics", 331

¹¹⁹ Ibid

¹²⁰ Jaquette, "Women and Democracy: Regional Differences and Contrasting Views", 111

¹²¹ Ibid

¹²² Ibid

democracy. Their work is crucial to this thesis as two of the case studies deal with gender based issues. Furthermore, as Chandler notes regime transitions can have gendered impacts.¹²³

In his work “The Globalization of Democracy”, Diamond analyzes the global trends towards democracy in the 1980’s and 1990’s. Diamond analyzes how international and domestic factors impact democratization.¹²⁴ Diamond argues that there are two types of domestic factors that are important to global democratic trends: the changes in the development, organization, consciousness and mobilization of civil society, and the division and failures of the departing authoritarian regime.¹²⁵ What is particularly useful in Diamond’s theory is his brief discussion of democratization in post-Soviet states as case studies in the global democratic revolution.¹²⁶ Diamond reiterates the three critical components of the democratic transition in the former Soviet states: “the transition from state socialism to market economy, crafting and institutionalizing new democratic structures in each republic, and working out a new system of economic and political interaction among the republics”.¹²⁷

A second important portion of Diamond’s work is his critique of Schmitter and O’Donnell’s theory of democratic transition.¹²⁸ Diamond argues that while their elite centered argument recognizes the mobilization of civil society, their argument is inadequate for two reasons: their image of civil society is missing the process of change that transforms societies, and second they ignore the contribution of civil society during

¹²³ Chandler, *Democracy, Gender, and Social Policy*, 44

¹²⁴ Diamond, “The Globalization of Democracy”, 32

¹²⁵ Ibid, 43

¹²⁶ Ibid, 32

¹²⁷ Ibid, 33

¹²⁸ Ibid, 45

the period after the authoritarian regime has split and the “soft-liners” have begun to liberalize the former regime.¹²⁹

There are several key critiques that can be made of Diamond’s theories. In this work, Diamond, discusses some key domestic factors that impact a transition to democracy, where he particularly focuses factors of socioeconomic development.¹³⁰ Diamond argues that factors such as income, social and occupational status, and increasing levels of education can foster democratic behaviors, norms, and values within state populations.¹³¹ Additionally, Diamond argues that these socioeconomic developments have the potential to alter interest coalitions.¹³² The discussion of the importance of the development of socioeconomic factors (increased income and education levels) has been discussed in great detail throughout the classic democratic literature with theorists such as Martin Lipset and as noted earlier with particular regards to the Russian case study this theory can be problematic. Many scholars such as Chandler,¹³³ have commented on the decrease in social welfare, and the drastic negative impacts the transition had on the Russian economy. This dramatic shift in the way of life and its impacts on Russian society, economy, and government questions the extent to which this emphasis on socioeconomic factors can be directly applied to the study of the Russian transition to democracy.

The second critique that can be made concerns the impact of international factors on the transition to democracy. Diamond argues that international factors and certain

¹²⁹ Ibid

¹³⁰ Diamond, “The Globalization of Democracy”, 47

¹³¹ Ibid

¹³² Ibid

¹³³ Chandler, *Democracy, Gender, and Social Policy*, 44

pressures can affect the process of authoritarian breakdown.¹³⁴ Diamond maintains that responses to democratic pressures such as: responses to human rights violations by established democratic countries can decrease domestic support for authoritarian regimes and can often aggravate the divisions between the fractions within an authoritarian regime.¹³⁵ Within this particular argument, Diamond pays attention to the influence of the United States within international affairs.¹³⁶ He argues that U.S pressure was critical to democratization in Peru, Panama, and Grenada etc. (most of the countries Diamond listed were Latin American with the exception of Poland).¹³⁷ When studying Russia, it's geopolitical position and its political role in the international system must be taken into account when accounting for the role of international pressure on authoritarian regimes. Russia is a unique case study in this sense, as it has a permanent position on the United Nations Security Council; the pressure that certain international actors may be able to place on Russia is different than other authoritarian or democratizing regimes. Russia's geopolitical position and influence is different than any other Eastern European states. It is also critical to add to the theory of Russia's democratization how Russia's geopolitical position has changed since the collapse of the Soviet Union. For example, the influence that the Russian government has within Europe and to some extent their influence globally, is related to the oil and gas industry and the influence that Russia has within that market. This could be seen in some other countries within particular regions such as Latin America and Africa, but could not be generalized to those entire regions. Diamond fails to take this discussion into account when discussing international actors in the role of

¹³⁴ Diamond, "The Globalization of Democracy", 49

¹³⁵ Ibid , 49

¹³⁶ Ibid

¹³⁷ Ibid

democratizing regimes. Finally, Diamond's work focuses primarily on democratization in Latin America, rather than Eastern Europe. This is partially due to the date of publication of the book; as it was written four years after the collapse of Communism in Eastern Europe too soon after the beginning of a transition to make strong generalizations about the democratic transition in Eastern Europe. While looking at previous democratic transitions is a well-sounded methodological framework, it should be noted that the two regions and their transitions are not synonymous.

Valenzuela's work is critical to the theoretical framework of democratization due to his analysis of democratization in Latin America. In his work, Valenzuela argues that there are three key factors in understanding the democratic transition in the 1980's in Latin America: first, the decline of the left, second, the historic legitimacy of democratic practices, finally the failure of authoritarian regimes.¹³⁸ Valenzuela's work is valuable to this thesis for three reasons. To begin with, he chooses to recognize that within any study of democratization and transitions no set of economic or cultural determinants appears to explain in a satisfactory manner the origin and evolution of the democratic experience.¹³⁹ This leaves room for further growth in the field of democratization. In particular, this assertion leaves room for the work in this thesis, which focuses on the development of substantive aspects of democracy, in particular the rule of law.

A second critical element to Valenzuela's work is his argument that it is not certain that a particular path followed by a certain country during the transition process will have a positive effect on the consolidation of democracy within that state.¹⁴⁰ This

¹³⁸ Arturo Valenzuela, "External Actors in the Transitions to Democracy in Latin America" in *Pathways to Democracy: The Political Economy of Transitions*, (Routledge: London, 2000): 120

¹³⁹ Valenzuela, "External Actors in the Transitions to Democracy in Latin America", 118

¹⁴⁰ Ibid, 120

argument is particularly important to the study of Russia. Russia has been seen to transition to democracy since the fall of communism, however it is often debated whether or not democracy has actually consolidated in Russia, with many scholars arguing that democracy has not consolidated in Russia at all and that Russia is still in a state of transition. This thesis ascribes to this idea, and argues that Russia is still in a transition to democracy and that this is evidenced by the resurgence of authoritarian values and ideology within the current Russian government. Some scholars such as Chandler¹⁴¹ have even argued that while Russia made strides directly after the end of communism to democratize, it has recently moved back towards an authoritarian style regime. Changes to the constitutional structure, challenges to recent voting procedures and outcomes, and rampant human rights violations have all made scholars question the legitimacy of Russia's democratic state. Finally, Valenzuela's analysis of domestic and international factors falls closely in line with Diamond's discussion of international and domestic factors in democratization.¹⁴² This is a valuable contribution to the literature, as it does not prioritize one factor over another, it gives equal attention to domestic and international issues and factors.

This set of readings challenges the traditional theories of democratization by incorporating gender and women's movements into the analysis, looks at international factors as well as domestic, and discusses the importance of civil society to democratization. Waylen and Jacquette argue for the inclusion of women's movements into the analysis of democratization. Diamond and Valenzuela make valuable contributions with their analysis of democratization in Latin America and their discussion

¹⁴¹ Chandler, *Democracy, Gender, and Social Policy*, 44

¹⁴² Valenzuela, "External Actors in the Transitions to Democracy in Latin America", 120

of domestic and international factors and how they influence the process of democratization. The author's contributions broaden the literature and applicability of theories of democratization. The final section of this literature review will briefly discuss three prominent case studies that have been used to build theories of democratization.

Case Studies: Latin America, East and Central Europe, and Africa

The final section of this chapter will discuss the works of: Terry Karl, Philip Roeder, Steven Fish, Phillippe Schmitter and Terry Karl, Valerie Bunce, and Ibonvbere, Dutkiewicz, and Sakwa. These works are especially crucial to this thesis as some of them provide detailed discussions of Russia. Although this is not a comparative analysis it is important to understand the background of democratization theories.

Latin America

In the article "Dilemma's of Democratization in Latin America" Karl presents a good discussion of the current theories of democratization and applies them to the study of Latin America.¹⁴³ Karl challenges theories of democratization that focus on the "preconditions" for democracy by grounding his analyses in a study of the process of democratization in Latin America¹⁴⁴. She argues that the precondition of a market economy and capitalist development is not enough to ensure democratic consolidation.¹⁴⁵ This brings us back to Lipset's theory, which presented a similar argument. Second, she discusses the idea that a pre-democratic consensus and a certain set of values are considered the main prerequisite of political democracy, and finally, the last precondition is the idea that specific domestic historical conditions and configurations were said to be

¹⁴³ Terry Karl, "Dilemmas of Democratization in Latin America" *Comparative Politics*, 23 no. 1(1990): 3

¹⁴⁴ Ibid

¹⁴⁵ Ibid

prerequisites for democracy.¹⁴⁶ His main argument is that the experience of Latin American countries in the 1980's challenges the notion of these preconditions for democracy.¹⁴⁷ Karl argues that through the analysis of various countries within Latin America, there are several anomalies that suggest the need for a revision of the theory of democratic preconditions.¹⁴⁸ Within this framework, it is argued that there are no preconditions that are sufficient to produce a certain outcome.¹⁴⁹ A critical revision to this theory is the notion that what the literature considers preconditions of democracy, would be better understood as future outcomes of democracy.¹⁵⁰ Karl argues that within the Latin American context, there are four ideal types of democratic transitions: reform, revolution, imposition and the pact.¹⁵¹

This argument and critique is important to this thesis, as the process of Russian democratization and the study of Latin America and Russia demonstrate counter-examples to the concept of “preconditions for democracy”. While Karl grounds his analysis in the study of Latin America, the arguments of the theory of preconditions of democracy do not necessarily apply to the study of Eastern Europe. The theories of Karl may not be directly applicable to the study of democratic transition in Russia, since she based her theory directly on specific examples and conditions from Latin American countries. Latin America is a fundamentally different region of study than Eastern Europe. The various conditions that prevail in Russian history and contemporary Russian society and politics are very different than Latin America.

¹⁴⁶ Ibid

¹⁴⁷ Karl, “Dilemmas of Democratization in Latin America”, 4

¹⁴⁸ Ibid, 5

¹⁴⁹ Ibid

¹⁵⁰ Ibid

¹⁵¹ Ibid

Africa

The study of democratization in Africa also poses significant challenges to classical theories of democratization. Although, Russia and Africa contain many historical, cultural, economic and political differences (of particular importance is Africa's experience with colonialism); the two states do, however contain some important similarities with regards to their respective relationships to democracy and the process of democratization. The underlying dynamic process of democratization has not resulted in a dramatic restructuring of the contexts or content of politics in Africa.¹⁵² The era of democratization in African politics became known as the "lost decade", where social and economic conditions deteriorated to such an extent that poverty, crime, prostitution, and infrastructure collapse etc. came to characterize African politics and economy.¹⁵³ What is crucial with this argument is that the elites did not perpetuate democratic norms or values, contrary to some early theories of democratization, the elites hindered democratic development in many African countries.¹⁵⁴ There is one particular similarity between the democratic transition in Africa and Russia. The elites in Russia and Africa played key roles in the transition and consolidation of democracy in these regions. Due to this, this discussion by Ihonvbere is an interesting addition to the theoretical framework of this thesis work.

Russia

¹⁵² Ake, 1993, as cited in Julius Ihonvbere "Where is the Third Wave? A Critical Evaluation of Africa's non-transition to Democracy" in *Multiparty Democracy and Political Constraints in Democratization in Africa*, eds. John Mbaku and Julius Ihonvbere, (Ashgate, 1998): 10

¹⁵³ Ihonvbere "Where is the Third Wave? A Critical Evaluation of Africa's non-transition to Democracy" in *Multiparty Democracy and Political Constraints in Democratization in Africa*, eds. John Mbaku and Julius Ihonvbere, (Ashgate, 1998): 13

¹⁵⁴ Ibid

Schmitter & Karl use Russia as a case in order to explore the notions of “transitology and consolidology” within democratization theories, and argue that “transitology and consolidology claim that by applying a universalistic set of assumptions, hypotheses, and concepts, they can together explain and guide the way from an autocratic to a democratic regime”.¹⁵⁵ They argue that consolidologists need to shift their thinking from the notion of “political causality” to a paradigm of “bounded rationality”.¹⁵⁶ The working assumption of Schmitter & Karl is as follows: “provided the events or processes satisfy certain requirements, their occurrence in Eastern Europe or the former Soviet Union should be considered at least initially, analogous to events or processes happening elsewhere. More than that, they should be treated as part of the same wave of democratization that began in Portugal in 1974”.¹⁵⁷ Schmitter & Karl note that with the dissolution of the Soviet Union, consolidologists and transitologists saw the changes with “imperial intent”.¹⁵⁸ Specialists of the region opposed these theories by arguing that cultural, ideological, and national peculiarities of the specific case study, in particular the historical background of the nation, are critical to the study of democratization.¹⁵⁹ The critical component of their argument is the assertion that “the lessons or generalizations already drawn from previous transitions and now being made about the difficulties of regime consolidation should ex hypothesis be rejected”.¹⁶⁰ The particularities of a country (cultural, historical, or institutional etc.) should emerge from systematic comparison.¹⁶¹

Valerie Bunce’s article responds to Schmitter and Karl’s criticism of the theories of

¹⁵⁵ Schmitter and Karl, “The Conceptual Travels of Transitologists and Consolidologists: How far to the East should they go? *Slavic Review*, 53 no.1 (1994): 173

¹⁵⁶ *Ibid*, 176

¹⁵⁷ *Ibid*, 178

¹⁵⁸ *Ibid*, 177

¹⁵⁹ *Ibid*

¹⁶⁰ *Ibid*

¹⁶¹ *Ibid*, 178

transitology¹⁶². Bunce's argument contains four main points: she believes that Schmitter and Karl are wrong when they discuss area studies and comparative studies as opposites, and that Schmitter and Karl do not pay enough attention to the fundamental differences between Eastern and Southern Europe; third, Bunce argues that the comparison between the East and South cannot be reduced to the debate between area studies and comparative studies; finally, she argues that there are good reasons to engage in this comparison.¹⁶³ This thesis ascribes to the notion that area and regional studies are crucial to the study of democratization, and that the cultural and historical background of a given state is vital to the analysis of democratization in a given state.

After reading through various theories of democratization, Roeder's work seems to be applicable to the study of Russia. Roeder identifies several gaps in the traditional theories. Roeder argues that the existing theories of democratization seem unable to answer the question of why authoritarianism failed in some Soviet successor states.¹⁶⁴ Roeder's argument centers on a model, which focuses on bargaining within authoritarian regimes.¹⁶⁵ He points out that the simpler economic theories are not able to explain the development of democracy in Russia, Moldova or Ukraine.¹⁶⁶ These case studies do not follow the typical patterns laid out by the economic hypothesis.¹⁶⁷ "The odds that countries within Russia's income bracket become authoritarian are two to one, and Russia, Moldova and Ukraine fall below Huntington's upper middle class income group"

¹⁶² Valerie Bunce, "Should Transitologists be Grounded?" *Slavic Review*, 54 no. 1 (1995): 10

¹⁶³ *Ibid*, 18

¹⁶⁴ Phillip Roeder, "The Rejection of Authoritarianism" in *PostCommunism and the Theory of Democracy*, eds. Richard Anderson (Princeton University Press: Princeton, 2001): 11

¹⁶⁵ Roeder, "The Rejection of Authoritarianism," 23

¹⁶⁶ Roeder, "The Rejection of Authoritarianism," 20

¹⁶⁷ *Ibid*

according to Roeder.¹⁶⁸ These case studies have also suffered extreme economic decline since their transition to democracy, which also counters the typical economic hypothesis.¹⁶⁹ Roeder also argues that the political-sociological hypothesis was also not sufficient to explain democratization in these case studies.¹⁷⁰

Roeder notes that the associational ties in Russia between civil society and political society are extremely weak, and they are far weaker than in Latin America or other industrial societies, in fact Ukraine and Russia lack crucial components of civil life that underpin community life.¹⁷¹ Second, the Russian case study differs significantly from previous studies as Russian political culture rejects the current democratic order, and many citizens have nostalgia for the previous nondemocratic forms of governance.¹⁷² This nostalgia among the Russian population is crucial to the consolidation of democracy and the study of democracy in Russia as citizen's desire for and embodiment of democratic values is often seen as crucial to the process of democratization.¹⁷³

A third factors that Roeder notes is the importance of titular elites in the process of democratization.¹⁷⁴ While important this factor is not crucial to this thesis.

One critique of Roeder's theory is that he appears to consider Russia to be a consolidated democracy that has never slid back towards authoritarian tendencies. However, due to recent events with changes to the constitution, alleged election fraud, and significant human rights violations, many scholars and critiques such as Fish, Chandler, Dutkiewicz, and Rupnik (and many others) have argued that Russia has moved

¹⁶⁸ Ibid

¹⁶⁹ Ibid

¹⁷⁰ Roeder, "The Rejection of Authoritarianism," 21

¹⁷¹ Ibid

¹⁷² Roeder "The Rejection of Authoritarianism", 22

¹⁷³ Ibid

¹⁷⁴ Roeder, "The Rejection of Authoritarianism", 30

towards authoritarian tendencies of the past and should not be considered democratic. Roeder cites Steven Fish who offers an account of the dynamics of regimes that have failed at democratization and could backslide towards authoritarianism.¹⁷⁵

The article written by Steven Fish is one of the most pertinent pieces of writing for this thesis topic. Fish argues: “it may be time to consider putting to pasture or at least questioning the relevance of several of the foundationalists on whom contemporary theorists of democratization have relied so heavily on”.¹⁷⁶ Fish presents a discussion of the major theories of democratization and analyzes why they may not be the best theories to use when theorizing about the process of democratization in Eastern Europe.¹⁷⁷ He argues that the post-Communist experience yields a paradox in the study of democratization:

Where democratization is normally expected to yield baneful side effects it has not done so, and where democratization should produce strongly positive consequences (particularly in enhancing accountability and representativeness) it has done so only sporadically and in ways that large proportions of inhabitants regard as profoundly unsatisfactory.¹⁷⁸

This is a painfully accurate description of the Russian experience with democracy, and this description continues to be an accurate description of the lives reality of Russian “democracy” today.

One of the critical components of Fish’s criticism is his discussion of Schumpeter’s definition and conceptualization of democracy.¹⁷⁹ Fish argues that if we use the definitions set out by Schumpeter (mentioned in the previous sections of this chapter) well over half of the post-communist states would be considered democracies,

¹⁷⁵ Roeder, “The Rejection of Authoritarianism”, 52

¹⁷⁶ Steven Fish, “PostCommunist Subversion: Social Science and Democratization in Eastern Europe and Eurasia”, *Slavic Review*, 58 no. 4 (1999): 819

¹⁷⁷ Ibid

¹⁷⁸ Ibid

¹⁷⁹ Ibid, 815

yet this may not be the best way of describing the state of democratic transitions in Eastern Europe.¹⁸⁰ He also criticizes Huntington's theories of democratization, by arguing that Huntington employs a "garbage can model".¹⁸¹ According to Fish, Huntington's theory "offers absurd caricatures of the very notion of "culture", and surreal and fallacious images of the importance of religious tradition for the possibilities of popular rule and for relations among socio-cultural groups".¹⁸²

Alongside his criticism of classical democratization theories, Fish critiques three of the main approaches to understanding the process of democratization. He begins by discussing the socioeconomic structural and sociocultural structural explanations.¹⁸³ Fish notes that this theory is based upon a handful of anecdotes, and analyzes the smoothness of democratization in homogeneous Poland and Hungary, and claims that the transition is more problematic in more diverse countries such as Croatia and Bulgaria.¹⁸⁴ He has found that ethnic homogeneity is unrelated to democratic achievement.¹⁸⁵ This assertion is particularly important as one of the case studies in this work deals with the rights of migrants in Russia.

Second Fish calls "transitology" the third major theoretical approach and he challenges the legitimacy of this approach by applying it to the study of Eastern Europe.¹⁸⁶ In addition, he notes that the theoretical lens of transitology does not directly address the issue of cross-national variation in the extent of democratization.¹⁸⁷

Transitology typically focuses on what type of transition a country goes through and

¹⁸⁰ Ibid

¹⁸¹ Ibid, 821

¹⁸² Ibid

¹⁸³ Ibid, 796

¹⁸⁴ Ibid

¹⁸⁵ Ibid

¹⁸⁶ Ibid, 798

¹⁸⁷ Ibid, 799

whether or not a country makes it to its first elections.¹⁸⁸ However, this is grounded in the presumptions of the definition of a procedural democracy, rather than accounting for elements of a substantive democracy, thus creating a further gap in the theory of transitology. Fish makes a crucial statement about the state of democratization literature:

Few studies focus on the Post-Communist region, however, most writing offer investigations on the causes of or impediments to democratic stability or “completion” of regime change, rather than systematic empirical analysis of and theorizing about cross national variation in the extent of democratization.¹⁸⁹

In addition to Steven Fish, Dutkiewicz’s work regarding the commodification of

democracy and modernization in Russia have been poignant pieces of theoretical work which have provided effective frameworks for the theorization of democratization in Russia. Dutkiewicz offers a political economic framework for understanding democracy in Russia. He argues that:

In the market, democracy in the 1990’s became a commodity of the European Economic Community and Russia like any other commodity (i.e.: a thing which can be bought and sold on the “democratic market”). By buying decision access to the political process, property, the media, buying influence in elections at any level and decision makers and politicians, influencing courts and police (i.e. the purchase of civil liberties), a select few were able to become de facto owners of the state and became those who were able to enjoy and benefit from democracy. In other words, all aspects of liberal democracy were sold with the result of commodification of the entire structure of democracy. I call this process the commodification of democracy.¹⁹⁰

Furthermore, Dutkiewicz argues that democracy has strong support among Russian citizens; although, “the benefits of democracy are understood by citizens in terms of social safety, fairness, and system stability in addition to the basic freedoms understood

¹⁸⁸ Ibid

¹⁸⁹ Ibid

¹⁹⁰ Piotr Dutkiewicz, “Transitional Economies and the Commodification of Democracy” in *Democracy versus Modernization: A Dilemma for Russia and the world*, eds. Inozemtsev and Piotr Dutkiewicz, (Routledge, 2013): 54

to be part and parcel of democracy”.¹⁹¹ According to Dutkiewicz, Russian citizens understand democracy “as a function through which to achieve social dignity secured by decent living conditions and safety”.¹⁹² Dutkiewicz argues that the issues of primary concern for most people who have faced social and economic dislocations are predominantly focused on their own and their children’s prospects for material well-being, and opportunities to be equal citizens in a state without the potential of corruption.¹⁹³

What is particularly important when discussing the growth of democracy in Russia and the role of rule of law is Dutkiewicz’s assertion that as democracy becomes commodified through a process similar to the process of capitalization, it is subject to a similar process of accumulation.¹⁹⁴ However, rather than accumulating capital, the commodification of democracy leads to the accumulation of power.¹⁹⁵ In addition, Richard Sakwa has presented some key theories with regards to democracy in Russia. He argues that Russian politics is characterized by “a dominance of a powerful yet diffuse administrative regime, which recognizes its subordination to the constitutional state on the one side, and its formal accountability to the institutions of mass representative democracy on the other, but at the same time, democratic institutions are subordinate to the regime and vulnerable to arbitrary rule.”¹⁹⁶

In summation, these three sections have brought together various theories of democratic transition and consolidation. Many of the classical theories and portions (or

¹⁹¹ Ibid

¹⁹² Dutkiewicz, “Transitional Economies and the Commodification of Democracy”, 54

¹⁹³ Ibid

¹⁹⁴ Ibid

¹⁹⁵ Ibid

¹⁹⁶ Richard Sakwa, “Can Putinism Solve its Contradictions”. *Vladai Club*.
<http://valdaiclub.com/politics/66103.html>

key ideas from theories or case study analysis) cannot be applied to the study of Russia, as they are based in western and Eurocentric understandings and patterns of democratic transition and do not take into account Russia's history or the particular nature of communism that existed in Russia. There is room for significant growth in the study of the process of democratization in Russia. Many of the traditional theories of democratization do not discuss the development of the rule of law within the process of democratization to a satisfying extent. This thesis will add to the current body of literature by exploring the role of the development of an effective rule of law within the process of democratization in Russia. The following chapter has a theoretical aspect as well as a practical aspect. To begin it will outline to what extent the rule of law has been analyzed within studies of democratization, and will outline why the analysis and discussion of the rule of law within the study of democratization is key to the theorization of the process of democratization. In addition, the following chapter will discuss the existing judicial system in Russia, and will discuss the role of the ECHR within the judicial system in Russia.

Chapter Four: The Importance of the Rule of Law in the Process of Democratization

As mentioned in the previous chapters there are several key components and factors that influence the process of democratization in a given state, the development of an effective rule of law is one of these pivotal factors. This chapter will begin by briefly outlining the definition of “rule of law” and the current state of the rule of law in Russia, and the role of Putin and his “dictatorship of the law”. Secondly, this chapter will briefly outline the court structures that are discussed in this thesis, and will then discuss the ECHR and the way that it functions with regards to member states who violate the convention. The rule of law is a crucial component to a functioning democratic society as it sets the norms and codes by which society abides. Palombella argues that:

As democratic power can be unbridled and unlimited, it would be unreasonable to consider the rule of law as an unnecessary problem in a democratic regime, at least until one acknowledges the distinct service and the distinct nature of law and politics, despite their stable interweaving.¹⁹⁷

The study of the rule of law as a factor in democratization is inextricably related to the democratic process of a state in at least three ways: “rule of law protects the civil liberties and the rights of the entire population, it establishes networks of responsibility (such as legal codes and judicial systems including the police force and court systems, and this includes the highest level of state officials), and finally it upholds the political rights of a democratic regime”.¹⁹⁸ This thesis ascribes to the liberal notion of universal human rights which are used by institutions such as the United Nations and the ECHR. Rule of law is an abstract principle that is inextricably linked to the democratic processes of a country,

¹⁹⁷ Palombella Gianluigi, “The Rule of Law as an Institutional Ideal in *Rule of Law and Democracy: Inquiries into Internal and External Issues*, eds. Leonardo Morlino and Gianluigi Palombella (Brill: Boston, 2010): 33

¹⁹⁸ Morlino, “The Two rules of Law between Transitions to and Quality of Democracy”, 51

and Morlino influenced the definition of rule of law in this thesis.¹⁹⁹ Rule of law is understood in this thesis within the liberal notion of human rights and is seen as effective when a state creates, enforced and abides by laws, which ascribe by universal human rights norms. Citizens (including the elites and government officials) are subject to the law and must abide by it.²⁰⁰ Furthermore, the law upholds the civil and political rights of the people, and these rights include the “substantive” components of democracy such as, socio-economic, citizenship, and cultural rights.²⁰¹ There are two key components of the rule of law, the quality of the law, and the quality of the implementation of the law.²⁰² There is an inherent duality that exists, and it is crucial that each component be effective in order to boost democratic change.²⁰³ Morlino makes a crucial point when he notes that: “the spread of democratic values on the popular and especially the elite level, as well as within bureaucratic traditions and legislative and economic means are the necessary conditions for a democratic rule of law”.²⁰⁴ As such it is crucial for rights to exist within the law, these rights must be embodied within policy makers and government officials as well as within the citizens in order for there to be a liberal, democratic, and effective rule of law within a given country.²⁰⁵ Post-Soviet Russia lacks the proper implementation of the law, and it could be argued that many of the current pieces of legislation²⁰⁶ that

¹⁹⁹ Ibid

²⁰⁰ Ibid

²⁰¹ Ibid

²⁰² Ibid

²⁰³ Richard Sakwa, “Can Putinism Solve its Contradictions”. *Vladai Club*.

<http://valdaiclub.com/politics/66103.html>, & Piotr Dutkiewicz, “Transitional Economies and the Commodification of Democracy” in *Democracy versus Modernization: A Dilemma for Russia and the world*, eds. Inozemtsev and Piotr Dutkiewicz, (Routledge, 2013): 54

²⁰⁴ Morlino, “The Two rules of Law between Transitions to and Quality of Democracy”, 53

²⁰⁵ Ibid, 50-54

²⁰⁶ This must of course, be distinguished from the new pieces of legislation that are by nature meant to take away civil rights and liberties, such as: the foreign agents law, which restricts advocacy groups and NGOs in Russia and the recent draft law which prohibits the publication of any negative information about the Russian military and government

protect civil and political liberties are not strong enough and lack proper mechanisms of enforcement.²⁰⁷

The development and maintenance of the rule of law is crucial to the development of a democratic society, yet it presents potential quandaries and difficulties within the process of democratization in Russia. In the study of post-Soviet states, there is not enough literature that discusses the various intricacies of the growth and maintenance of the rule of law within democratization (particularly in the study of Russia),²⁰⁸ and how this growth impacts the process of democratization in these states.²⁰⁹ A significant portion of literature discusses the development of core democratic institutions (such as the institutionalization of fair and corrupt free elections), and the development of various democratic bodies (such as a variety of political processes and various pieces of legislation and constitutions), and the development of courts and judiciary. However, there needs to be a narrow and specific focus in the literature on the development and maintenance of effective rule of law within a given state.²¹⁰ Without an effective rule of law (i.e. a state in which laws are enforced and do not violate the democratic rights of the citizens and abides by universal human rights norms), the quality of democracy in any given post-Soviet state must be questioned. According to Leonardo Morlino, there is a good body of traditional literature regarding democracy and the rule of law, however, a number of key aspects still need to be analyzed regarding the relationship between the

²⁰⁷ *Human Rights Watch*. March 31, 2014 (<http://www.hrw.org/news/2014/03/31/russia-new-assault-advocacy-groups>) & March 28, 2014 (<http://www.hrw.org/news/2014/03/28/russia-stop-crackdown-free-expression>)

²⁰⁸ At present, the analysis of the Ukraine, and the current referendum process and political tumult that has resulted could be an excellent addition to the study of the growth of the rule of law in post-Soviet states.

²⁰⁹ Morlino, "The Two rules of law between Transitions to and Quality of Democracy", 39

²¹⁰ *Ibid*

rule of law and democracy.²¹¹ Morlino argues that the nature of the relationships needs to be analyzed further, especially when the rule of law is considered as a precondition for the analysis of democratic change.²¹² Studies should be aimed at understanding what role the rule of law plays in democratization, and how the rule of law can help entrench democratic principles in a state.²¹³

A key factor in the broadening of the literature regarding the rule of law and democratic change in post-Soviet states is the role of institutional actors.²¹⁴ Morlino emphasizes the importance of this factor when he demonstrates that other non-institutional and institutional aspects in established democracies can influence the rule of law.²¹⁵ The role of internal and external institutions was researched and theorized within the traditional democratization literature by scholars such as Valenzuela and O'Donnell²¹⁶. As such, this thesis will attempt to demonstrate the relationship that exists between institutional actors that are internal and external to Russia by looking at the relationship between the ECHR and the CCRF. In theories of democratization these two factors are often discussed separately. The interrelation between the rule of law and democracy permeates institutions and spheres across society.²¹⁷ According to Morlino, rule of law makes it possible for individual rights to flourish, which are core principles of democracy.²¹⁸ “A government’s respect for the sovereign authority of the people and a

²¹¹ Ibid

²¹² Ibid

²¹³ Ibid

²¹⁴ Ibid

²¹⁵ Ibid

²¹⁶ Valenzuela, “External Actors in the Transitions to Democracy in Latin America”, 120 & O’Donnell, “Illusions about Consolidation, 49

²¹⁷ Morlino, “The Two rules of law between Transitions to and Quality of Democracy”, 39

²¹⁸ Ibid

constitution depends on the acceptance of the law”.²¹⁹ Democracy includes institutions and processes that are beyond the immediate domain of the law, and are despite this deeply rooted in the law.²²⁰

Rule of Law in Russia-Counter Judicial Reform and the law as a political weapon

In the study of the process of democratization in post-Soviet states and particularly in Russia, there is a distinct and powerful link between the rule of law and politics.²²¹

Pallombella notes that “as a normative ideal the rule of law is not neutral, it is a politically cross cutting concept, and this is particularly important and relevant because the ideal of rule of law asks for the law to rule and to provide guidance to society”.²²²

O’Donnell notes that the rigorous application of the law or in certain cases the relationship of the law to the superficially efficient bureaucracy can have negative consequences for the most vulnerable and socially weak members of society.²²³ This can be seen later in the discussion of the case studies. Furthermore, he argues that then there is a possibility for the use of the law as a genuine ‘political weapon’.²²⁴ It is in these moments or situations, he argues, where we see a persistent and widespread temptation for politicians to use the law against their adversaries, whether within the political sphere or against NGOs or civilians.²²⁵ As seen in the development of democracy in post-Soviet Russia, adversaries who dissent against the political elite including political adversaries in neighboring countries, non-governmental organizations, international and regional organizations as well as Russian citizens are often victims of the elites using the law as a

²¹⁹ Ibid

²²⁰ Ibid

²²¹ Ibid

²²² Morlino, “The Two rules of Law between Transitions to and Quality of Democracy”, 33

²²³ Ibid, 52

²²⁴ Ibid

²²⁵ Morlino, “The Two rules of law between Transitions to and Quality of Democracy”, 53.

weapon. The use of the rule of law as a political weapon is a particularly salient description of the role of the rule of law in post-Soviet Russia. This can be seen with the persecution of journalists in Russia, the Pussy Riot case, and the new laws governing the work of NGOs such as the Foreign Agent Law²²⁶. Since the ascent of President Putin to Russian politics the landscape of democratic change has significantly changed and the transition to democracy has swiftly come to a halt. The role of clientalism and the role of the elites in Russia, especially the elites in Putin's ruling party have taken on elevated roles in the process of the democratic process in Russia, especially with the power and function of Putin's ideology.²²⁷ Rupik argues that in an effort to propagate a practical ideology, Putin's team has aimed to promote three specific readily visible institutions as objects for respect and affection amongst the Russian bureaucracy.²²⁸ These include: the role of the president, the military, and the law and the institutions of law in Russia.²²⁹ However, researchers must ask what Putin's institutions of law are like. As such the legitimacy of the legal system in Russia must be questioned, and researchers need to theorize ways in which this system can move from being a vehicle of Putin's ideology towards a legitimate democratic institution. It is crucial here to think back to the notion of the commodification of democracy as noted by Dutkiewicz and to perhaps argue that the rule of law has become commodified, and seen as a way by the elites to gain power.²³⁰ Putin has spoken frequently of establishing what he describes as a "dictatorship of the

²²⁶ Human Rights Watch. <http://www.hrw.org/news/2014/08/29/russia-foreign-agents-law-hits-hundreds-ngos-updated-august-29-2014>. Accessed July 10, 2014

²²⁷ Ryabov, "Democratization and Modernization in the Context of the Transformation of Post-Soviet States", 150

²²⁸ Jacques Rupnik, "The PostCommunist Divide" in *Democracy after Communism*, eds. Larry Diamond and Marc Plattner, (The John Hopkins University Press: Baltimore, 2002): 249

²²⁹ Ibid

²³⁰ Dutkiewicz, "Transitional Economies and the Commodification of Democracy" in *Democracy versus Modernization: A Dilemma for Russia and the world*, eds. Inozemtsev and Piotr Dutkiewicz, (Routledge, 2013): 54

law”.²³¹ What is crucial to note with regards to the study of the rule of law in Russia, is that the discrepancies between the letter of the law or the law as written and the behavior of the rulers as well as the judges and the courts has actually widened since the end of the Yeltsin period.²³² During the nine years of Yeltsin’s presidency there were systematic reforms of the courts and the judiciary, which involved establishing the conditions for judicial independence and empowering the courts.²³³ However, Yeltsin was not able to allocate money to these changes.²³⁴ By the end of his term the courts had gained key elements of independence and power, but lacked the financial ability and the authority for their implementation.²³⁵

In his first term Putin made several positive changes to the legal system: he increased funding and convinced the legal community to approve a new procedure that would increase fairness of the court decisions.²³⁶ In theory this increase of funding would mean that the judicial system could function more effectively and do more work to protect the rights of Russian citizens. However, as demonstrated with the case studies the emergence of truly independent and effective courts requires changes to the informal practices that connect to the work of the court and in broader culture.²³⁷ As mentioned previously, it is the quality of the law and the implementation that make for an effective rule of law.²³⁸ Solomon argues that:

²³¹ Ibid

²³² Rupnik, “The Post Communist Divide”, 250

²³³ Peter Solomon, “Assessing the Courts in Russia: Parameters and Progress under Putin”, *Demokratizatsiya*, 16 no. 1 (2008): 66

²³⁴ Ibid

²³⁵ Ibid

²³⁶ Ibid

²³⁷ Ibid

²³⁸ Richard Sakwa. “Can Putinism Solve its Contradictions?” *Vladai Club*. <http://valdaiclub.com/politics/66103.html> January 13, 2014.

Although all of these changes would reflect improvements or improve the administration of justice in the Russian Federation, they would not by themselves produce full-fledged legal order. One would need in addition a shift in the attitudes of public officials, if not also the public itself, toward law, include respect for law as a good in itself rather than simply a means of pursuing one's ends. An instrumental approach to the law dominated Soviet culture, but law served as an instrument of a variety of powerful individuals and groups but an instrumental approach to law still predominates.²³⁹

It is clear that into Putin's second term as President, he has continued to create a dictatorship of the law, and has used the law as a means of propagating an authoritarian ideology rather than allowing the law to act as a protection mechanism for citizens. This is evident with the "Foreign Agents Law" brought forward in 2013, in which the ministry of Justice filed civil law suits against four NGOs: Women of Don, the Center for Social Policy and Gender Studies, the LGBT organization "Coming Out", and Memorial Anti-Discrimination Center.²⁴⁰ What is crucial is that in this instance, the prosecutors were using a piece of the Russian Civil procedure code in order to justify this political measure.²⁴¹ The code states that a civil law suit is justified when "it is in defense of rights, freedoms, and the legitimate interests of citizens, general public interests or interests of the Russian Federation, its subjects and municipal entities"; prosecutors used this code in order to force NGOs to register as foreign agents and as a consequence to be subject to increased surveillance.²⁴² As mentioned earlier, this is a classic example of the rule of law being used as a political weapon, and thus emphasizes the importance of the rule of law as a core principle in the process of democratic change.

²³⁹ Solomon, "Assesing the Courts in Russia: Parameters and Progress under Putin", 72

²⁴⁰ *Human Rights Watch*, April 9, 2014 <http://www.hrw.org/news/2014/04/08/russia-constitutional-court-upholds-foreign-agents-law>. Accessed July 10, 2014

²⁴¹ Ibid

²⁴² Ibid

These types of attempts at counter reform of the judicial system are not new in Russia.²⁴³ During the late Tsarist period, supporters of judicial counter reform consisted of an identifiable segment of the upper echelons of bureaucracy.²⁴⁴ However, contemporary threats to reform come from: the Ministry of Economic Development, deputies in the state Duma, a political friend of the president, the leadership of the Federation Council, the Federal Security Service, and many powerful actors within the presidential administration.²⁴⁵ Solomon argues that in Tsarist Russia and in early post-Soviet Russia counter reforms were motivated by a desire to limit judgments and verdicts of the judges that went against the interests of powerful people in the state.²⁴⁶ In addition, Solomon observes that similar patterns of tension existed in the late Tsarist period of and in the contemporary.²⁴⁷ He notes that in Tsarist Russia there was a tension between an authoritarian regime and the independent and powerful courts, which underpinned the struggle for judicial reform, and that similar patterns could be seen in Putin's Russia.²⁴⁸

As mentioned previously, contemporary Russia is often described as a hybrid regime caught between aspects of democracy and authoritarianism, this is highlighted by the recent pieces of legislation (such as the "Foreign Agents Law") that exemplify authoritarian tendencies by restricting freedoms. Scholars have even described Russia as a liberal or pluralistic form of authoritarianism; the politics of judicial reform highlight this and provide support for this idea.²⁴⁹ Solomon makes a crucial observation: "not only are democratic institutions in Russia weak, but in the name of security, the leader is

²⁴³ Solomon, "Threats of Judicial Counter reform in Putin's Russia", 340

²⁴⁴ Ibid

²⁴⁵ Ibid

²⁴⁶ Ibid

²⁴⁷ Ibid

²⁴⁸ Ibid, 341

²⁴⁹ Ibid

committed to building a system of power that is more consistent with authoritarianism than democracy”.²⁵⁰ This highlights Dutkiewicz’s theory of the commodification of democracy and the accumulation of power for the powerful elite of the state.²⁵¹ While it is clear that there have been some positive changes that have occurred in Russia with regard to changes in the judicial system, it is hard to say that an effective rule of law exists for two particular reasons (both of which will be discussed further in the case study sections): the first is the high number of Russian citizens who are taking cases to the ECHR, and the second is that in contemporary Russia there has been the creation of discriminatory laws which do not abide by the values enshrined in the Russian Constitution. As such it is difficult to argue that these changes to the legal system have had any positive impacts, particularly since these changes and the legal system are highly politicized.

This subsequently affects the process of democratic consolidation in Russia. Since these four organizations provided key services to members of the population in Russia who are marginalized and could be considered at risk, the targeting of non-governmental organizations (NGOs) in 2013 by the government clearly impedes the development of civil rights for those groups, and thus harms the process of democratic change. Furthermore, Russia’s Federal anti-LGBTQ propaganda “law” has been used as a means to muzzle activists in the area and those who identify as LGBTQ in Russia.²⁵² This is especially threatening to democratic consolidation as the rights of these marginalized groups and minorities are “protected” under article 19 and 20 in the Russian

²⁵⁰ Ibid

²⁵¹ Dutkiewicz, “Transitional Economies and the Commodification of Democracy”, 54

²⁵² Tanya Cooper. “Dispatches: More Blows Against LGBT Rights in Russia”. *Human Rights Watch*, December 5, 2013. <http://www.hrw.org/news/2013/12/05/dispatches-more-blows-against-lgbt-rights-russia>

Constitution²⁵³, thus the Constitution is highly politicized in Russia and is subject to the whims of the political elite.²⁵⁴

Rupnik argues that whether the law in Russia outgrows its role “as the redundant codification of the states subordination of society” and become an institution that protects the rights of the people that citizens can embrace, depends on whether or not it can be overhauled and effectively enforced.²⁵⁵ It is pertinent to discuss the current structure of the Russian legal system in order to understand where democratic change can happen. As such, the following section of this chapter will briefly discuss the nature of the Russian legal structure, and will end with a discussion of the relationship between the ECHR and the CCRF.

Russian Constitutional Law

The legal structure of the Russian Federation is complex and contains many different bodies and structures. Courts maintain a very important position as an institution in a democratic society; the development of an effective judicial system that respects the civil and political rights of citizens is seen as a core component of democratic change.²⁵⁶

Solomon argues that:

The purpose of courts is to provide to members of the public the opportunity to obtain the impartial resolution of disputes in a timely manner, they must act fairly

²⁵³ Article 19 states: “all people shall be equal before the law and the court. The State shall guarantee the equality of rights and freedoms of man and citizen, regardless of sex, race, nationality, language, origin, property and official status, place of residence, religion, convictions, membership of public associations, and also of other circumstances. All forms of limitations of human rights on social, racial, national, linguistic or religious grounds shall be banned. Finally, Man and woman shall enjoy equal rights and freedoms and have equal possibilities to exercise them. Article 20 states: everyone has the right to life, and capital punishment until its complete elimination may be envisaged by a federal law as an exclusive penalty for especially grave crimes against life, and the accused shall be granted the right to have his case examined by jury trial. Constitution of the Russian Federation. <http://www.constitution.ru/en/10003000-01.htm>

²⁵⁴ Constitution of the Russian Federation. <http://www.constitution.ru/en/10003000-03.htm>

²⁵⁵ Rupnik, “The PostCommunist Divide”, 250

²⁵⁶ Fogelklou, “Constitutional Order in Russia: A New Territory for Constitutionalism?”, 232

and expeditiously, and the design of judicial systems should contribute to these ends.²⁵⁷ After the dissolution of the Soviet state, there were several key legislative developments that lead to the creation of the Russian Federal Constitutional Court. As Russia experienced a chaotic and violent past, it must first be noted that the progression from a former authoritarian state with a long history of communism as well as a long history of revolution and violence the development of the rule of law after the fall of the Soviet Union has been a long and complicated process.²⁵⁸ Furthermore, it should be noted that citizens in Russia experienced significant amounts of violence during the Soviet regime, and because of this it is crucial to acknowledge historical and social memory that exists in the region is a particularly important part of the social context of the study of Russia.²⁵⁹ The ongoing violence in the Chechnya region, the two civil wars within the region, the multiple terrorist attacks that occurred in the region, and the questionable role and actions of the Russian army in the Chechnyan region have perpetuated and deeply engrained a historical and social collective memory of violence within Russian citizens, as well as within the collective memory of citizens living in countries close to and those who are in a close relationship with Russia, which is exemplified by the current conflict in Ukraine. This engrained collective memory and the ongoing violence in Russia emphasizes the importance of the rule of law in the process of democratization in Russia, and further complicates the process of democratization due to a lack of respect for the

²⁵⁷ Solomon, “Assessing the Courts in Russia: Parameters of Progress under Putin”, 64

²⁵⁸ Fogelklou, “Constitutional Order in Russia: A New Territory for Constitutionalism?”, 232

²⁵⁹ Rupnik, “The PostCommunist Divide” in *Democracy after Communism*, eds. Larry Diamond and Marc Plattner, (The John Hopkins University Press: Baltimore, 2002): 250 & Leszek Balcerowicz, & “Understanding PostCommunist Transitions” in *Democracy After Communism* 2002, ed. Larry Diamond and Marc Plattner (The John Hopkins University Press: Baltimore), 64

civil and political rights of all Russian citizens as well as the citizens of neighboring countries.

In 1991, the Russian government enacted the “Law on the Constitutional Court”, which designated the creation of the Constitutional Court.²⁶⁰ This would be the first of its kind in Russian history, and the first court in Russian history to be given the competence to decide constitutional issues.²⁶¹ This law granted the CCRF the power to review the constitutionality of legislation as well as other normative acts.²⁶² What is the truly crucial role of the CCRF (particularly during the Putin regime) is the court’s power to pronounce the constitutionality of decisions of the “law-applying practice” of the ordinary courts, other state organs, and officials and to decide to what extent they consistent with the constitutional provisions concerning human rights.²⁶³ It is particularly important to note that while the CCRF may have these powers, scholars must ask to what extent does the Court use these powers to uphold rights and freedoms that are enshrined in the Constitution? In theory the principles of the activities of the CCRF are: equality, openness, independence and collegiality.²⁶⁴ As mentioned previously, contemporary Russia has been incorporating more authoritarian characteristics and tendencies into law and politics over several years, rather than democratic values, and as such the Court (i.e.: the judges and lawyers) do not maintain the same freedom to be able to question the actions of Putin or the new questionable pieces of legislation.²⁶⁵ This highlights why the

²⁶⁰ Gennady Danilenko, “The New Russian Constitution and International Law”, *The American Journal of International Law*, 88 no. 3 (1994): 459

²⁶¹ Ibid

²⁶² Danilenko, “The New Russian Constitution and International Law”, 459

²⁶³ Ibid

²⁶⁴ Marina Lomovtseva and Jane Henderson, “Constitutional Justice in Russia”, *Review of Central and East European Law*, 34 (2009): 58

²⁶⁵ Lomovtseva & Henderson, “Constitutional Justice in Russia”, 38

CCRF's relationship with the ECHR can potentially be vital to the preservation of human rights and the rule of law in contemporary Russia.

There are two pieces of legislation that delineate the competence of the Constitutional Court: the 1993 Constitution of the Russian Federation under article 125, and the 1994 Federal Constitutional Law, "On the Constitutional Court of the Russian Federation".²⁶⁶ The reputation of the CCRF was established through several court rulings in high profile controversial cases, such as the KGB Ministry and Internal Affairs, the status of the Communist party, and the Tartasan referenda.²⁶⁷ The 1993 constitution has several parts that were created in order to embed a sense of rule of law and order.²⁶⁸

In the early years of the CCRF there were some significant benefits to the creation of the court, as well as the some significant issues in the application of the jurisdiction of the CCRF²⁶⁹. Pomeranz argues that in the early years after the creation of the CCRF when the court stayed within its designated duties, it was able to demonstrate that it could exercise restraint and assert judicial review, however the CCRF also showed a destructive tendency to go beyond its judicial role and become directly involved in politics.²⁷⁰ The constitution of the Russian Federation states that the President, the Federal Assembly (both of the houses of parliament), the courts of law, and the government may exercise state power, and judicial power is completely separate from the executive and legislative branches.²⁷¹ Fogelklou argues that despite the gaps and contradictions that are within the practice of law and the constitution, the structure of the constitutional documents are

²⁶⁶ Ibid

²⁶⁷ William Pomeranz, "Judicial Review and the Russian Constitutional Court: The Chechen Case", *Review of Central and East European Law*, 23 no. 1 (1997): 11

²⁶⁸ Danilenko, "The New Russian Constitution and International Law", 459

²⁶⁹ Pomeranz, "Judicial Review and the Russian Constitutional Court: The Chechen Case", 11

²⁷⁰ Ibid, 14

²⁷¹ Fogelklou, "Constitutional Order in Russia: A New Territory for Constitutionalism?", 231

based on a recognition of the priority of the integrity of the person over and above the protection of state interests, and this is found in articles two and eighteen²⁷² of the constitution.²⁷³ The CCRF is supposed to (ideally) resolve issues that are related to the constitution, this includes: a. federal laws and normative acts of the President of the Russian Federation, the Federation Council of the Federal Assembly, the state Duma of the Federal Assembly, and the government of the Russian Federation; b. the constitutions and charters of the republics, as well as laws and other normative acts of the subjects of the Russian Federation; c. international treatise that the Russian Federation is a partner to; and, d. treaties between agents of state power of the Russian Federation and agents of state power of the subjects of the Russian Federation.²⁷⁴

Since the creation of the CCRF, the court has been working towards resolving two key issues: one was the restoration of the strength and unity of Russian constitutionality by bringing the charters, the constitutions, and legislation of the subjects of the Russian Federation into conformity with the Constitution of the Russian Federation along with the federal laws.²⁷⁵ The second issue that the court has been working towards is making sure that the establishment of legislation in Russia fully reflects the spirit of the Constitution.²⁷⁶ The CCRF is seen as an avenue to acquire and fight for political and social rights for many citizens, every year about 10,000-14,000 citizens appeal to the

²⁷² Article 2 states: Man, his rights and freedoms are the supreme value. The recognition, observance and protection of the rights and freedoms of man and citizen shall be the obligation of the State. Article 18 states: The rights and freedoms of man and citizen shall be directly operative. They determine the essence, meaning and implementation of laws, the activities of the legislative and executive authorities, local self-government and shall be ensured by the administration of justice. *Constitution of the Russian Federation*. <http://www.constitution.ru/en/10003000-03.htm>

²⁷³ Fogelklou, "Constitutional Order in Russia: A New Territory for Constitutionalism?", 232

²⁷⁴ Ibid, 239

²⁷⁵ Lomovtseva & Henderson, "Constitutional Justice in Russia", 39

²⁷⁶ Ibid

CCRF.²⁷⁷ Unfortunately, the court accepts only about 1-2% of these cases.²⁷⁸ This indicates that in order to deal with and remedy the amount of cases brought to the CCRF, there must be some systemic changes that need to occur in order for there to be less violations of civil and political rights and human rights in Russia. Ideally and logically if systemic issues are resolved and there are less rights violations in Russia, there would be a more effective rule of law and a decreased amount of Russian citizens would be taking their cases to the CCRF.

The Russian Constitution contains a specific relationship with international law.²⁷⁹ During the creation of the new Russian Constitution in 1993, Russia's obligations to international treaties were an issue that figured prominently in the discussion²⁸⁰. Lawmakers were concerned with assuring effective compliance with Russia's international obligations, and particularly Russia's international human rights obligations.²⁸¹ As a result of this emphasis on Russia's obligations to international norms and standards the constitution contains an:

Unprecedented number of references to international law, and to a large extent the constitutional provisions on international law reflect the desire of democratic Russia to become an open and law abiding member of the international community.²⁸²

As a result, a relationship between Russian domestic law and international law have developed and become an important aspect to the growth of the rule of law in Russia, this relationship manifests and is operationalized not only through the political realm but also

²⁷⁷ Ibid

²⁷⁸ Ibid

²⁷⁹ Ibid

²⁸⁰ Ibid, 452

²⁸¹ Ibid

²⁸² Ibid

through the CCRF and its relationship with the ECHR. This shift from the internal policies of the Soviet Union towards an external vision with an emphasis on international law was motivated by several politico legal considerations, many of which are still important to contemporary Russia²⁸³. Many policy makers and citizens believed that Soviet internal law lagged behind legal standards that had developed internationally.²⁸⁴

Second, after the dissolution of the Soviet Union and reports regarding the state's violations of human rights a reliance on international law indicated that international institutions were accorded more trust than national institutions, which by this time domestic institutions had lost most of their legitimacy.²⁸⁵ Finally, international human rights standards were given a high degree of legitimacy not only because of their prior acceptance by the Soviet Union, but also because of their general recognition and implementation by what was viewed as "the civilized nations".²⁸⁶ The legitimacy that was attributed to human rights standards was also based on the perception that these standards expressed what was seen and understood as 'universal human values'.²⁸⁷ The link between the CCRF and international law can be found in Article 15(4) of the Russian Constitution.²⁸⁸ This article clearly states that: "all international law is part of the Russian domestic legal system".²⁸⁹ This can be contrasted with other contemporary constitutions, which usually only incorporate either custom or treaties, however the Russian

²⁸³ Ibid

²⁸⁴ Ibid

²⁸⁵ Danilenko, "The New Russian Constitution and International Law", 459

²⁸⁶ Ibid, 463

²⁸⁷ Ibid

²⁸⁸ Ibid

²⁸⁹ Ibid

constitution incorporates both treaty law and “the generally recognized principles and norms of international law”.²⁹⁰

The Russian judicial structure has many different sets of structures and bodies. The lower levels of courts and judicial systems include the Justices of Peace and district courts.²⁹¹ Second there are the supreme courts of the republics, regional courts, of the autonomous regions and autonomous districts.²⁹² Finally, there is the Constitutional Court and the Supreme Court. The Supreme Court is the supreme judicial body for civil, administrative, criminal and other cases under the system of general jurisdiction: “the Supreme Court supervises the validity, substantiality and the legality of the sentences and other decisions of lower-level courts”.²⁹³ While the CCRF may exist to protect the rights of the people, in order for the rule of law to be effective, democratic values must be entrenched and practiced by all of the lower level courts in Russia. The ordinary courts have broad competence to review acts of law application within an autonomous judicial hierarchy, which is (supposed) to be isolated from any external influence.²⁹⁴ Peter Krug argues that: “the direction taken by the Russian Supreme Court and the other ordinary courts in shaping the nature of the ordinary court constitutionalism will be significant for the evolution of the constitutional development in Russia”.²⁹⁵ The result in the Russian legal system is that the system has two ultimate authorities exercising constitutional control within substantially separate areas of competence, the CCRF and the Supreme

²⁹⁰ Danilenko, “The New Russian Constitution and International Law”, 465

²⁹¹ Ibid

²⁹² United Nations <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/126/50/PDF/G0912650.pdf?OpenElement>, 7

²⁹³ Peter Krug, “The Russian Federation Supreme Court and Constitutional Practice in the Courts of General Jurisdiction: Recent Developments”, *Review of Central and East European Law*, 26 no. 2 (2000): 130

²⁹⁴ Ibid

²⁹⁵ Ibid, 146

Court.²⁹⁶ Peter Krug argues that the significant question is not whether ordinary court constitutionalism will continue to exist and thrive in Russia, but more importantly the extent of its long-term impact.²⁹⁷ However, the recent actions of Vladimir Putin have worked against the stated objectives of the CCRF, as many of his recent political actions including: refusing to allow those who identify as queer to be able to adopt children, and the actions against the group “Pussy Riot” and many others actively contradict freedoms that are laid out by the Russian Constitution, particularly freedoms laid out in Article 19.²⁹⁸

European Court of Human Rights and the Constitutional Court of the Russian Federation

The European Court of Human Rights (ECHR) was established with the European Convention on Human Rights, which was adopted in 1950.²⁹⁹ According to the Russian constitution, section 15(4), the European Convention on Human Rights is an integral part of the legal system.³⁰⁰ The European Convention on Human Rights established a common set of civil and political rights across the member states of the Council of Europe.³⁰¹ The European Court of Human Rights was founded in 1959, and was created to hear individual petitions from citizens at large with regards to a member state’s failure to protect the rights and freedoms that are enshrined in the convention.³⁰² There are forty-seven member states of the Council of Europe, including the Russian Federation who participates in the ECHR.³⁰³ The ECHR was one of the first human rights committees,

²⁹⁶ Ibid

²⁹⁷ Ibid

²⁹⁸ The Constitution of the Russian Federation. <http://www.constitution.ru/en/10003000-01.htm>

²⁹⁹ Alexei Trochev, “All Appeals lead to Strasbourg? Unpacking the impact of the European Court of Human Rights”, *Demokratizatsiya*, 17 no. 2 (2009): 145

³⁰⁰ Fogelklou, “Constitutional Order in Russia: A New Territory for Constitutionalism?” , 236

³⁰¹ The, Russia and the European Court of Human Rights, <http://www.srji.org/en/echr/russia/>,

³⁰² Ibid

³⁰³ The European Court of Human Rights <http://www.echr.coe.int/Pages/home.aspx?p=home>

and the Convention provides three means of enforcement.³⁰⁴ These included the Committee of Ministers, the ECHR, and the European Commission of European Rights.³⁰⁵ The Court examines the respondent's government's obligations under the European Convention and makes a ruling with regard to whether or not the government has violated any provisions of the convention.³⁰⁶ The members of the Council of Europe³⁰⁷ have several obligations after an adverse ruling of the Court. Members are obliged to make a payment of compensation to the individuals or groups who have appealed to the Court, if it is necessary the state in question must take further measures to help the individual, and finally a state may be required to take measures to ensure that similar violations cannot occur in the future.³⁰⁸ Furthermore, when the violation is rooted in or is directly linked to deficiencies in the domestic legal order and the violations are likely to impact a large number of people within a given state, the state in question is required to engage in policy or legislation reform, or to take other measures to address the systemic issue.³⁰⁹ Issaeva, Sergeeva and Suchkova summarize a criticism made by the scholar Steven Greer who argues that in addition to the ECHR assigning a judgment, the ECHR needs to "identify precisely what steps need to be taken in order to comply with the judgments".³¹⁰ There are some drawbacks and positive aspects to the power of the

³⁰⁴ Courtney, Hillebrecht. "Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights." *Human Rights Review* (2012) 13 no. 3: 279

³⁰⁵ Ibid

³⁰⁶ Hillebrecht. "Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights.", 279

³⁰⁷ Known throughout this thesis as the COE.

³⁰⁸ Issaeva, Sergeeva, and Suchkova, "Enforcement of the Judgments of the European Court of Human Rights in Russia: Recent Developments and Current Challenges", *International Journal of International Human Rights*, (2011) 8 no.13, 68

³⁰⁹ Ibid

³¹⁰ Issaeva, Sergeeva, and Suchkova, "Enforcement of the Judgments of the European Court of Human Rights in Russia: Recent Developments and Current Challenges", 69, found in Greer, "The European Convention on Human Rights". *Achievements, Problems and Prospects*. First Edition. (2006) New York: Cambridge University Press. 160-161

ECHR. “One of the most important aspects and powers of the ECHR is its enforcement capacity”.³¹¹ One of the most aggressive means of enforcement that the court can use for punishing non-compliance is expulsion from the COE.³¹² As noted throughout this thesis, this is clearly not effective enough, nor is it a strong enough deterrent, as Russia continues to not comply with the rulings of the court, and this non-compliance has had detrimental impacts on the state of human rights in Russia. The COE has threatened to expel Russia and the Ukraine, however these are clearly empty threats as they are still members despite the repeated violations of human rights in each state.³¹³ This is evidenced in the analysis of the case studies. In addition, one of the most important drawbacks and gaps in the power of the ECHR is the fact that the ECHR and the Committee of Ministers have very little power to overturn domestic legislation and domestic court decisions, or to impact policies within a given state.³¹⁴ The impacts of this will be discussed further in the case analysis section.

The ECHR is under a considerable amount of strain due to the massive caseload and the amount of petitions it receives every year.³¹⁵ “Since 1999 the court has provided judgments for 14,017 cases, but receives an additional 50,000-60,000 petitions alleging human rights abuses in various states”.³¹⁶ The ECHR has been criticized by academics and by other bodies of the COE for its reluctance to specify the remedial measures that are necessary according to the violation.³¹⁷ Approximately 90% of the cases at the ECHR

³¹¹ Hillebrecht. “Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights”, 283

³¹² Ibid, 282

³¹³ Ibid, 283

³¹⁴ Ibid

³¹⁵ Ibid

³¹⁶ Ibid

³¹⁷ Issaeva, Sergeeva, and Suchkova, “Enforcement of the Judgments of the European Court of Human Rights in Russia: Recent Developments and Current Challenges”, 70

are close to or are repetitive cases, which indicates that the same type or similar types of rights violations are occurring over and over again.³¹⁸ This highlights the criticisms put forth by academics such as Steven Greer. Hillebrecht argues that if states were complying with the rulings of the tribunal then the number of repeat cases would be on the decline rather than increasing, and as such she argues that this is clearly a problem of implementation.³¹⁹ It has been found that the highest rates of petitions are coming from a very small number of states, these include: Italy, Turkey, Romania, Russia, and the Ukraine.³²⁰ According to Hillebrecht these are the states that are causing the most notable strain on the ECHR.³²¹ Due to this problem of implementation and the high rate of repeat cases this thesis has chosen to focus on the implementation aspect of Russia's relationship with the ECHR rather than focusing on the way that lawyers and judges are implementing the values and norms of the rulings into their everyday work.

Despite these criticisms, the court has been relatively successful since it was created, with a rate of 49% compliance with its rulings.³²² However, it must be noted that implementing and compliance with the court's rulings is a political process.³²³ As noted previously, the law and politics often intersect, and this is evidenced by the implementation of the tribunal's rulings. Hillebrecht argues that since the implementation of these rulings is inherently political, it is essential to understand the politics surrounding the domestic execution of the ECHR rulings and the domestic institutional capacity to

³¹⁸ Hillebrecht, "Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights," 296

³¹⁹ Ibid,

³²⁰ Ibid 284

³²¹ Ibid

³²² Ibid, 283

³²³ Ibid

implement the rulings.³²⁴ The politicized implementation of the ECHR rulings further indicates the important link between democratization and the growth of rule of law in Russia.

Russia and the ECHR

After the dissolution of the Soviet Union, the Russian Federation ratified the European Convention on Human Rights in May 1998.³²⁵ This was a significant step towards accepting the human rights standards and norms created and abided by in the COE, and by ratifying this convention and the norms of human rights, the Russian Federation demonstrated an attempt to further incorporate democratic norms and values into the Russian political system.³²⁶ However, while it is an excellent first step to ratify the convention, in order for these human rights norms and democratic norms to become embedded in Russian law, the norms and values need to become embedded in society and the Russian government. As Solomon notes, for democratization to occur, Russian officials must also have an attitude that respects the law.³²⁷ It was not enough that the Russian government ratified the convention, the government needed to make the adherence to the convention and the protection of human rights a priority of the Russian government by implementing human rights within the Russian judiciary, Russian government practices and Russian society at large.

The Russian membership in the COE began on shaky ground. Two years after ratifying the convention Russia was almost removed from the Council due to the second

³²⁴ Hillebrecht, "Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights," 284

³²⁵ Trochev, "All Appeals lead to Strasbourg? Unpacking the impact of the European Court of Human Rights", 145

³²⁶ Ibid

³²⁷ Solomon, "Assessing the Courts in Russia: Parameters and Progress under Putin", 66

war in Chechnya.³²⁸ In addition, “when Russia joined the COE the Russian government had promised to reform its criminal justice system, to abolish the death penalty, to ratify the 1950 convention” (which it did), “to ratify the protocols and treatise of the Council of Europe, to recognize the right of an individual applicant to the jurisdiction of the ECHR, and to pass a new civil code”.³²⁹ What is crucial to the relationship between the CCRF and the ECHR is that despite the fact that Russia reneged and did not follow through on many of these commitments, the government and the CCRF do recognize the jurisdiction of the ECHR and the ability for individual citizens to take a case to the ECHR.³³⁰ Furthermore, in 2011 there were approximately 40,000 petitions from Russia citizens claiming human rights abuses against the Russia state, indicating that there is still a significant amount of the total petitions are coming from Russian citizens.³³¹

Many of the cases involving the Russian Federation are related to “violations of the right to life, the right to a fair trial, the prohibition on torture and inhumane or degrading treatment, the right to liberty and security of the person, the right to respect of private and family life, home and correspondence, of the freedom of expression, the right to effective remedy, and finally their obligation to cooperate with the ECHR”.³³² The judgments of the ECHR provide the basis for calls for crucial legal reforms and changes in state practice³³³. Furthermore, there are individual measures, which include payment as

³²⁸ Hillebrecht. “Implementig International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights.” 288

³²⁹ Trochev, “All Appeals lead to Strasbourg? Unpacking the impact of the European Court of Human Rights”, 147

³³⁰ Ibid

³³¹ Hillebrecht. “Implementig International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights.” 287

³³² *The Russian Justice Initiative*, Russia and the European Court of Human Rights
<http://www.srji.org/en/echr/russia/>

³³³ Ibid

compensation, and the re-opening of a criminal investigation.³³⁴ The general measures implemented by the court are intended to aim at preventing future violations and may consist of various measures such as: new policies, improved human rights education, and legal reforms.³³⁵ Furthermore, the courts judgments carry with them the potential to improve the human rights of a state and to strengthen the protections available to individuals.³³⁶ With the analysis of cases from Russia, this appears to only be in theory. It can be argued that the strength of the judgments of the court and the changes that can be brought about due to its judgments can have a positive impact on the state of democracy in a given country in theory, however there needs to be research as to how this works in practice this will be examined in the case study portion of the thesis.

While these individual measures may remedy an individual case, the general measures seek to address systemic problems that are revealed in the Courts judgments.³³⁷ Unfortunately, since the ratification of the Convention, the Russian state has not done enough to entrench the rule of law or democratic norms within government institutions, and as a result there are 41,300 pending cases against the Russian government at the ECHR.³³⁸ Russia is the state with the most complaints lodged against it with the COE.³³⁹ As of now the necessary changes to the Russian political system and judicial system have not been made in order to decrease the number of complaints lodged against the Russian government. However, the high number of cases brought to the ECHR does indicate that a growing number of Russian citizens are becoming more aware of their political and

³³⁴ Ibid

³³⁵ Ibid

³³⁶ Ibid

³³⁷ Ibid

³³⁸ Ibid

³³⁹ Ibid

social rights (which are enshrined in the Russian constitution), and are, as Chandler pointed out using some ulterior means of resisting the Russian state.³⁴⁰ Chandler argues that:

Russians have turned to the ECHR in order to request that the Russian government fulfill its human rights commitments as a member of the Council of Europe. Furthermore, the ECHR like the United Nations CEDAW process represented one arena where the spread of rights-based norms had irreversibly penetrated the Russian political arena.³⁴¹

In contemporary Russia under the influence of Putin, day after day with the decisions that the CCRF makes a distancing has been observed between the Constitution and those who originally conceived of it and the original intentions of its creation.³⁴²

Even though, the ECHR and the way that it can influence the integration of effective rule of law in Russia can be crucial to the attempts to democratize contemporary Russia, the question remains to what extent this can occur? This relationship between these two legal bodies is important to study because the CCRF takes into account not rulings of the ECHR (supposedly) but it also cites the decisions and interpretations of the ECHR as well as definitions and interpretation from the European Convention of Human Rights.³⁴³

The relationship between the CCRF and the ECHR works in two fundamental ways, the CCRF can use judgments and interpretations from cases at the ECHR, and secondly Russian citizens can take a case to the ECHR and the ECHR can decide whether

³⁴⁰ Chandler, *Democracy, Gender, and Social Policy*, 152

³⁴¹ Ibid

³⁴² Marie-Elisabeth Baudoin, "Is the Constitutionalism Court the Last Bastion in Russia against the Threat of Authoritarianism", *Europe-Asia Studies*, 58 no. 5 (2006): 692

³⁴³ Baudoin, "Is the Constitutionalism Court the Last Bastion in Russia against the Threat of Authoritarianism", 691

or not to take the case and can impose a judgment on Russia.³⁴⁴ The use of the judgments and interpretations of the ECHR in Russian law can be operationalized through the education of Russian judges and lawyers.³⁴⁵ Sundstrom argues that improving Russian judges and lawyers knowledge and use of the ECHR has been an area of focus for activist lawyers, foreign donors who are working on the implementation of the European Court rulings, and has been important to international organizations.³⁴⁶ Annual reports by the CoE (Committee of the Ministers) which monitors the execution of the ECHR judgments by member states have frequently noted the inadequate preparation of Russian judges as a problem that demands remedy through improved and more widespread publication and education of Russia's legal obligations under the ECHR and the convention.³⁴⁷ Anna Demeneva, a staff member of Sverdlovsk Regional Human Rights Ombudsman's office wrote:

We sometimes observe human rights problems where we know that there is a European Court Ruling on Russia, and we understand that if they do not take this practice into account, then there will be violations, and there will either be lawsuits or a system will develop that will need to be untangled.³⁴⁸

Many observers from various organizations have pointed out how important it is that judges and lawyers bring awareness to the European Convention of Human Rights and to incorporate it into their work as this allows for human rights violations to be solved within Russia, rather than so many cases ending up in the ECHR.³⁴⁹

³⁴⁴ Ibid

³⁴⁵ Lisa Sundstrom, "Advocacy beyond litigation: Examining Russian NGO efforts on Implementation of European Court of Human Rights Judgments", *Communist and PostCommunist Studies*, 45 (2012): 258

³⁴⁶ Ibid

³⁴⁷ Ibid

³⁴⁸ Ibid

³⁴⁹ Ibid

In addition, the ECHR is able to influence Russian rule of law and the CCRF through the cases that individual Russian citizens bring to the ECHR. This aspect will be the primary focus for this thesis with the analysis of three judicial cases. The ECHR was able to decide individual cases that satisfy three conditions: the applicant must have exhausted all domestic remedies by seeking out Russian law enforcement agencies and courts with regards to the violations of their rights³⁵⁰, third the applicant (s) must file their complaint within six months of having exhausted domestic remedies; finally, the applicant's complaint must rely on the rights that are guaranteed under the 1950's convention.³⁵¹ Fogelklou argues "that positive changes to the judicial and political system in Russia cannot conceal the fact that Russia's path towards a constitutional democracy and the rule of law has been and still is difficult and full of contradictions."³⁵² The ECHR provides another avenue and system for Russian citizens to pursue their civil and political rights³⁵³. In his address to the Federal Assembly Putin stated that: "the letter of the law and real life are sometimes far away principles from one another".³⁵⁴ In addition, the implementation of constitutional principles and international law and standards is very difficult in reality.³⁵⁵ The implementation of international norms and constitutional law is difficult in contemporary Russia for several reasons. In Russia, the judicial system

³⁵⁰This can be an extremely problematic condition as many applicants are scared of the police or are applying because they have faced abuse or violence from the police.

³⁵¹ Trochev, "All Appeals lead to Strasbourg? Unpacking the impact of the European Court of Human Rights", 1

³⁵² Fogelklou, "Constitutional Order in Russia: A New Territory for Constitutionalism?", 234

³⁵³ The United Nations International Covenant on Civil and Political Rights has laid out Civil and Political. This information can be found here: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> Civil and Political rights include (but are not limited to): the inherent right to life, no one shall be held in slavery etc. Furthermore, these rights are also enshrined in the European Convention on Human Rights, of which Russia is a signatory to, and which established the European Court of Human Rights. http://www.echr.coe.int/Documents/Convention_ENG.pdf

³⁵⁴ Fogelklou, "Constitutional Order in Russia: A New Territory for Constitutionalism?", 234

³⁵⁵ Ibid

is financially weak.³⁵⁶ Furthermore, the judges are not independent, and the integrity of the judges within all levels of the judicial system is not guaranteed.³⁵⁷ “Third, the interpretation of the Russian constitution has in practice created a very strong presidential system”.³⁵⁸

Unfortunately, Russian operates under a series of contradictions. While many judges and courts have incorporated judgments and interpretation from the ECHR, the Russian government has also highly criticized the ECHR.³⁵⁹ Despite the fact that as a member the Russian government is able to appoint judges who draw on the judgments of the ECHR and the 1950 convention during their administration of justice in Russia, the non-democratic regime often criticizes the ECHR and argues that the court is biased.³⁶⁰ Due to the high number of petitions coming from Russian citizens the COE often accuses Russia of jeopardizing the future of the COE and the legitimacy of the ECHR.³⁶¹ The COE and Russia still remain at odds over the high number of petitions coming from Russian citizens, yet the animosity is not only from the COE, Russia remains hostile towards the COE and the ECHR³⁶². In 2005 the Foreign Minister of Russia stated:

I would like to confirm that we seriously regard the Council of Europe’s monitoring in Russia. But we cannot ignore the fact that the volume of commitments that we are requested to assume is much larger than was initially addressed to the founding fathers of the Council of Europe. We are not making a problem of it, but we see a certain political subtext.³⁶³

³⁵⁶ Ibid

³⁵⁷ Ibid

³⁵⁸ Ibid

³⁵⁹ Ibid, 279

³⁶⁰ Trochev, “All Appeals lead to Strasbourg? Unpacking the impact of the European Court of Human Rights”, 1

³⁶¹ Hillebrecht. “Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights”, 288

³⁶² Ibid

³⁶³ Hillebrecht. “Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights”, 279

This indicates that the Russian government is not necessarily overtly criticizing the COE, the Foreign minister clearly believes that there are political reasons for why the Russian government is being taken to the ECHR, rather than admitting that there are systemic issues in Russia that contribute to the high level of petitions against the Russian state and the high number of human rights violations that occur in Russia.

This chapter has outlined the importance of the rule of law and the development of an effective and legal regime to the process of democratization in Russia. The development of rule of law and a legal system that protects the rights of the citizens of a state is a crucial component to developing an effective democratic regime. In addition, this chapter has laid out the role of the ECHR and its relationship to the Russian Constitutional Court, and how this relationship has the potential to contribute to the construction of the rule of law in Russia. The following chapter will expand this discussion of the relationship between the ECHR and the CCRF by analyzing three cases that have been recommended to the ECHR and have received judgments from the ECHR.

Section Two: Case Studies

The relationship between the ECHR and the CCRF is best understood through the analysis of judicial cases that have been sent to the ECHR that deal with human rights that are enshrined in the Russian Constitution as well as the European Convention of Human Rights. As such the following section will analyze three cases that have been sent to the ECHR and have been given verdicts by the court. Each case deals with issues of human rights violations in Russia and each case addresses different aspects of human rights and gives voice to marginalized individuals in Russia. The relationship between the ECHR and the CCRF can best be understood through the analysis of case studies because it allows for the researcher to see how the ECHR can influence the development of the rule of law in Russia as the ECHR points out where the gaps are in Russian law and how this can be eradicated. Furthermore, the analysis of this relationship is important because it demonstrates to what degree a regional organization can influence the growth of democratic principles and practices in Russia, and to what degree a regional organization can influence the process of democratization in Russia. This section discusses the three case studies *Alekseyev v. Russia*, *Konstantin Markin v. Russia*, and *Kiyutin v. Russia*.

Chapter Five

Case Study #1: Alekseyev v. Russia Case Number: 4916/07, 25924/08, & 14599/09- The Call for Freedom of Assembly and LGBTQ Rights in Russia

This case is important because it deals with the rights of the LGBTQ community in Russia. The issue of LGBTQ rights has been an important human rights issue in Russia since the Alekseyev case, and gained particular attention during the 2014 Olympics in Sochi. It is crucial to discuss what lessons can be learned from the Alekseyev case and how Russia can progress towards these rights in the future. Furthermore, as Chandler has noted, regime transitions can have gendered impacts.³⁶⁴ While extensive literature has been done concerning the status of women in Russia, there is a growing field of literature concerning the rights of LGBTQ individuals in Russia. In addition, Chandler notes that a regime transition provides a moment when it is possible to reconfigure the relationship between the citizen and the state.³⁶⁵ The case of Alekseyev v. Russia allows for researchers to understand how the relationship between the Russian state and the LGBTQ community has been reconfigured, and how it can be continually changed to provide rights for this community. Several international, regional and national organizations have expressed concern regarding the rights of LGBTQ persons in Russia.

The Status of the LGBTQ community in Russia

Hate crimes and hate speech are issues that the LGBTQ face everyday in Russia.³⁶⁶

According to several NGOs, there isn't any legislation in Russia that explicitly

³⁶⁵ Chandler, *Democracy, Gender, and Social Policy*, 44

³⁶⁶ "Charity Foundation for Social and Legal Community Assistance Rainbow", "LGBT Organization Coming Out", and "Russian LGBT Network", "Alternative Report: Implementation of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in the Russian Federation in Relation to Sexual Orientation and Gender Identity". 5

recognizes that: hate speech and hate crimes directed towards the LGBTQ community or individuals may exacerbate the circumstances of a particular crime.³⁶⁷ In addition, existing legislation surrounding hate crimes and hate speech in Russia are not interpreted to include LGBTQ people as a specific social group, and law enforcement bodies do not collect statistics or information about hate crimes that are directed at LGBTQ individuals.³⁶⁸ The United Nations (UN) International Covenant on Civil and Political Rights report notes that the UN is concerned about acts of violence against lesbian, bisexual, gay, and transgender persons in Russia.³⁶⁹ This includes (but is not limited to) reports of harassment by the police and incidents of individuals being assaulted or killed based upon their sexual orientation.³⁷⁰ The UN has also reported concern about discrimination in health care, education, employment, as well as the infringement of the right to freedom of assembly and association.³⁷¹ The UN Covenant on Civil and Political Rights has labeled this discrimination as systematic discrimination, and has noted that this discrimination is institutionalized within the state party.³⁷² This has included hate speech and manifestations of intolerance and prejudice by public officials and religious leaders, and has also manifested in the media.³⁷³ Several Russian NGOs have noted that crimes are not only committed against individuals, but they are also committed against groups and participants of human rights events that support the LGBTQ community such

³⁶⁷ “Charity Foundation for Social and Legal Community Assistance Rainbow”, 5

³⁶⁸ Ibid

³⁶⁹ United Nations, *International Covenant on Civil and Political Rights in the Russian Federation*, 2009, 12

³⁷⁰ Ibid

³⁷¹ Ibid

³⁷² Ibid

³⁷³ Ibid

as the Pride March. Furthermore, there are no mechanisms to protect the victims and witnesses of these crimes, which leads to under reporting of crimes.³⁷⁴

The UN has recommended that the Russian government provide protection against violence and discrimination based on sexual orientation, and that this should include the creation and reinforcement of anti-discrimination legislation that includes the prohibition of discrimination on the basis of sexual orientation.³⁷⁵ Furthermore, the UN has advised the Russian government to intensify its efforts to combat discrimination against LGBTQ persons and to take the necessary measures to guarantee the right to peaceful association and assembly for the LGBTQ community.³⁷⁶

Facts of the Case:

The case of Alekseyev v. Russia highlights all of the main conclusions of the NGOs reports and the report of the UN Covenant of Civil and Political Rights, particularly the institutionalized and systematic discrimination that LGBTQ persons face and the emphasis by the UN on the right to a freedom of assembly and association for LGBTQ persons. In April 2011 the ECHR came to the conclusion that the Russian Federation had violated Alekseyev's rights under Articles 11, 13 and 14 of the European Convention of Human Rights.³⁷⁷

Mr. Alekseyev is a 'gay rights activist' in Russia and had made several individual applications to the ECHR with regards to his intent to hold a 'Pride March'³⁷⁸ in Moscow

³⁷⁴ "Charity Foundation for Social and Legal Community Assistance Rainbow", 37

³⁷⁵ United Nations, *International Covenant on Civil and Political Rights in the Russian Federation*, 2009, 12

³⁷⁶ "Charity Foundation for Social and Legal Community Assistance Rainbow", 13

³⁷⁷ Paul Johnson, "Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the ECHR: Alekseyev v. Russia", *Human Rights Law*, 11 no. 3 (2011): 578

³⁷⁸ Pride marches and pride parades are celebrations of lesbian, bisexual, gay and transgender culture.

in 2006.³⁷⁹ On March 24, 2006 the mayor of Moscow confirmed his opposition to the ‘Pride March’ when he asked his first deputy as well as several other officials argued that this opposition was in order to take ‘effective measures and deterrence of any gay-oriented public or mass actions in the capital city’³⁸⁰. The Department for Liaison with Security Authorities of the Moscow Government told the applicant that his proposal had been refused on the grounds of “public order and the prevention of riots, the protection of health, morals, and the rights and freedoms of others”.³⁸¹ In addition, Mr. Alekseyev submitted a proposal for a peaceful picket, which was also denied by the city of Moscow. Alekseyev appealed the city’s decisions at several different levels of the judicial system in Russia: the Tverskoy District Court of Moscow, the Taganskiy District Court, and the Moscow City Court.³⁸² All courts dismissed his appeals and many found that the restriction on the march and the picket had been justified based upon safety concerns.³⁸³

After taking his complaints to three domestic courts, Mr. Alekseyev brought his case to the ECHR.³⁸⁴ The Russian government justified the decision of the domestic courts and the ban of the marches and the pickets with three main arguments: “the prevention of disorder and the protection of public safety, the protection of the rights and freedoms of others, and finally the protection of morals.”³⁸⁵ The Russian Federation argued that “these aims were legitimate due to claims made by several religious groups within the city, which suggested that these events would cause safety issues and moral

³⁷⁹ Ibid

³⁸⁰ Ibid

³⁸¹ Johnson, “Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the ECHR: Alekseyev v. Russia”, 579

³⁸² Ibid

³⁸³ Ibid, 580

³⁸⁴ Ibid

³⁸⁵ Ibid

offence.”³⁸⁶ The Russian Federation cited statements made by the Union of Orthodox Citizens, the Muslim authority of Mizhniy Novgorod, and the Supreme Mufti for Russia.³⁸⁷ This privileges the voice of religious groups over other groups in Moscow and creates a dangerous hierarchy of identities and groups within the city. The applicant’s case was based upon the violation of Article 11, 13, and 14 of the European Convention of Human Rights. With regard to Article 11³⁸⁸, the court unanimously decided that Alekseyev had suffered a violation of his rights.³⁸⁹ With regards to Article 13³⁹⁰, the applicant argued that there had not been an “effective remedy for the violation of his freedom of assembly in which he argued that the administrative and bureaucratic processes of the domestic courts were too slow and as a result did not allow for the following LGBTQ events that had been planned to actually take place”.³⁹¹ The ECHR agreed with the applicant because the “timing of the event is crucial to participants as well as to organizers, and second, there are time limits for organizers of events under Russian law, however the law does not provide specific legally binding time frames for

³⁸⁶ Ibid

³⁸⁷ Ibid, 581

³⁸⁸ Article 11 of the European Convention of Human Rights stipulates that: “everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. No restrictions shall be places on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.”-“European Convention of Human Rights,” http://www.echr.coe.int/Documents/Convention_ENG.pdf 10

³⁸⁹ Johnson, “Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the ECHR: Alekseyev v. Russia”, 581

³⁹⁰ This article of the European Convention of Human Rights stipulates that: “everyone whose rights and freedoms as set forth in this convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”- “European Convention of Human Rights”, http://www.echr.coe.int/Documents/Convention_ENG.pdf, 11

³⁹¹ Johnson, “Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the ECHR: Alekseyev v. Russia”, 581

the authorities to give a decision before the date of the event”.³⁹² Finally, the applicant complained that his rights under Article 14³⁹³ were violated, as the public authorities of Moscow identified explicit reference to sexual orientation as the grounds for the ban, the main reason for their refusal to grant permission was a moral disapproval of homosexuality.³⁹⁴ Finally, the court found in favour of the applicant and judged that he had suffered a violation of his rights under Article 14 of the Convention.³⁹⁵ The ECHR awarded the applicant €12,000 (583,371.09 Roubles) for non-pecuniary damages, and €17, 510 (851,235.64 Roubles) for costs.³⁹⁶ However, the question with regards to this case remains, “what does this show about the development of the rule of law in Russia, and what can be said about the relationship between the ECHR and the CCRF?” With this case it can be seen that there were some positive as well as negative developments with regards to the growth of rule of law in Russia. These counter developments demonstrate that there still exists tension between the ECHR and the CCRF, and that there is still significant room for improvement within this relationship.

The Positive Impacts and Results of Alekseyev v. Russia

This case denotes some positive changes in the growth of rule of law in Russia in that it demonstrates that ordinary Russian citizens are accessing the different levels of the judicial system and are using this as a way to advocate for their rights, this exemplifies

³⁹² Ibid

³⁹³ Article 14 of the European Convention of Human Rights stipulates that: “the enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as: sex, race, colour, language, political or other opinion, national or social origin, association with a national minority, property, birth or status.”-“European Convention of Human Rights”, http://www.echr.coe.int/Documents/Convention_ENG.pdf, 13

³⁹⁴ Johnson, “Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the ECHR: Alekseyev v. Russia”, 581

³⁹⁵ Ibid

³⁹⁶ Ibid, 579

what Chandler has found in her recent study.³⁹⁷ It also demonstrates that the ECHR is making similar judgments as other international organization, and are thus not necessarily biased against Russia. Chandler notes that regime transitions enable new forms of participation and bring new opportunities to influence legislation.³⁹⁸ This notion is embodied by the case of Aleseyev v. Russia. Chandler argues that this follows a particular trend in Russia, in that from 2005 onwards the more authoritarian the system becomes, the more individual citizens are using their remaining democratic avenues in order to demand more equality and more equitable social policies.³⁹⁹ It can be argued that the persistence of Mr. Alekseyev and the ability for him to bring multiple cases forward to the ECHR due to Russia's membership in the COE embodies this notion that regime transitions can bring about new forms of resistance and new ways to influence legislation. Furthermore, it highlights what Chandler noted about individual citizens using new avenues to demand that their rights be upheld by the Russian state.⁴⁰⁰ The protection of minorities from violence and discrimination and the development of equality and human rights are crucial components to the development of strong democratic values, and are important to the consolidation of democratic principles in a given state. As Morlino argues, democratization and the rule of law are linked in that the law is supposed to protect civil and political rights.⁴⁰¹ The right to freedom of assembly for minorities (gender, ethnic or otherwise) is an important aspect of this development of human rights, and is particularly important, as Russia is a signatory to the European Convention of Human Rights in which this right is enshrined. Freedom of assembly is also a crucial

³⁹⁷ Chandler, *Democracy, Gender, and Social Policy*, 46

³⁹⁸ Ibid

³⁹⁹ Chandler, *Democracy, Gender, and Social Policy*, 152

⁴⁰⁰ Ibid

⁴⁰¹ Morlino, "The Two rules of law between Transitions to and Quality of Democracy", 51

component of civil and political rights. This case draws attention to the discrimination faced by the LGBTQ community in Russia, and indicates to what extent the ECHR can eliminate this discrimination. This case is important to this thesis because as Johnson points out the judgment shows a clear and positive evolution of the Court's Jurisprudence in relation to the right to freedom of assembly guaranteed under Article 11.⁴⁰² The case of Alekseyev is important because it shows that universal human rights norms are permeating Russian society as Chandler has noted⁴⁰³, and demonstrates that the law is in some ways accessible to Russian citizens and that they are using it as an avenue to pursue their rights.⁴⁰⁴

In addition to taking his case to the ECHR, Mr. Alekseyev made a claim to the United Nations that his rights had been violated under article 21 of the International Covenant of Civil and Political Rights⁴⁰⁵. While international organizations are not the focus of this thesis, the findings of the UN covenant of Civil and Political Rights are similar to those of the ECHR. Thus demonstrating a consistency in the interpretation of human rights norms and international treatise. "Under Article 2 paragraph 3 (a) of the Covenant, the state party of Russia is obligated to provide the applicant with adequate compensation as well as under an obligation to take steps to prevent similar violations in the future".⁴⁰⁶ This ruling is important to this thesis as it demonstrates a similar understanding of human rights and the role of the Russian state in protecting human rights across different organizations. Furthermore, it demonstrates that the ECHR is not

⁴⁰²Johnson, "Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the ECHR: Alekseyev v. Russia", 579

⁴⁰³ Chandler, *Democracy, Gender, and Social Policy in Post-Communist Russia* (Palgrave MacMillan, 2013): 152

⁴⁰⁴ Ibid

⁴⁰⁵ United Nations, "The United Nations Covenant of Civil and Political Rights", 2009, 1

⁴⁰⁶ United Nations, "The United Nations Covenant of Civil and Political Rights", 2009, 9

imposing radically different consequences or judgments than other bodies. It demonstrates that the ECHR is not attempting to harm Russia with their judgments (as argued by some Russian judges), but rather are imposing judgments that are consistent with the international rights based norms that have been developing since the Second World War. Furthermore, this judgment demonstrates willingness by the ECHR to strongly condemn public authorities that interfere with peaceful assemblies of the LGBTQ community and organizations.⁴⁰⁷ Unfortunately, the court continues to use a piecemeal approach rather than a universal application of the convention with respect to issues related to sexual orientation. With this case the ECHR has taken a step towards expanding the provisions of the Convention's rights to non-heterosexuals.⁴⁰⁸ This is an important step towards ensuring that all marginalized individuals and those who face discrimination can apply to the court and seek justice outside of their state judicial systems.

The result of *Alekseyev v. Russia* demonstrates that the ECHR and its relationship with the Russian Federation and the CCRF can have some positive impacts, however with regards to the transition to democracy and the development of the rule of law, there are several aspects that must be developed further in order to transition towards more democratic principles and to further ensure that democratic principles are fully embedded in the Russian judicial system and the state. While, the case of *Alekseyev v. Russia* had some important consequences for the development of the rule of law in Russia and for the protection of LGBTQ persons in Russia from discrimination, there were not enough significant changes to the quality of the law or the implementation of the law, and

⁴⁰⁷ Ibid

⁴⁰⁸ Ibid

the rights of the LGBTQ community that are enshrined in the Russian Constitution are still not protected enough.

Drawbacks of the work of the ECHR

There's room in the work of the ECHR and its relationship with the CCRF to act as a more effective catalyst for democratic change. In particular this could be achieved by ensuring that all levels of the judiciary system incorporate the rulings of the ECHR and by mandating and enforcing systemic changes within the Russian state.

Addressing the issue from the Bottom-Up

The case of *Alekseyev v. Russia* has set important precedence within Russian Constitutional Law, and set in some ways set a minimum standard for the development of LGBTQ rights in Russia. After looking at the case of *Alekseyev v. Russia*, it is clear that it is important to have verdicts from the ECHR; however, this does not appear to be solving any of the human rights violations against the LGBTQ community in Russia. In fact throughout the case and since the case, the state of LGBTQ rights in Russia have gotten worse, with the Russian state acting as an active participant in these violations with discriminatory practices and legislation. It is clear that change cannot only be administered through top-down mechanisms such as the ECHR. As Richard Sakwa has noted what is crucial to the development of the rule of law is the quality of a law and the quality of implementation.⁴⁰⁹ With regards to rights under the Russian constitution, they are of average quality, however, laws protecting LGBTQ persons from discrimination do not exist under Russian law⁴¹⁰. As evidenced by the case of *Alekseyev v. Russia*, the

⁴⁰⁹ Richard Sakwa, "Can Putinism Solve its Contradictions". *Vladai Club*.
<http://valdaiclub.com/politics/66103.html> Jnuary 13, 2014

⁴¹⁰ "Charity Foundation for Social and Legal Community Assistance Rainbow", 13

Russian government is not upholding its duties with regards to the ECHR and the European Convention of Human Rights.

The changes must also come from the lower level domestic courts. In a previous court case Aleseyev appealed to the Constitutional Court in protest against the ruling of a Riazan's oblast statute establishing a penalty for 'homosexual propaganda' to children, in which he argued led to the arrest of individuals protesting publicly for gay rights.⁴¹¹ The Constitutional Court found that regional governments do not have jurisdiction over human rights, and therefore cannot violate them.⁴¹² The democratic values and norms that are espoused through the rulings of the ECHR must not only become embedded within the CCRF, these political and civil rights must also be protected by all levels of the judicial system in Russia. In order for there to be democratic progress and change these norms must not only be embedded in the upper echelons of the court system, but they must also be practiced by judges, lawyers and police officers in the regional and domestic courts. As Morlino notes, the rule of law is inextricably linked to democratization in that the law is supposed to protect the civil and political liberties of the people, and it must also develop a strong network of responsibility.⁴¹³ This network of responsibility cannot only exist between the ECHR and the CCRF, but it must also exist within the domestic courts and the police force. As such, it is crucial that all components of the judicial system reinforce these human rights norms. As Solomon notes, in order for there to be growth in rule of law, there must be a shift in the attitudes of public officials towards the law and with a respect for the law.⁴¹⁴

⁴¹¹ Chandler, *Democracy, Gender, and Social Policy*, 164

⁴¹² Ibid

⁴¹³ Morlino, "The Two rules of law between Transitions to and Quality of Democracy", 51

⁴¹⁴ Peter Solomon, "Assessing the Courts in Russia: Parameters and Progress under Putin", 66

The ECHR and the Importance of Systemic Changes

In addition to a shift in emphasis from the upper level courts to the lower level courts, and in order to further democratic change, the ECHR must begin to mandate states and particularly the Russian state to make systemic changes rather than only demanding monetary compensation. Furthermore, the ECHR must provide a detailed descriptions of how these systemic changes can occur.⁴¹⁵ The need for mandatory systemic changes is highlighted by the amount of repeat cases and the sheer volume of petitions from Russian citizens. While the monetary compensation provides a sense of fiscal relief to the individual who experienced the trauma and the human rights violation, this type of solution does not provide redress for the community at large, particularly the LGBTQ community.in Russia. Despite the verdict in *Alekseyev v. Russia*, the Russian state continues to persecute and discriminate against those in the LGBTQ community. This discrimination occurs at the lower levels of the judicial system, within the police force, as well as at the higher levels of the judicial system with the CCRF and the legislation of the Russian state. This case highlights how the CCRF is clearly not fulfilling this part of its mandate, as this new legislation violates Articles 19 and 20 of the Constitution. Since the verdict of *Alekseyev v. Russia*, the Russian state has not made Russia a safer place for the LGBTQ community; the state has continued to pursue discriminatory policies and practices against the community. This is highlighted by the discriminatory “homosexual propaganda law” passed in 2012, which Human Rights Watch argues is so vague it could

⁴¹⁵ Issaeva, Sergeeva, and Suchkova, “Enforcement of the Judgments of the European Court of Human Rights in Russia: Recent Developments and Current Challenges”, *International Journal on Human Rights*, 9 (15) (2011): 69, found in Greer “The European Convention on Human Rights” 160-161

impact anyone wearing or holding a rainbow flag or hosting a LGBTQ rally.⁴¹⁶ In addition, the protests surrounding the Sochi Olympics by the LGBTQ community and its allies as well as several queer athletes, indicates that people around the world are upset by the state of LGBTQ rights in Russia.⁴¹⁷

In conclusion, the ECHR provides a space for individual Russian citizens to be able to push and fight for their rights when they have experienced a human rights violation in Russia. This provides a small means of democratic change, such that democratic principles and values have become more accessible to Russian citizens and Russian citizens have become more aware and knowledgeable about issues of human rights and universal normative human rights appear to have penetrated the Russian political arena.⁴¹⁸ However, as seen with the case of *Alekseyev v. Russia*, it is crucial that there be bottom up change alongside upper level judicial change in order to ensure greater democratic principles and values in Russia. Despite the verdict of *Alekseyev v. Russia*, LGBTQ individuals and groups continue to face discrimination and persecution by the lower levels courts and the police force and the Russian state as a whole.⁴¹⁹ Furthermore, the CCRF and the Russian legislator fail to protect the rights of the LGBTQ community by not reinforcing the rights that this community has under the Russian Constitution. Despite the rulings and the amount of petitions from Russian citizens at the ECHR, the ECHR has not intervened enough in order to keep the Russian government from creating discriminatory legislation. Homophobic legislation in Russia is clearly still

⁴¹⁶ “Russia should Raise LGBT Issues at Summit: Homosexual Propaganda Ban could become Law” *Human Rights Watch*. June 1, 2012. <http://www.hrw.org/news/2012/06/01/russia-eu-should-raise-lgbt-issues-summit> accessed september 4, 2014

⁴¹⁷ Ibid

⁴¹⁸ Chandler, *Democracy, Gender, and Social Policy*, 164

⁴¹⁹ United Nations, *International Covenant on Civil and Political Rights in the Russian Federation*, 2009, 12

an issue; as such the ECHR has failed to deal with the systemic discriminatory issues in Russia. The discrimination faced by this community on a daily basis and the rallies of support from around the world for the LGBTQ community in Russia during the Sochi Olympics show that there needs to be systemic change in Russia. Ordering systemic or structural changes alongside monetary compensation is a part of the mandate of the ECHR, and as such the ECHR must expand its scope and monitor these systemic changes once they are ordered. This case shows that despite the verdict of the court, discrimination and persecution of individuals can and will continue unless systemic changes are ordered and monitored by the ECHR. Otherwise, the ECHR remains a small means of democratic change rather than a catalyst or regional organization that can create large societal changes. The following chapter discusses the case of Kiyutin v. Russia, which deals with the issue of migrant's rights and the rights of those living with HIV/AIDS.

Chapter Six

Case Study #2: Kiyutin v. Russia Case Number: 2700/10 The Call for Increased

Migrant's Rights and the Rights of those Living with HIV/AIDS

The case of Kiyutin v. Russia is significant to this study as it not only involved a new reading of Article 14 of the European Convention of Human Rights, it is also significant because it deals with family and privacy rights, migrant rights, has significant impacts for those living with HIV/AIDS in Russia, and finally as a by product there has been more attention given to those who are at a high risk of being infected with HIV/AIDS (such as those who use injection drugs and those who identify as LGBTQ). This is important to the study of democratization because it challenges the stigma surrounding HIV/AIDS and the stigma around migrants, and reinforces the fact that civil and political rights also apply to migrants and those living with HIV/AIDS. Furthermore, it forces researchers to consider the state of democracy and human rights in Western states as many countries outside of Europe do not allow migrants who are HIV positive to have permanent residence permits, which as mentioned later violates some global principles of human rights. As this analysis will point out there remains a great deal of work that must be done in order to achieve more rights for migrants who are HIV positive and for those living with HIV/AIDS in Russia. The following chapter will begin with a brief discussion of the history of HIV/AIDS in Russia, it will then discuss the facts of the case, and the chapter will finish with an analysis and discussion of how this can positively or negatively impact democratization in Russia.

History of HIV/AIDS in Russia

In the past two decades and particularly since the dissolution of the Soviet Union, Russia has dealt with an epidemic of HIV/AIDS.⁴²⁰ Scholars argue that this is linked to a lack of education regarding drug use and safe sex practices, as well as unregulated drug use and prostitution.⁴²¹ According to Human Rights Watch, heroin injection remains a key driver of HIV/AIDS in Russia, however government policies have been hostile to “opiate substitution therapy”, which advocates argue is a central and key element to HIV prevention in most countries.⁴²² According to Lane, the World Health Organization (WHO) released a report in 2005 indicating that Russia “had one of the fastest growing HIV epidemics globally with an extremely rapid increase since 1996”.⁴²³ In “1995 as a response to the outbreak of HIV/AIDS cases the Russian Federation introduced the ‘HIV Prevention Act’”.⁴²⁴ “This act provides free medical assistance to Russian nationals living with HIV/AIDS and orders any foreign nationals or stateless people who are residing in Russia to be deported immediately upon discovering that they are HIV positive”.⁴²⁵ As noted later this reinforces stigma and it can be argued is a discriminatory policy that is [potentially] based in xenophobic sentiments. Following this act, the Foreign Nationals Act established in 2002 that any foreign nationals who are married to Russians or who had a Russian child to apply for a residence permit.⁴²⁶ In addition, section 7 of this act stipulates that a temporary residence permit can be denied without actually having a

⁴²⁰ Hilary Lane, “Kiyutin v. Russia: The European Court of Human Rights Acknowledges the Need for Protection of a class of Individuals with HIV/AIDS”, 506

⁴²¹ Lane, “Kiyutin v. Russia: The European Court of Human Rights Acknowledges the Need for Protection of a class of Individuals with HIV/AIDS”, 506

⁴²² “Russia: HIV/AIDS Pioneer Fights for Vulnerable Populations: Humanitarian Action helps Drug Users and Street Children”, *Human Rights Watch*, September 9, 2005
<http://www.hrw.org/news/2005/09/08/russia-hiv-aids-pioneer-fights-vulnerable-populations>

⁴²³ Lane, “Kiyutin v. Russia: The European Court of Human Rights Acknowledges the Need for Protection of a class of Individuals with HIV/AIDS”, 516

⁴²⁴ *Ibid*, 507

⁴²⁵ *Ibid*, 508

⁴²⁶ *Ibid*, 507

negative HIV status.⁴²⁷ This means that a migrant without a negative HIV status can still be denied a residence permit, even if they meet other criteria as well as the HIV criteria.⁴²⁸ In addition, one interesting stipulation within Russian immigration legislation is that any foreign national who is not required to have a travel Visa to enter Russia can stay in Russia for up to ninety days at a time.⁴²⁹ This appears to contradict the other policies as foreign nationals who do not require a Visa do not have to demonstrate that they are HIV negative yet they can stay in Russia up to 90 days.⁴³⁰ As discussed later this creates some contradictions within Russian immigration legislation and means of HIV control. This time frame is paramount for the court's decision regarding vulnerable groups and their analysis regarding the prevention of the spread of HIV/AIDS in Russia.⁴³¹

In 2011, the United Nations Committee on Economic, Social and Cultural Rights⁴³² found that they were concerned about the spread of drug addiction, including drug use by way of injection, which is the main factor for the growing epidemic of HIV/AIDS, hepatitis C, and tuberculosis in the Russian Federation.⁴³³ The UN-CESCR argues that the Russian state party should continue its effort to increase knowledge of and access to affordable contraceptive methods and reproductive health methods in Russia, and to ensure that family planning information as well as services are available to all Russian citizens, including those who live in rural areas⁴³⁴. Finding these services and information

⁴²⁷ Ibid

⁴²⁸ Ibid

⁴²⁹ Ibid

⁴³⁰ Ibid

⁴³¹ Ibid

⁴³² For the rest of this thesis, this will be abbreviated to: UN-CESCR

⁴³³ United Nations, United Nations, Committee on Economic, Social, and Cultural Rights-Economic and Social Council, June 1, 2011

⁴³⁴ Ibid

may be particularly difficult in rural areas of Russia as they are often quite remote. Furthermore, the Committee has encouraged the Russian Federation to include sex education in school curricula in order to prevent the spread of STIs including HIV/AIDS, to prevent early pregnancy, and to provide information about reproductive and sexual healthcare.⁴³⁵ Finally, the UN-CESCR urged the state party to include the costs of modern contraceptive methods into the public health insurance scheme.⁴³⁶ All of these types of measures are common means of reducing the spread of STI⁴³⁷s and especially HIV/AIDS in a given state.

In addition to the recommendations of the United Nations, an HIV/AIDS organization in Russia called Humanitarian Action Fund has shown that doing outreach and providing care to Russia's most marginalized populations is the best way of curbing and slowing the epidemic of HIV/AIDS in Russia.⁴³⁸ According to Human Rights Watch:

While the Russian government continues to try and sweep its fast growing HIV/AIDS epidemic under the rug, Humanitarian Action has shown that providing outreach and care to drug users, sex workers, and those who are forgotten by government policy⁴³⁹, is the most effective response to the epidemic.⁴⁴⁰

Recently the Russian government has taken some steps towards HIV/AIDS prevention. In June 2013, during the G20 Civil Summit the Russian Federation and UNAIDS have launched a new regional cooperation program for technical assistance for

⁴³⁵ Ibid

⁴³⁶ Ibid

⁴³⁷ STIs refers to sexually transmitted infections

⁴³⁸ "Russia: HIV/AIDS Pioneer Fights for Vulnerable Populations: Humanitarian Action helps Drug Users and Street Children", *Human Rights Watch*, September 9, 2005

<http://www.hrw.org/news/2005/09/08/russia-hiv-aids-pioneer-fights-vulnerable-populations>

⁴³⁹ It can be argued that migrants would fall into this category, particularly undocumented migrants.

⁴⁴⁰ Russia: HIV/AIDS Pioneer Fights for Vulnerable Populations: Humanitarian Action helps Drug Users and Street Children", *Human Rights Watch*, September 9, 2005

<http://www.hrw.org/news/2005/09/08/russia-hiv-aids-pioneer-fights-vulnerable-populations>

HIV and other infectious diseases in the CIS (Commonwealth of Independent States).⁴⁴¹

The Russian Federation has given 16 Million dollars (in US monetary value, 5886 0000.00 Roubles) to the program, which will run from 2013-2015.⁴⁴² According to Gennandiy Onishchenko head of Rospoterbnadzor, the program will “strengthen health systems, ensure better epidemiological surveillance of HIV, and will promote and heighten the scale of HIV prevention programs for key populations at higher risks of HIV, especially migrants”.⁴⁴³ This program is particularly important in the former CIS region and especially in Russia due to the rising epidemic of HIV/AIDS in the CIS region, and is especially important as the international donor community has scaled back their commitments to CIS countries, and have redirected their efforts elsewhere.⁴⁴⁴ This has left many countries in the CIS region struggling to maintain their responses to HIV/AIDS, as many of the means of preventing HIV/AIDS can be quite costly to states.⁴⁴⁵ In addition, the Russian government has decided that infectious diseases, including HIV/AIDS will be on the agenda of the G8 in 2014, as the Russian government has assumed the role of G8 President throughout 2014.⁴⁴⁶ With this context in mind, the following section deals with a case explicitly related to migrant rights under the Foreign Nationals Act and the rights of migrants living HIV/AIDS in Russia.

Facts of the Case:

⁴⁴¹ “Russia Strengthens Commitment to reversing AIDS Epidemic” *UNAIDS*, <http://www.unaids.org/en/resources/presscentre/featurestories/2013/june/20130614russiaprogramme/>

⁴⁴² Ibid

⁴⁴³ Ibid

⁴⁴⁴ Ibid

⁴⁴⁵ Ibid

⁴⁴⁶ Ibid

The applicant Mr. Kiyutin acquired citizenship of Uzbekistan after the collapse of the USSR.⁴⁴⁷ “In 2002, Mr. Kiyutin purchased a home and land in the Oryol region of Russia,⁴⁴⁸ in 2003 Mr. Kiyutin married a Russian national, and in 2004 they had a daughter”.⁴⁴⁹ “In order to be with his wife and daughter, Mr. Kiyutin applied for a Russian permanent residence permit but he was denied based upon his positive HIV status.⁴⁵⁰ He applied for a temporary residence permit in 2009, however the Oryol Region Federal Migration Service denied his request”.⁴⁵¹ “In addition, they gave him three days to leave the country or risk deportation, which is not a significant amount of time to deal with family issues or to create arrangements with regards to living accommodations and childcare”.⁴⁵² “With reference to the Foreign Nationals Act, Migration Services denied his request, which restricts permanent residence permits to foreign nationals who cannot show a negative HIV status; furthermore, the Russian domestic courts rejected his appeals.”⁴⁵³ “Kiyutin appealed the decisions of the Russian courts based upon the United Nations document regarding HIV/AIDS prevention, and filed a complaint against the Russian Federation with the ECHR”.⁴⁵⁴ “Inter Rights, the International Centre for the Legal Protection of Human Rights made two recommendations: 1. That the general non-discrimination of the key universal and regional human rights treatise were interpreted as prohibiting discrimination on the basis of HIV or AIDS status, 2. people living with

⁴⁴⁷ Lane, “Kiyutin v. Russia: The European Court of Human Rights Acknowledges the Need for Protection of a class of Individuals with HIV/AIDS”, 505

⁴⁴⁸ Ibid

⁴⁴⁹ Joseph, Dute. “Selected Legislation and Jurisprudence: European Court of Human Rights” *European Journal of Health Law*, 18 (2011): 423

⁴⁵⁰ Lane, “Kiyutin v. Russia: The European Court of Human Rights Acknowledges the Need for Protection of a class of Individuals with HIV/AIDS”, 505

⁴⁵¹ Ibid

⁴⁵² Ibid, 506

⁴⁵³ Ibid

⁴⁵⁴ Ibid

HIV/AIDS should benefit from the prohibition on discrimination on account of disability, which exists in the court's case law and in other legal systems".⁴⁵⁵

The United Nations has addressed the rights of those living with HIV/AIDS in several documents and these documents set some precedence for the decisions made in *Kiyutin v. Russia*. This is particularly important, since as noted earlier after the demise of the Soviet regime, international law and international norms were extremely important to the new Russian government and their importance was encased in section 15(4) of the Russian Constitution.⁴⁵⁶ "The UN Declaration of Commitment on HIV/AIDS in 2001 acknowledges the significance of family to support those living with HIV/AIDS".⁴⁵⁷ In addition the declaration acknowledges "there is a need for strengthened legislation to eliminate all forms of discrimination against those living with HIV/AIDS, and to ensure the full enjoyment of all human rights and fundamental freedoms."⁴⁵⁸ Furthermore, with regards to migrant's rights, "the joint United Nations Program on HIV/AIDS International Organization for Migration (UNAIDS/IOM) and the office of the UN High Commissioner for Human Rights addressed the issue of HIV/AIDS related travel restrictions in their 2004, 2006 and 2008 guidelines".⁴⁵⁹ Specifically the office of the UN High Commissioner for Human Rights specifically stated that "any restrictions on these rights based on suspected or real HIV status alone, including HIV screening of international travellers are discriminatory and cannot be justified by public health

⁴⁵⁵ Ibid

⁴⁵⁶ Danilenko, "The New Russian Constitution and International Law", 459

⁴⁵⁷ Lane, "Kiyutin v. Russia: The European Court of Human Rights Acknowledges the Need for Protection of a class of Individuals with HIV/AIDS", 508

⁴⁵⁸ Ibid

⁴⁵⁹ Ibid

concerns”⁴⁶⁰ This then sets a precedence and a framework from which the case could be understood within the ECHR and within the context of the Russian Federation.

Mr. Kiyutin brought his complaint under several Articles however, the ECHR found that only articles 8 and 14 were the most applicable.⁴⁶¹ Furthermore, the court analyzed the case under article 8 in conjunction with article 14.⁴⁶² Article 8 was the same article, which was used by Mr. Alekseyev in his case against the Russian state. It is especially important to note not only that there are high numbers of repeat cases at the ECHR but that several of the same articles are found to have been violated by Russia even within this small sample of three cases. In each case the Russian state has used similar arguments for its court rulings, which was that in both cases the Russian state argued that by impeding these individual rights the state was attempting to protect public safety. The first section of article 8 notes “all individuals have the right to respect for their private and family life, home and correspondence”.⁴⁶³ Since there are instances when these rights can be restricted within reason, section 2 notes that these rights are not absolute, and that in some circumstances public policy may require governmental interference.⁴⁶⁴ What is crucial to this case is that Article 8 does not force any member state to grant residency based on matrimony or family ties; however, a states immigration policies cannot violate human rights in their residency applications.⁴⁶⁵ To be more specific, the Convention does not mandate an absolute obligation to member state’s to

⁴⁶⁰ Ibid

⁴⁶¹ Ibid

⁴⁶² Article 8 addresses the right to respect for private and family life and rules out interferences by a public authority in those rights except when it is deemed necessary for the interests of public safety, for the protection of health and safety and for morals. European Convention of Human Rights. <http://www.supremecourt.ge/files/upload-file/pdf/act4.pdf>

⁴⁶³ European Convention of Human Rights. <http://www.supremecourt.ge/files/upload-file/pdf/act4.pdf>

⁴⁶⁴ Ibid

⁴⁶⁵ Lane, “Kiyutin v. Russia: The European Court of Human Rights Acknowledges the Need for Protection of a class of Individuals with HIV/AIDS”, 509- 510

permit married couples of differing nationalities to have permanent residency in the state of one member of the couple.⁴⁶⁶ Although, it must be noted that this does not mention anything about how this impacts couples who have children, or how children impact the process given that Article 8 protects aspects of family life⁴⁶⁷. This is particularly important to this case as Mr. Kiyutin applied for a temporary and permanent residency in order to be with his wife and daughter who are both Russian residents.

Article 14 was applied in conjunction with Article 8 because according to the ECHR its protection against discrimination complements the goals of Article 8.⁴⁶⁸ According to the Convention and the ECHR, Article 14 cannot stand-alone when it is used as a basis for a case before the ECHR and thus it must be used in combination with another article of the convention.⁴⁶⁹ Article 14 “discrimination on the grounds of sex, race, colour, political or other opinion, national or social origin, association with a national minority, property, birth or *other status*”⁴⁷⁰ The goal of Article 14 is to prevent discrimination of individuals based on distinguishable characteristics.^{471 472} Hilary Lane

⁴⁶⁶ Lane, “Kiyutin v. Russia: The European Court of Human Rights Acknowledges the Need for Protection of a class of Individuals with HIV/AIDS”, 509-510

⁴⁶⁷ The ECHR emphasizes that even though the convention cannot mandate anything regarding the immigration policies of a given state, they do hold that immigration policies must be compatible with a foreign national’s human rights, particularly their rights regarding privacy and family life. The ECHR has a very specific way of understanding “family life”. “Family life” according to the ECHR and the Convention is defined as including lawful and genuine marriages, such as the marriage in which a child is born. This definition is extremely problematic because it leaves out marriages and family structures that are outside the Western normative understanding of what a family is. This excludes those who are not legally married but have a child, and excludes couples that are not legally allowed to marry in a given state, such as same sex couples that find it difficult to marry in Russia. Furthermore, it could possibly exclude couples that are not married but one spouse may be dependent on the other. This excludes migrants. Lane, “Kiyutin v. Russia: The European Court of Human Rights Acknowledges the Need for Protection of a class of Individuals with HIV/AIDS”, 511 & European Convention of Human Rights.
<http://www.supremecourt.ge/files/upload-file/pdf/act4.pdf>

⁴⁶⁸ Lane, “Kiyutin v. Russia: The European Court of Human Rights Acknowledges the Need for Protection of a class of Individuals with HIV/AIDS”, 512

⁴⁶⁹ Ibid

⁴⁷⁰ Ibid

⁴⁷¹ Ibid

argues that the list included in the convention is purely illustrative and is not completely exhaustive, and as such the words “other status” provide for broad interpretation, including characteristics that are not innate or inherent, which can include things such as health status”.⁴⁷³ With this in mind, the ECHR chose to read in and interpreted “other status” to include persons with health statuses such as those who are HIV positive⁴⁷⁴. The UN Commission on Human Rights, which calls for the right to privacy for people living with HIV/AIDS, supports this finding and a prohibition of HIV/AIDS related discrimination.⁴⁷⁵

With the support of the Council of Europe and the UN, the ECHR agreed that health status would be considered an area of prohibited discrimination under Article 14.⁴⁷⁶ The ECHR’s decision to include health status into Article 14, specifically an individual’s HIV status has made this a landmark decision for the ECHR.⁴⁷⁷ The ECHR was and continues to be very concerned about the stigma associated with HIV/AIDS, which began in the early 1980’s.⁴⁷⁸ “By recognizing that individuals with HIV/AIDS are members of a vulnerable group the ECHR held Russia’s HIV negative status provision to a higher burden of necessity under the law.”⁴⁷⁹ This is important as it could lead to greater growth and expansion of the rule of law in Russia, as it sets an important precedence for Russian judges and lawyers to follow. Furthermore, with this

⁴⁷² It should be noted that the convention and the article not only leave the term “other status” vague but they also leave the definition of “distinguishable characteristic” extremely vague. This leaves considerable room for interpretation and for characteristics to be read into the convention.

⁴⁷³ Lane, “Kiyutin v. Russia: The European Court of Human Rights Acknowledges the Need for Protection of a class of Individuals with HIV/AIDS”, 510

⁴⁷⁴ Ibid

⁴⁷⁵ Ibid

⁴⁷⁶ Ibid

⁴⁷⁷ Lane, “Kiyutin v. Russia: The European Court of Human Rights Acknowledges the Need for Protection of a class of Individuals with HIV/AIDS”, 515

⁴⁷⁸ Ibid

⁴⁷⁹ Ibid

interpretation, the ECHR has widened the field of possible areas of discrimination to be protected under Article 14 to areas that are not outwardly visible.⁴⁸⁰ Hilary Lane argues that the ECHR has opened the door for other cases to challenge the definition of “other status” under Article 14 and has thus opened the door for other vulnerable groups to be considered under the same article.⁴⁸¹

For several reasons the court ruled unanimously that there had been a violation of Article 14 of the Convention, taken in conjunction with Article 8.⁴⁸² In addition, the court ruled that the Russian Federation had to pay Mr. Kiyutin €15,000 (702,017.71 Russian Roubles) for non-pecuniary damages and €350.00 (16,380.41 Roubles) for some respective costs and expenses.⁴⁸³ The final section of this chapter will provide an analysis of how this case and the subsequent decision have potentially impacted the process of democratization in Russia.

Analysis

There were some of the positive and negative factors of this case that speak to the degree in which the ECHR can and cannot act as a mechanism for the growth of rule of law and democracy in Russia. The case of Kiyutin v. Russia illustrates the relationship between the CCRF and the ECHR and illustrates the relationship between international donors and international HIV/AIDS organizations and the Russian Federation. In addition this case highlights the importance of addressing the systemic issues that are impacting the democratic transition and the systemic issues that are leading to human rights abuses rather than simply addressing a human rights violation with a monetary payment to the

⁴⁸⁰ Ibid

⁴⁸¹ Lane, “Kiyutin v. Russia: The European Court of Human Rights Acknowledges the Need for Protection of a class of Individuals with HIV/AIDS”, 518

⁴⁸² Ibid

⁴⁸³ Dute, “Selected Legislation and Jurisprudence: European Court of Human Rights”, 435

complainant. This re-emphasizes some of the issues laid out in the Alekseyev v. Russia case.

Infrastructure Building and funding for those living with HIV/AIDS

Arguably this case has provided one aspect of a positive development of the rule of law in Russia. The implementation of the new regional cooperation program for technical assistance for HIV and other infectious diseases in the CIS region and the monetary donation of 16 Million dollars seems to show that the Russian government is attempting to address some of the systemic issues that impact the rise of HIV/AIDS in Russia and the CIS region. This demonstrates a recognition by the Russian state that the issue of HIV/AIDS is so vital to the Russian state that it is an issue worth spending the time and money to create infrastructure to help deal with it. While the program was not necessarily created due to the results of the Kiyutin v. Russia case, there is a clear positive linear progression of the Russian government putting more money and effort into fighting the rise of HIV/AIDS in Russia. Furthermore, the new program pledges to provide support and medical help to migrants who are living with HIV/AIDS.⁴⁸⁴ This is particularly important, as the Foreign Nationals Act through prohibitive measures does not encourage migrants to get tested or seek medical attention, since they deport anyone who has a positive HIV status almost immediately.⁴⁸⁵ This demonstrates that in a minimal way the Russian government is attempting to direct some effort towards helping migrants who are living with HIV/AIDS, which can be considered a positive development in the realm of human rights in Russia. It remains to be seen to what degree this program will help those

⁴⁸⁴ “Russia Strengthens Commitment to reversing AIDS Epidemic” *UNAIDS*, <http://www.unaids.org/en/resources/presscentre/featurestories/2013/june/20130614russiaprogramme/>

⁴⁸⁵ Lane, “Kiyutin v. Russia: The European Court of Human Rights Acknowledges the Need for Protection of a class of Individuals with HIV/AIDS”, 508

who are living with HIV/AIDS in Russia or other countries in the CIS region; however, it is crucial to the development of further rights for those living with HIV/AIDS in Russia and the CIS to move towards the development of infrastructure to help those living with HIV/AIDS. The full impact of this program can only be seen years after the development of this infrastructure. There is still significant room for the growth of infrastructure to help those living with HIV/AIDS, and there is significant room for more growth in terms of migrant rights in Russia, particularly those who are living with HIV/AIDS. There also needs to be additional infrastructure to help and support those who use drugs, especially those who inject drugs.

Finally, with regard to theories of democratization, the role of the UN and ECHR as well as the development of the UNAIDS-Russian Federation program, points to the importance of regional organizations in the development of democratic principles and human rights in Russia. More particularly, the role of the ECHR and the verdict of the court illustrate the importance of regional organizations such as the ECHR in the development of the rule of law in Russia. Despite the fact that the ECHR did not demand that the Russian Federation make any systemic changes within the verdict and only demanded that the Russian state give the applicant a payment, the fact that the Russian state has implemented a program to enable systemic change is a small part of the democratic transition and the development of democratic values and principles and assists with the development of further human rights in Russia.

Drawbacks of the role of the ECHR with regards to migrant's rights and HIV/AIDS

While there are some small positive democratic changes with regards to HIV/AIDS prevention and migrant's rights (by way of migrants inclusion in the new funding

program for HIV/AIDS prevention) in Russia there are still some significant drawbacks to the developments after the Kiyutin v. Russia case with regard to democratic growth and the growth of rule of law in Russia. Arguably, the drawbacks far outweigh the small positive democratic changes. While the Russian state introduced a new program aimed at reducing the spread of HIV/AIDS in Russia, the Foreign Nationals Act makes the life of migrants more difficult and dangerous and contrary to the claims of the Russian government does not help maintain the health and safety of the Russian state or population. As this is a legislated act and a piece of law in Russia, the existence of this act and its contents impedes the growth of an effective and equitable rule of law in Russia. With the Foreign Nationals Act, the Russian state has no problem implementing the law by deporting migrants or refusing migrants temporary or permanent residence permits.⁴⁸⁶ In addition, the law is quite clearly discriminatory and contributes to the HIV/AIDS epidemic in Russia.⁴⁸⁷ Of the 47 members of the Council of Europe only six states require than an individual applying for residence permit provide negative HIV test results; furthermore, other states do not impose restrictions on the entry, stay or residence of people living with HIV on account of their HIV status.⁴⁸⁸

It has been proven through various studies that travel and residence restrictions on people living with HIV/AIDS is not be an effective way of preventing the spread of HIV/AIDS, and may actually be harmful to public health and the safety of a state.⁴⁸⁹ In fact it is better to understand the root problems of the spread of HIV/AIDS rather than using immigration legislation and border control as an answer to the epidemic. This type

⁴⁸⁶ Dute, "Selected Legislation and Jurisprudence: European Court of Human Rights", 425

⁴⁸⁷ Ibid

⁴⁸⁸ Ibid

⁴⁸⁹ Ibid

of legislation can be harmful to public health for two main reasons: the exclusion of HIV positive foreigners can create a false sense of security among a state's population by encouraging the population to consider HIV/AIDS a foreign problem that is taken care of by deporting infected foreigners and by not allowing them to settle in a state (temporarily or permanently).⁴⁹⁰ The second issue is that these types of restrictions on those living with HIV/AIDS leads to migrants remaining in a country illegally and avoiding HIV/AIDS screening.⁴⁹¹ As a result of these types of policies a migrant's HIV status may remain unknown.⁴⁹² Contrarily, the Russian government does not apply HIV/AIDS related travel to tourists or short-term visitors, nor does the state apply HIV tests on Russian nationals leaving or returning to the country.⁴⁹³ This different treatment of HIV positive long-term settlers (migrants) compared to short-term visitors or Russian nationals may be objectively justified by the risk that short-term visitors could potentially place an excessive demand on the publicly funded health care system versus receiving treatment elsewhere.⁴⁹⁴

However this argument does not fit with the medical structure in Russia and as such this economic argument is not very strong for several reasons. As mentioned previously, with these types of restrictive legislation, a migrant's health status may remain undetermined or they may remain in a state illegally, which could place more of a burden on the state's systems.⁴⁹⁵ Furthermore, these economic arguments for the exclusion of prospective HIV positive residents are only applicable in a state and legal

⁴⁹⁰ Dute, "Selected Legislation and Jurisprudence: European Court of Human Rights", 425

⁴⁹¹ Ibid

⁴⁹² Ibid

⁴⁹³ Ibid

⁴⁹⁴ Ibid

⁴⁹⁵ Ibid

system where foreign residents could benefit from the national health care scheme at a reduced rate or for free; however, in Russia this is not the case for foreign residents.⁴⁹⁶ Furthermore, as noted earlier, a negative HIV status does not necessarily guarantee a residence permit under the Foreign Nationals Act. Finally, the practice of the exclusion of HIV positive non nationals from entry and/or residence in a given state with the objective of reducing HIV transmission is based on a very specific set of assumptions that individuals will engage in a certain set of specific and unsafe behavior and that individuals will fail to protect themselves.⁴⁹⁷ These assumptions lead to generalizations and legislation that are not founded in fact but are based on discrimination.⁴⁹⁸

Policies such as these only reinforce stereotypes and stigma, and further entrench discrimination against migrants and those seeking temporary or permanent residence in Russia. This not only strengthens existing stigmas (rather than breaking down stigma), policies such as the Foreign Nationals Act leads to embedded structural discrimination within the immigration system in Russia and could possibly lead to and contribute to institutionalized xenophobia within the immigration system in Russia. The very fact that only 6 of the 47 member states require proof of HIV negative status for their residency permit applications, while only one state has a similar declaration, and three states allow deportation of foreigners with HIV positive status, demonstrates that there is a consensus among European countries that an HIV/AIDS positive status is not an appropriate ground for discrimination within the residency permit application.⁴⁹⁹ Essentially the Russian government demonstrated that this legislation is based more on stigma and discrimination

⁴⁹⁶ Ibid

⁴⁹⁷ Ibid

⁴⁹⁸ Ibid

⁴⁹⁹ Lane, "Kiyutin v. Russia: The European Court of Human Rights Acknowledges the Need for Protection of a class of Individuals with HIV/AIDS", 516

rather than facts related to the spread of HIV/AIDS. In addition, the Russian state undermines its own laws and public health “objectives” by allowing those who are living with HIV/AIDS into Russia for periods of up to three months, and the Russian state does not ever address this gap between these two pieces of legislation.⁵⁰⁰

It can be seen with the case of Kiyutin v. Russia that structural and systemic changes are crucial to further democratic change. Furthermore, it can be shown that despite the relationship between the CCRF and the ECHR and despite the verdicts of the ECHR there are only small democratic changes that can occur. As seen with the Foreign National Act and the case of Kiyutin v. Russia in order for there to be real democratic change and for the transition to democracy and the development of an effective rule of law in Russia there cannot only be monetary compensation for a human rights violations. While the ECHR is crucial to the monitoring of Russian laws and provides a means for Russian citizens to appeal for democratic change in Russia, the fact that the ECHR does not require systemic changes and does not monitor Russia to ensure that systemic and structural changes occurs means that the ECHR can only minimally act as a means or catalyst for democratic change in Russia. It is clear that the Foreign Nationals Act is based upon discriminatory ideas and practices, and must be changed or eliminated in order for there to be further democratic change and migrant rights in Russia.

Furthermore, it remains to be seen how the new program between the Russian state and UNAIDS helps those who are living with HIV/AIDS in Russia. As Dutkiewicz has pointed out, there is a degree of commodification of democracy in Russia, with the purchasing of power has impacted the state of democracy in Russia.⁵⁰¹ In the next few

⁵⁰⁰ Ibid

⁵⁰¹ Dutkiewicz, “Transitional Economies and the Commodification of Democracy”, 54

years scholars and politicians will be able to see if this program and the money put into it by the Russian state is the government paying lip-service to the issue of HIV/AIDS in Russia and particularly migrant rights in Russia, or if the Russian state will make valid efforts to provide more rights for migrants living with HIV/AIDs in Russia. However, as noted previously the most poignant points for democratic change with regards to migrant rights and for the reduction of stigma around HIV/AIDS in Russia lies in changes to the Russian Foreign Nationals Act.

Chapter Seven

Case study #3: Konstantin Markin v. Russia Case Number: 30078/06

This chapter will explore the final case study of this thesis. This case study is important to the discussion of the growth of the rule of law in Russia as it deals with gender discrimination and gender stereotypes that are based on traditional (Russian and Western) conceptions of gender and gender roles. Lauri Malksoo argues that this case has become a “litmus test” for Russia’s relationship with international law in general, and more specifically, European human rights law.⁵⁰² According to Malksoo, the decision of the ECHR marks an important evolution of the ECHR jurisprudence concerning gender stereotypes and parental rights, as well as the application of human rights norms to the military.⁵⁰³ In addition, this ruling is the first direct challenge to a ruling of the CCRF.⁵⁰⁴

The discussion of gender equity and the dismantling of traditional gender stereotypes are critical to the development of democracy and democratic values in a given state. As noted by Jacquette and Waylen the inclusion of gender and particularly women’s movements are crucial to theories of democratization.⁵⁰⁵ As such, the discussion of this case challenges traditional theories of democracy and democratization, and further reinforces the notion that traditional definitions and theories of democracy are insufficient for the analysis of the transition to democracy in Russia. Furthermore, as Jacquette points out, it is crucial to incorporate gender issues into the discussion of democratization as it has been argued that the vitality of the gender movements are

⁵⁰² Lauri Malksoo, “Markin V. Russia Application No. 30078/06 <http://echr.coe.int>. European Court of Human Rights (Grand Chamber), March 22, 2012” *The American Journal of International Law*, (2012): 837

⁵⁰³ Malksoo, “Markin V. Russia Application No. 30078/06 <http://echr.coe.int>. European Court of Human Rights (Grand Chamber), March 22, 2012”, 837

⁵⁰⁴ Ibid

⁵⁰⁵ Jacquette, “Women and Democracy: Regional Differences and Contrasting Views” 111 & Waylen, “Women and Democratization: Conceptualization Gender Relations in Transition Politics”, 33

important indicators of the extent to which democratic institutions are working on the ground, and to what extent these institutions impact the lived reality and experiences of marginalized groups in Russia.⁵⁰⁶ This chapter will begin by briefly discussing gender stereotypes in Russia, followed by a discussion of the facts of the case, with the last section providing an analysis of how this pertains to democratic transition and the growth of the rule of law in Russia.

Gender Roles and Stereotypes in Russia

The Constitution of the Russian Federation has two articles which address gender equality: Article 19, p. 3, which claims equal rights and freedoms for men and women and equal opportunities for their implementation.⁵⁰⁷ In addition, article 15 notes that international documents that have been signed and ratified by the Russian Federation are a part of its national legislation and are thus a priority.⁵⁰⁸ Furthermore, the Russian Federation has signed and ratified most international documents that aim to promote gender⁵⁰⁹ equality.⁵¹⁰ While the case deals with a man who has been discriminated against, it is crucial to discuss how women fit into Russian society and how Russian laws, culture, legislation etc. impact them. This is an important component to the analysis of this case because researchers must understand where men in Russia stand in comparison, and what different groups face in terms of discrimination. Furthermore, while this case deals with a male complainant, researchers must ask why women in the military or in

⁵⁰⁶Jaquette, “Women and Democracy: Regional Differences and Contrasting Views”, 1

⁵⁰⁷ Constitution of the Russian Federation. <http://www.constitution.ru/en/10003000-01.htm> Accessed July 10, 2014

⁵⁰⁸Danilenko, “The New Russian Constitution and International Law”, 459

⁵⁰⁹ It should be noted that equality and equity are not the same, and it would require further changes to the political and social conditions of Russia in order to achieve gender equity.

⁵¹⁰ All-Russian Association Women’s Nongovernmental Organizations Consortium of Women’s Nongovernmental Associations *United Nations Convention on the Elimination of all forms of Discrimination Against Women* (2010),1

society at large are not being as vocal, and if this has anything to do with the existing patriarchal structures of Russian society and government.

According to the Consortium of Women's Non-Governmental Associations, the Russian Federation's national priorities do not include the issue of gender equality and do not include any mechanisms to deal with gender equality.⁵¹¹ NGO's argue that the federal authorities of the Russian Federation do not understand that social problems cannot be solved without the acknowledgement and incorporation of a gender component.⁵¹² Furthermore, NGOs claim that women's vertical and horizontal discrimination continue in that women primarily hold low paying jobs and there are fewer women in decision making positions such as governors or within the government.⁵¹³ Along those lines, the term "feminization of poverty" has become a common term in the study of post-Soviet states. According to several NGOs, women's salaries make up 60% of men's salaries, and 67% of working women have higher or special secondary education compared to 46% of men.⁵¹⁴

Furthermore, many of those who are living in poverty despite having a job are women.⁵¹⁵ According to the United Nations there are over 400 jobs that women have been banned from participating in by the Russian state, in order to protect their reproduction.⁵¹⁶ Alongside employment discrimination, women face overwhelming amounts of domestic violence.⁵¹⁷ According to several NGOs, police people treat cases of

⁵¹¹ Ibid

⁵¹² All-Russian Association Women's Nongovernmental Organizations Consortium of Women's Nongovernmental Associations *United Nations Convention on the Elimination of all forms of Discrimination Against Women* (2010). 2

⁵¹³ Ibid

⁵¹⁴ Ibid

⁵¹⁵ Ibid

⁵¹⁶ Ibid

⁵¹⁷ Ibid

domestic violence as a “family problem” and as such chose not to begin criminal proceedings against those who commit domestic violence.⁵¹⁸ The Russian Federation does not have a law that addresses domestic violence, and NGOs and the United Nations have urged the Russian Federation to not consider domestic violence cases as private charges.⁵¹⁹

In addition to entrenched gender discrimination, the Russian state reinforces patriarchal family systems and patriarchal conceptions of the family.⁵²⁰ These conceptions and the legislation that reinforces them strengthen and further embed gender discrimination in all aspects of Russian society. Unfortunately, these policies ignore the role of fathers and NGOs and the UN claim that these policies enhance gender discrimination.⁵²¹ Furthermore, the Russian Federation has ratified the International Labor Organization’s (ILO) Convention No. 156 related to workers with family responsibilities, however the Russian state has yet to implement it.⁵²² This means that fathers have not been able to take parental leave and women bear responsibility for unpaid domestic labour.⁵²³ The United Nations and NGOs argue that these measures taken by the Russian Federation and the Russian Federation’s inability to implement the ILO’s convention No. 156 further consolidates traditional patriarchal structures which assign women to the role of mothers and homemakers, and as a consequence assign men to be the “breadwinners”.⁵²⁴

⁵¹⁸ All-Russian Association Women’s Nongovernmental Organizations Consortium of Women’s Nongovernmental Associations *United Nations Convention on the Elimination of all forms of Discrimination Against Women* (2010), 3

⁵¹⁹ Ibid

⁵²⁰ Ibid

⁵²¹ Ibid

⁵²² Ibid

⁵²³ Ibid

⁵²⁴ Ibid

As demonstrated by the case of Konstantin Markin v. Russia this type of legislation has left Russian men unable have significant roles as fathers, and further enhances gender stereotypes. While these types of traditional patriarchal pieces of legislation deeply impact men and the role that they can have within family structures, it is even more important to note that these types of legislation are rooted in sexism and patriarchy⁵²⁵. Some may go even further to argue that these traditional attitudes and legislation are rooted in misogyny⁵²⁶. As such, it is important to note that these attitudes harm men but it is even more important to acknowledge that these attitudes have a detrimental impact on women and women face much harsher consequences related to these attitudes and laws than many men due to many of the factors stated above. This is especially important considering the status of women in Russia, and the state of gender equality in Russia. Furthermore, these types of attitudes and legislation have critical impacts on women and those who identify as non-gender conforming identities.

Malksoo makes a crucial argument with regard to Russia's traditionalist views, noting that:

To the extent that the traditionalist argument appears to be strengthening in Russia, at least among the political and judicial elites, European human rights discourse will be further challenge, not just from the view point of institutional legitimacy, but also from the viewpoint of substance. Because of this tension, Russia will continue to be a difficult partner in the Strasbourg system and how far to extend the margin of appreciation regarding Russia will remain problematic.⁵²⁷

Facts of the case:

This case is particularly important and unique because it deals with a situation that went through the military court rather than the lower domestic courts. This provides

⁵²⁵ Patriarchy refers to a society or a system where men hold the majority of power and women are largely excluded from it.

⁵²⁶ Misogyny refers to a hatred of women.

⁵²⁷ Malksoo, "Markin V. Russia Application No. 30078/06 <http://echr.coe.int>. European Court of Human Rights (Grand Chamber), March 22, 2012", 842

more depth to the study because it discusses an additional court within the Russian judicial system. Konstantin Markin served in the Russian army when he and his wife divorced in 2005, and after their divorce the couple reached an agreement under which the three children would continue to live with Mr. Markin and his former wife would pay child support.⁵²⁸ In October 2005, Mr. Markin applied to the head of the military unit for three years of parental support, however his application was rejected because the legislation that allowed for parental leave only applied to female military personnel.⁵²⁹ Under the same rules and legislation Mr. Markin qualified for three months of parental leave.⁵³⁰ The military unit denied his request, however, the unit did provide him paid leave and was given financial assistance in lieu of his “difficult family situation, the necessity of taking care of three minor children, and the absence of other sources of income”.⁵³¹ Mr. Markin chose to take his case to the CCRF arguing that the provisions of the Military Service Act (the act which limits the three year parental leave to female military personnel) violates the equality clause of the Russian Constitution.⁵³² In 2009 the CCRF rejected Mr. Markin’s application for two main reasons. Firstly, the CCRF based their decision on the special legal status of the military, and second, there are limitations on human rights and freedoms in connection with the necessity to create appropriate conditions for efficient professional activity of servicemen who are “fulfilling their duty

⁵²⁸ Malksoo, “Markin V. Russia Application No. 30078/06 at <http://echr.coe.int>, European Court of Human Rights (Grand Chamber), March 22, 2012”, 837

⁵²⁹ Ibid

⁵³⁰ Ibid

⁵³¹ As quoted in Lauri Malksoo, “Markin V. Russia Application No. 30078/06 at <http://echr.coe.int>, European Court of Human Rights (Grand Chamber), March 22, 2012” *The American Journal of International Law*, (2012), from a Letter from the head of the Military Unit No. 41480 to the applicant Nov 9, 2006, 836

⁵³² Malksoo, “Markin V. Russia Application No. 30078/06 at <http://echr.coe.int>, European Court of Human Rights (Grand Chamber), March 22, 2012”, 836

to protect the fatherland”.⁵³³ Furthermore, the court argued that due to specific demands of the military, simply excusing servicemen from their duties en masse⁵³⁴ “might cause detriment to the public interests protected by law”.⁵³⁵

In 2006 Mr. Markin filed a complaint against the Russian Federation in the European Court of Human Rights, by 2010 a chamber of the ECHR decided in Markin’s favor, in which the court found a violation of Article 14 in conjunction with Article 8.⁵³⁶ These are the same articles used in the Kiyutin v. Russia case, demonstrating that as mentioned previously, it is important for researchers to recognize not only the high amount of cases coming from Russian citizens but that the ECHR appears to be dealing with several violations of the same articles. Indicating that there are clearly some systemic issues at play.

This decision came eighteen months after the CCRF decision that Mr. Markin’s rights had not been violated.⁵³⁷ What is unique in this case with regard to judicial processes is that after the judgment, Russia wanted the case referred to the Grand Chamber.⁵³⁸ This is not typical judicial protocol given that the court had not indicated that there had been any major political split among the judges.⁵³⁹ Russia argued that the case had been effectively resolved since Markin had been parental leave and financial

⁵³³ Ibid

⁵³⁴ This seems to indicate that men cannot be released from their duties on mass but that women can and this seems to indicate something about military priorities with regards to their personnel. Experts from Ghent University have maintained that is merely a “gender stereotype” to argue or to emphasize that fighting and military service is for men rather than for women, and that this contention does not adequately reflect the social realities in European countries. In Lauri Malksoo, “Markin V. Russia Application No. 30078/06 at <http://echr.coe.int>. European Court of Human Rights (Grand Chamber), March 22, 2012” *The American Journal of International Law*, (2012): 842

⁵³⁵ Ibid

⁵³⁶ Ibid

⁵³⁷ Malksoo, “Markin V. Russia Application No. 30078/06 at <http://echr.coe.int>. European Court of Human Rights (Grand Chamber), March 22, 2012”, 837

⁵³⁸ Ibid

⁵³⁹ Ibid

assistance. In addition, the Russian government argued that the divorce of Markin and his former wife was actually a fraud, as the couple had continued their relationship, remarried in 2008 and had a fourth child.⁵⁴⁰ The ECHR awarded Mr. Markin € 3,000 (145,842.77 Roubles) for non-pecuniary damages.⁵⁴¹ The following section of this chapter will analyze and discuss how this case can impact democratic change in the Russian state.

What Does this Mean for Democratic Change?

This section will discuss the positive democratic changes as well as the shortcomings of the Markin v. Russia case. While the case led to some positive changes, there were some shortcomings in the Court's decision and there remain some particularly important gender issues that must be resolved in Russia before Russia can be considered to be moving towards democracy.

Positive Outcomes from Markin v. Russia

The case of Konstantin v. Markin has provided some positive democratic changes in that it further emphasizes what the case of Alekseyev and Kiyutin v. Russia show which is that global human rights norms have penetrated Russian society, and that the law and these norms are more accessible to Russian citizens than they had ever been previously.⁵⁴² Furthermore, this case is crucial because it challenged some of the patriarchal and traditional gender stereotypes that the Russian state reinforces. According to Malksoo, there are several important consequences of the verdict of Markin v. Russia. Malksoo argues that this will motivate individuals and lawyers to file complaints with the

⁵⁴⁰ Ibid

⁵⁴¹ European Court of Human Rights, Grand Chamber, Konstantin Markin v. Russian Judgment (March 2012): 46

⁵⁴² Chandler, *Democracy, Gender, and Social Policy*, 36

CCRF, and will feel encouraged to challenge the decisions of the CCRF through the ECHR.⁵⁴³ While Malksoo describes this as a “repercussion” of the Markin case, however as previously noted in this thesis, the law becoming more accessible to individual Russians is a positive change for democratic reform in Russia. As noted earlier, Chandler argues that this indicates that universal human rights norms are penetrating the Russian political arena, and the everyday social life of Russian citizens.⁵⁴⁴ As such, this thesis argues that this change to the traditional legal landscape in Russia is a positive change; furthermore, the case of Markin v. Russia opened the door for further challenges to the decisions of the CCRF.

Additionally, this case demonstrates to Russian citizens that this is a legitimate way for them to resist the authoritarian nature of the Russian government. The case of Konstantin v. Markin demonstrates that if a single father who works as a soldier in the interior of Russia was able to find the resources to appeal to the ECHR, awareness around global human rights norms have penetrated Russian society more deeply than ever anticipated.⁵⁴⁵ The question still remains to what extent this can create democratic change in Russia.

Drawbacks of the Markin case

As argued in the other case studies, the drawbacks of the Markin case far outweigh any positive democratic change that is linked to the case. As noted earlier in the chapter, Russia has a history of maintaining gender stereotypes and entrenching gender stereotypes within legislation and within society. As seen with this case traditional and

⁵⁴³ Malksoo, “Markin V. Russia Application No. 30078/06 at <http://echr.coe.int>. European Court of Human Rights (Grand Chamber), March 22, 2012”, 842

⁵⁴⁴ Chandler, *Democracy, Gender, and Social Policy*, 36

⁵⁴⁵ Ibid, 164

patriarchal gender stereotypes are still a major factor in Russian society today.⁵⁴⁶ The case of Konstantin Markin v. Russia challenges some of those traditional stereotypes. When thinking about democratic change and gender stereotypes it is important to not only think of positive changes for men but also for women. As Jacquette and Waylen have pointed out, women's movements and changes for greater rights for women are a strong indication of democracy working on the ground and democratic change. While, the positive changes for Markin break down some of the gender stereotypes that men face in Russia, it is crucial for researchers to ask, how has this change affected women? Unfortunately, the case did not go far enough to challenge the traditional roles of women in the military or the emphasis on men in the military over women, thus leaving unchallenged the traditional stereotypes and discrimination that women face in Russia.⁵⁴⁷ As Alexandra Timmer points out this decision may have lead to the inclusion of men in parental leave, but there has not been any amelioration of the situation of women in the Russian army.⁵⁴⁸ Timmer argues that one of the shortcomings of the Court is that they did not recognize that in the Russian army military servicewomen are considered less important than military servicemen.⁵⁴⁹ According to Timmer

The rules of the military that are based on gender stereotypes have the effect of putting military men who are also fathers with primary caretaking responsibilities in the difficult position of having to choose between their profession and their family life, while women 'face no such choice'⁵⁵⁰

⁵⁴⁶ All-Russian Association Women's Nongovernmental Organizations Consortium of Women's Nongovernmental Associations *United Nations Convention on the Elimination of all forms of Discrimination Against Women* (2010). 2

⁵⁴⁷ Alexandra Timmer, "Towards an Anti-Stereotyping Approach for the European Court of Human Rights", *Human Rights Law Review*, 11 no. 4 (2011): 728

⁵⁴⁸ Ibid

⁵⁴⁹ Ibid

⁵⁵⁰ Ibid

What is truly unfortunate in this case is that the Court neglected to understand that these stereotypes keep women from having access to professional careers in the military.⁵⁵¹

Furthermore, when analyzing this case it is crucial to ask to what extent has it challenged systemic gender discrimination in Russia? As mentioned in previous chapters, the ECHR tends to focus on giving monetary compensation to applicants, however not as much emphasis is placed on the systemic changes that need to occur in Russia. Clearly, there is a need for systemic changes with regards to gender roles and stereotypes in Russia, particularly with regards to challenges towards the traditional notions of family life and male and female roles in the family, and with the role of women in the military. The ECHR with its verdict should have mandated the Russian state to make systemic changes that would challenge the gender stereotypes within the Russian military that both women and men face and within Russian society at large. For the purpose of democratic change and democratic transition the emphasis must be on systemic changes rather than purely giving monetary compensation to applicants. In order for strong democratic changes to occur there must be systemic changes that are aimed at eliminating gender discrimination in Russian society as a whole. In addition, the stereotypes and patriarchal ideals of what a family is are not confronted by the ECHR. This means that non-traditional family types (such as: single parent families or same sex couple families) are still marginalized in Russia.

In addition, women have rarely taken cases to the ECHR.⁵⁵² Many women have appealed to the CCRF and have framed their argument through a social justice and social

⁵⁵¹ Ibid

⁵⁵² Chandler, *Democracy, Gender, and Social Policy*, 155

welfare lens rather than through a gender discrimination lens.⁵⁵³ This has often led to favorable outcomes for women from the Constitutional Court.⁵⁵⁴ However, then researchers must ask, why would the Constitutional Court be less favorable to women challenging the court on the basis of discrimination? This goes back to the notion of challenging gender discrimination and stereotypes in the Russian state. As seen with this case, traditional and patriarchal ideals are still strong or are strengthening amongst the political elite and the judicial elites, thus, making the challenging of these stereotypes more difficult and the presence of the ECHR more important.

In conclusion, the case of Konstantin v. Markin through the ECHR provided two positive democratic changes and increased democratic values: to begin with it challenged the traditional and patriarchal conceptions of gender to some degree in Russia , and second, this case emphasizes what Chandler has argued which is that with the presence of the ECHR the law and global human rights norms are penetrating Russian society, and they are becoming more accessible to the “everyday” Russian citizen.⁵⁵⁵ Unfortunately, this case has one shortcoming, it failed to deal with or address the traditional roles and stereotypes that women face in Russian society and within the Russian military.⁵⁵⁶ As noted previously in this chapter, women in Russia face discrimination in many areas of their life and face overwhelming amounts of violence.⁵⁵⁷ To not have a case that adequately deals with this means that gender discrimination and stereotypes have not been fully dealt with and gender equality and equity are not fully entrenched in Russian

⁵⁵³ Ibid

⁵⁵⁴ Ibid

⁵⁵⁵ Chandler, *Democracy, Gender, and Social Policy*, 36

⁵⁵⁶ Timmer, “Towards an Anti-Stereotyping Approach for the European Court of Human Rights”, 728

⁵⁵⁷ All-Russian Association Women’s Nongovernmental Organizations Consortium of Women’s Nongovernmental Associations *United Nations Convention on the Elimination of all forms of Discrimination Against Women* (2010). 2

society. This is piece is crucial to thinking about whether or not this case has spurred any democratic change, as Jaquette and Waylen have emphasized how important gender issues are to the process of democratic transition, particularly in Eastern Europe.⁵⁵⁸ For Jaquette and Waylen women's movements and the fight for gender equality and movements that seek to address gender discrimination are a crucial component to democratization⁵⁵⁹. These movements indicate to what extent democracy is taking place "on the ground" of a given state, and whether democratic values of equality are becoming entrenched in a given state.⁵⁶⁰ With this case, it is clear that there is some movement towards democratic values of gender equality, unfortunately these values are not completely embedded or entrenched in Russia.

Finally, while the ECHR has played a crucial part in the role in these cases and the decisions have had some important positive outcomes for the state of democratic transition in Russia, it must be said that overall the impact of the ECHR on the democratic transition in Russia was small. As seen with this case, the ECHR enforced monetary compensation from the Russian state to the applicant, yet did not order any type of systemic change that would impact men and women throughout the Russian military. This creates a significant gap within the process of democratic transition, as systemic changes are not encouraged. It could even be argued that this emphasis on monetary compensation rather than systemic changes fuels this lack of systemic change and further entrenches gender discrimination and pulls the Russian state farther away from democratic values. In essence, the monetary compensation even though it helps the

⁵⁵⁸ Jaquette, "Women and Democracy: Regional Differences and Contrasting Views", 111 & Waylen, "Women and Democratization: Conceptualization Gender Relations in Transition Politics", 33

⁵⁵⁹ Ibid

⁵⁶⁰ Ibid

applicants to some degree this is only an individual benefit, and communities, as a whole cannot benefit from the case. In addition, this appears to give the Russian state an easy way out and an easy way to appease the ECHR rather than having to do the difficult work of making systemic changes. Furthermore, the ECHR did not enforce any verdict that would challenge some of the gender discrimination that women face in the military and the systemic causes for it, this is quite problematic and further entrenches gender discrimination within the military.⁵⁶¹ In order for the ECHR to have played a bigger role in democratic reform in Russia with regard to gender discrimination in the military, the court would need to begin ordering and enforcing systemic changes so that the issues of this case are not brought back to the ECHR in the future.

These three case studies demonstrate that there is still significant room for democratic growth within Russia. In particular, the legal institutions need to fully embody democratic values and norms. The implementation of the ECHR rulings and the implementation of systemic changes in order to prevent further human rights violations are still crucial elements to the growth of the rule of law in Russia. Hillebrecht argues that Russia practices an “a la carte” style of compliance, in that the Russian state picks and chooses when it will comply⁵⁶², and typically the Russian state complies more with monetary compensation rather than systemic changes. Furthermore, Hillebrecht argues that effective implementation of the ECHR rulings and true growth of the rule of law lies within the domestic institutions being dedicated to democratic norms and values.⁵⁶³ Yet

⁵⁶¹ Timmer, “Towards an Anti-Stereotyping Approach for the European Court of Human Rights”, 728

⁵⁶² Hillebrecht. “Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights”, 290

⁵⁶³ Ibid

in Russia these institutions are weak and under the power of the executive, thus they do not have democratic values at their core.⁵⁶⁴

⁵⁶⁴ Ibid

Chapter Eight: Conclusion/Discussion

As seen with the various case studies and the discussion of theories of democratization, the current status of democracy in Russia is still in a state of transition, despite significant changes in the political, social and economic landscape of Russia. After the fall of the Soviet regime a small attempt was made by political elites to transition the new state into a state with democratic institutions and values. With the new Putin regime, researchers and writers claim that Russia is now moving more towards authoritarian values and practices rather than democratic values⁵⁶⁵. While certain democratic institutions have developed, several of these institutions are not effective or do not have democratic values at their core. As Dutkiewicz has noted, in Russia there has been a commodification of democracy, implying that the accumulation of power has been sought after by Russian political elites over democratic change.⁵⁶⁶ Furthermore, the buying off of democratic institutions in order to gain power is an important part of this commodification of democracy.⁵⁶⁷ As Sakwa has argued, “democratic institutions in Russia are subordinate to the regime, and are vulnerable to its arbitrary rule”.⁵⁶⁸ This can be seen with the judicial system and rule of law in Russia. The growth of the rule of law is especially important to the study of democratization in Russia. Morlino argues “that a government’s respect for the sovereign authority of the people and of a constitution depends on its acceptance of the law”.⁵⁶⁹ Morlino notes that this distinct relationship between the rule of law and democratization is seen in three crucial ways, “one of the most important ones being that

⁵⁶⁵Chandler, *Democracy, Gender, and Social Policy*, 36

⁵⁶⁶Dutkiewicz, “Transitional Economies and the Commodification of Democracy”, 54

⁵⁶⁷ Ibid

⁵⁶⁸ Richard Sakwa, “Can Putinism Solve its Contradictions”. *Vladai Club*.

<http://valdaiclub.com/politics/66103.html>

⁵⁶⁹ Morlino, “The Two rules of law between Transitions to and Quality of Democracy”, 39

the law protects the civil and political liberties of a population, and that the law upholds the political rights of a democratic state”.⁵⁷⁰ Furthermore Morlino argues that the rule of law makes it possible for individual rights to flourish, which are at the core of democracy.⁵⁷¹ As exemplified by the case studies, the rule of law is not neutral, it is a politically cross cutting concept.⁵⁷² Hillebrecht has also emphasized the importance and link between the rule of law and democratization, she argues that in order for the ECHR court rulings to be implemented effectively in a state there must be strong domestic democratic institutions, and these institutions must be dedicated to implementing the judgements.⁵⁷³ As identified in this thesis, the legal institutions in Russia do not [yet] have democratic values at their core, and do not represent inherently democratic institutions, thus presenting a key problem to the implementation of the ECHR rulings. In her studies of democratization, Remmer noted that there are several gaps in theories of democratization, by analyzing the growth of the rule of law in Russia this thesis has attempted to close one of those gaps.

This thesis has analyzed several case studies with the goal of understanding to what extent the ECHR can act as a mechanism for democratization in contemporary Russia. This body of work provides key additions to the literature of post-Soviet states by enlarging the theoretical body that looks at the role of the rule of law in democratization, and looks at how this can function in reality by analyzing the ECHR and its relationship with the CCRF. By looking at this relationship, this project has attempted to deepen the

⁵⁷⁰ Morlino, “The Two rules of law between Transitions to and Quality of Democracy”, 51

⁵⁷¹ Ibid, 57

⁵⁷² Palombella, “The Rule of Law as an Institutional Ideal”, 51

⁵⁷³ Hillebrecht, “International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights”, 279

analysis of how institutions internal and external (particularly regional institutions) to a state can impact the process of democratization.

This thesis began with the research question: “Can the ECHR act as a mechanism or catalyst for the implementation of democratic principles into the Russian judicial system, and as a by product contribute to the process of democratization in Russia?” This thesis argued that overall the relationship between the ECHR and the CCRF can be a limited tool for the growth of the rule of law in Russia and can have a limited impact on the process of democratization in Russia. This is seen with the analysis of the three judicial cases presented in this thesis. In addition this project has argued that the true potential for democratic change lies in the implementation of the democratic values espoused by the CCRF and the ECHR into the decisions of the lower regional courts of Russia, and within the ECHR to demand and enforce systemic changes upon the Russian state. However as emphasized by Chandler and seen with the three case studies, due to the ECHR more Russian citizens are aware of their rights and are using the ECHR as a way to protect these rights⁵⁷⁴. This thesis has argued that this is a powerful positive shift towards the entrenchment of democratic values within Russian society at large.

The three case studies each demonstrate three key similarities and qualities with the relationship between the ECHR and the CCRF and the role that the ECHR can play in the democratic transition in Russia. However, each case had its own particular characteristics. These cases exemplify Chandler’s argument that regime transitions bring about new methods of challenging a regime and for citizens to participate in civil and

⁵⁷⁴ Chandler, *Democracy, Gender, and Social Policy in Post-Communist Russia* (Palgrave MacMillan, 2013), 152

political culture.⁵⁷⁵ These cases further exemplify what Chandler has noted that the presence of the ECHR and its relationship to the CCRF has made the law and global human rights norms more accessible to the Russian population at large, this is evidenced by the high number of Russians who are sending petitions to the ECHR.⁵⁷⁶ Second, it is also clear that the ECHR with their verdicts are able to make some smaller positive changes to the rule of law in Russia (i.e.: set legal precedence and influence the way that the judges at the CCRF make decisions in the future, and judges have often been found to reference the judgments of the ECHR). What is also clear, however, is that without demanding and enforcing any systemic changes in Russia the rulings of the ECHR do not push for larger democratic changes in Russia.

There has been a great deal to learn from the case studies presented in this thesis. Each case study was chosen due to their relation to social justice and because each case study represented a different human rights issue and violations that had occurred in Russia, and represented different democratic values that need to be developed in Russia. Several other case studies could have been chosen and many other themes could have been chosen as a means of analysis; however, these particular cases are well known and had some particularly important characteristics. With the case of Aleseyev v. Russia the ECHR deals with a very important case of an individual who wants to host a march in Russia, which deals with the right to organize, and by extension deals with the LGBTQ rights in Russia, both of which are secured in the Russian constitution. Yet as we see with the other case studies the inability of the ECHR to mandate systemic changes alongside monetary compensation means that LGBTQ rights are left in a precarious state in Russia.

⁵⁷⁵ Chandler, *Democracy, Gender, and Social Policy*, 152

⁵⁷⁶ Ibid

As we have seen with some of the recent homophobic legislation in Russia, the rights of the LGBTQ community continue to be attacked by the Russian state. However, the case of *Alekseyev v. Russia* does demonstrate that the law and human rights are becoming more widely accessible to Russian citizens and that human rights norms are penetrating Russian society⁵⁷⁷. This case also shows that the ability of the ECHR to create democratic change is small if they do not initiate systemic changes.

The second case study of *Kiyutin v. Russia* further exemplifies the need for systemic changes in Russia, and demonstrates how democratic change in Russia is contingent on these systemic changes. This case was particularly important because it dealt with HIV/AIDS in Russia and migrant rights in Russia. It was important to the development of jurisprudence and set important precedence when the ECHR chose to “read-in” health status into Article 14 of the Convention.⁵⁷⁸ Health status, and individual’s rights who are HIV/AIDS positive are an important component of developing a substantive and inclusive form of democracy. In addition, making Russia more inclusive of migrants and challenging xenophobia that may be present in a society so as to create an equal and inclusive society is also a crucial component to developing democracy. This case demonstrated that the Foreign Nationals Act of Russia, only further embeds xenophobic attitudes by painting migrants as the bearers of HIV/AIDS. While, the ECHR cannot demand that Russia allows an applicant to have a temporary Visa, the ECHR can ensure that immigration policies do not violate any human rights, and the ECHR found that this act did violate the rights of migrants who are HIV/AIDS positive

⁵⁷⁷ Chandler, *Democracy, Gender, and Social Policy*, 152

⁵⁷⁸ Lane, “*Kiyutin v. Russia: The European Court of Human Rights Acknowledges the Need for Protection of a class of Individuals with HIV/AIDS*”, 510

and created a negative image of migrants amongst the Russian population yet did not appear to enforce any systemic changes with regards to the elimination of the “Foreign Nationals Act”. While, this was a landmark case in the ECHR due to the reading in of an individual's health status, in order for there to be more rights for migrants the ECHR needs to push for the Russian state to change their policies towards migrants who are HIV/AIDS positive and to change the “Foreign Nationals Act”. Without this systemic change, it is unlikely that there will be any long-term democratic reform in the area of HIV/AIDS rights for migrants.

Finally, the third case study dealt with the case of Konstantin Markin v. Russia. This case was particularly important to this thesis as it dealt with the challenging of traditional patriarchal gender stereotypes that currently exist in Russia. It was also particularly important because it dealt with the military, which is a big part of Russian society and is integral to the Russian state. The verdict of the ECHR was important because it forced the Russian state to deal with the gender stereotypes that were present in the Russian military legislation. However, while this case provided many positive changes, the ECHR failed to deal with the issue of gender stereotypes that women face in the Russian army, and failed to deal with some of the issues that women in Russia deal with in general. As seen with the other two case studies, the ECHR merely gave monetary compensation to the applicant rather than dealing with some of the systemic issues to ensure enduring change, which is a part of the mandate of the ECHR. As such, the case of Markin v. Russia demonstrates similar patterns with regards to the ECHR as the other two case studies.

However, what is evident is that Russian citizens are fighting for their rights by applying to the ECHR in order to protect their rights.⁵⁷⁹ This demarcates some positive democratic changes, as the law, the Russian judicial system, regional judicial systems, and human rights norms are consciously becoming accessible and embedded within Russian society.

Issaeva, Sergeeva, and Suchkova have made similar assertions regarding the role of the ECHR, although their claims rest on more positive assumptions regarding the role of the ECHR. According to the authors, “the convention system will serve as a litmus test to the outcome of any pending reform touching upon human rights issues in Russia”.⁵⁸⁰ They also make an astute observation regarding the state of domestic law in Russia; they note that Russia has a long history spanning centuries in which there has been an inherent problem of the enforcement of domestic law.⁵⁸¹ As seen with the case studies, this is clearly still an issue within contemporary Russia. Despite the fact that many rights are enshrined in the Russian constitution, many of these rights are continually violated by the Russian state. Article 19 was violated by the Russian state in these cases, yet there does not appear to be any systemic changes to keep these violations from occurring. Despite this, the authors take a more positive view of Russian democratic transition than this thesis. The authors believe that “if used wisely, the Convention mechanisms will allow Russia to bring its legal system up to the level of international standards”.⁵⁸² This thesis argues and demonstrates with the case studies that it may be possible for Russia to develop more democratic principles in the future and through its relationship with the

⁵⁷⁹ Chandler, *Democracy, Gender, and Social Policy*, 152

⁵⁸⁰ Issaeva, Sergeeva, and Suchkova, “Enforcement of the Judgments of the European Court of Human Rights in Russia: Recent Developments and Current Challenges”, 83

⁵⁸¹ Ibid

⁵⁸² Ibid

ECHR and the Convention to bring its legal system to the level of international standards, however it will not occur tomorrow, this will be a process that takes a considerable amount of time. While, the CCRF has the ability to implement and reference judgments made at the ECHR, it will be difficult for large democratic reforms to occur under Putin.

In conclusion, as seen with the three case studies, positive democratic change (or a move towards positive democratic change) has occurred due to the role of the ECHR and its relationship with the CCRF. In order for there to be long term democratic changes in Russia these democratic values that are demonstrated in the cases at the ECHR cannot only be taken in by the Russian Constitutional Court all levels of the judicial system must embody these values. Furthermore, in order for the ECHR to be a part of long term change in Russia, the ECHR must embody the second component of its mandate and enforce systemic changes in Russia, so that the issues that are being brought to the ECHR can be effectively dealt with and so that these human rights violations no longer occur, rather than merely giving monetary compensation to applicants. The majority of cases at the ECHR are still coming from Russia, and Russia is bogging down the system of the ECHR with complaints. This indicates that not only are citizens accessing the law, but that human rights violations (despite the verdicts of the court and the monetary compensation) are still occurring in Russia and are occurring at a rapid rate. If the number of cases from Russia begins to dwindle and the systemic issues that are causing these violations are dealt with there will be democratic change in Russia. There is significant room for more study on the link between Russian democratization and Russian rule of law. In particular, further research is needed regarding how and when

Russian lawyers and judges decide to reference cases from the ECHR and what impacts this has had or could potentially have on the growth of rule of law in Russia.

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