

A LOST WAR ON TERROR: FORGOTTEN LESSONS OF THE RUSSIAN EMPIRE[†]

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INTRODUCTION

The strength of a society based on the rule of law can be measured by its ability to cope with extraordinary situations. It is under these conditions that constitutional guarantees of individual rights are in the greatest tension with the state's need for self-preservation. There are times in any nation when extraordinary power must be used, notwithstanding many risks that are run when a state of exception (a.k.a. state of emergency, national emergency, state of siege, state of alert, state of readiness, situation of public danger, regime of full powers, regime of counterterrorist operations, prompt measures of security, etc., as referred to in different countries of the world) is declared. World history, including the history of Britain, the U.S., and other democratic nations, contains dozens of examples of when governments in dire straits were forced to acquire and exercise extraordinary powers or face extinction.¹ It is obvious that providing for

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1. President Lincoln's actions during the Civil War and President Roosevelt's measures during the Great Depression are graphic illustrations here.

regulation of governmental powers in emergencies is the best way to protect individual liberty and ensure the swiftest return to constitutional normalcy. Well-conceived and publicly debated legislative or especially constitutional provisions, adopted *long in advance* of the actual emergence of grave dangers, but invoked and strictly regulating governmental conduct *during* times of crisis may, on the one hand, be far more palatable than doing nothing at all, and, on the other hand, prevent society from gross abuse of governmental powers in the name of “salvation of the country in the time of dire straits.”²

In 1948, Clinton L. Rossiter observed in his famous book, *Constitutional Dictatorship: Crisis Government in the Modern Democracies*, “[n]o democracy ever went through a period of thoroughgoing constitutional dictatorship without some permanent and often unfavourable alteration in its governmental scheme [a] constitution which fails to provide for whatever emergency action may become necessary to defend the state is simply defective.”³

It is hard to disagree with Daniel P. Franklin that “necessity dictates the exercise of emergency powers, at times, in any republic.”⁴ However, the scholar seems to give an unreasonably and inadequately broad definition to the concept of “necessity.” According to Franklin, “it is at these times that a government must act *beyond* formal *constitutional control*.”⁵ It is quite understandable that after the “attack on America” of 11 September 2001 that this approach is shared by a significant and influential segment of the U.S. political elite. Yet the times of Oliver Cromwell, who stated in his speech to Parliament on 12 September 1654, “necessity hath no law,”⁶ seem

2. On 5 July 1987, in the article, “Reagan Advisors Ran Secret Government,” The Miami Herald revealed that Lieutenant Colonel Oliver North and the Federal Emergency Management Agency (FEMA) had drafted a contingency plan providing for the suspension of the Constitution, the imposition of martial law, abolition of state and local legislatures and their replacement with military commanders, and the round-up and detention in relocation camps of dissidents in the event of a national crisis. The plan, secretly obtained by The Miami Herald, provided for an executive order that former President Reagan would sign but not make public until a crisis broke. Although the White House denied that the executive order was ever signed, according to Jules Lobel, “some congressional sources believe that President Reagan did sign an executive order in 1984 and revised national military mobilization measures to deal with civilians in a national crisis.” During the Iran-Contras hearings in the U.S. Congress in July of 1987, a question posed to Lieutenant Colonel Oliver North about the FEMA plan was referred to as a ‘closed session.’ Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, n.1 (1989); MICHAEL LINFIELD, FREEDOM UNDER FIRE: U.S. CIVIL LIBERTIES IN TIMES OF WAR 165-67 (1990).

3. CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 13, 301 (1948) (emphasis added).

4. DANIEL P. FRANKLIN, EXTRAORDINARY MEASURES 3 (1991).

5. *Id.* (emphasis added).

6. Cromwell continued: “Feigned necessities, imaginary necessities . . . are the greatest cozenage men can put upon the providence of God” Mark M. Stavsky, *The Doctrine of State Necessity in Pakistan*, 16 CORNELL INT’L L. J. 341, 343 n.7 (1983) (quoting

to be over. Emergency powers, including introduction of a state of exception, cannot and should not be exercised “beyond constitutional control.” It is true that, in many countries of the world, even constitutional provisions cannot always firmly and effectively contain the dictatorial instincts of authorities; but that is not a justification to lift “constitutional control” altogether. On the contrary, it is quite easy to imagine what would happen if this last obstacle, the Constitution, were to be removed from the way of some politicians and social forces thirsting for unlimited power.

Yet, a question remains: what happens if a constitution and the whole legal order of a nation “fails to provide for whatever emergency action may become necessary to defend the state?” What happens if, using a modern term, a nation loses a “War on Terror?”

The catastrophe of the Russian Empire gives an answer to such questions and offers one of the most vivid lessons and graphic illustrations in the history of the world. We, the Russians, paid dearly for those lessons.

I. RUSSIAN HISTORY OF CONSTITUTIONAL CRISIS

In the whole body of the Russian Imperial legislation (from the seventeenth to early twentieth centuries), one can hardly find a statute that has been as much misinterpreted and misrepresented by either Russian (and Soviet) or Western commentators as the law “On Measures for the Preservation of the State Order and Public Tranquillity” (*O merakh k okhraneniiu gosudarstvennogo poriadka i obschestvennogo spokoistvia*), also known as the Emergency Law of 1881.⁷

The coinciding views of Bolsheviks and some foreign scholars on this law is astonishing. A founder of the Soviet state, Vladimir Ulyanov (a.k.a. Lenin), called it “Russia’s *de facto* constitution,”⁸ and Richard Pipes called it “the most important piece of legislation in the history of imperial Russia . . . [t]he real constitution under which . . . Russia has been ruled ever since.”⁹ In his denunciation of the emergency law, Pipes cited Alexei A.

4 THOMAS CARLYLE, CROMWELL’S LETTERS AND SPEECHES 65 (1870)); Lobel, *supra* note 2, at 1386 (quoting Radin, *Martial Law & the State of Siege*, 30 CALIF. L. REV. 634, 641 (1942)).

7. SVOD ZAKONOV ROSSIYSKOY IMPERII [SZ] [CODE OF LAWS OF THE RUSSIAN EMPIRE] Aug. 14, 1881, art. 53.

8. 21 V.I. LENIN, *Tri Zaprosa [Three Questions]*, in POLNOE SOBRANIE SOCHINENIY [COMPLETE WORKS] 104, 114 (Gosudarstvennoe Izdatelstvo Politicheskoi Literatury, 5th ed. 1961) (1912).

9. RICHARD PIPES, RUSSIA UNDER THE OLD REGIME 305 (1974) (also published in Russia in 1993). The full quotation reads: “On 14 August 1881, Alexander III signed into law the most important piece of legislation in the history of imperial Russia between the abolition of serfdom in 1861 and the October Manifesto of 1905, and more durable than either . . . [t]his document . . . has been the real constitution under which - brief interludes apart - Russia has been ruled ever since.”

Lopukhin,¹⁰ a former procurator, head of the Police Department (1902–1905), and Governor of Estlandia (1905) who became “disillusioned,” passed secret information to the revolutionaries, was tried for disclosing a state secret, and spent three years in Siberian exile (a microscopic term compared to punishments for similar crimes in Europe or America).¹¹ What Pipes didn’t mention is that Lopukhin’s report, with his criticism of the Emergency Law (“a remarkable pamphlet,” as Pipes called it), was first published in Geneva in 1905 with an introduction by the same Bolshevik leader Lenin.¹²

Another American researcher alleged that Russia’s “rulers . . . were nearly all apparently uncomfortable with the maintenance of that unpopular legislation, especially since their European role models no longer invoked such rules.”¹³

10. PIPES, *supra* note 9, at 306-07. Again, in the words of Pipes, “[t]he significance of this legislation [Emergency Law of 1881] can perhaps be best summarised in the words of” A.A. Lopukhin, according to whom, “in matters affecting state security there no longer were any objective criteria of guilt: guilt was determined by the subjective impression of police officials.” *Id.* at 307. See also A.A. LOPUKHIN, NASTOIASCHCHEE I BUDUSHCHEE RUSSKOI POLITSIИ [RUSSIAN POLICE TODAY AND TOMORROW] (V.M. Sablin ed., 1907). See generally A.A. LOPUKHIN, OTRYVKI IZ VOSPAMINANIИ PO POVODU VOSPAMINANIИ GR. S.I.U. VITTE [EXCERPTS FROM MEMOIRS] (1923).

11. Through a Menshevik journalist, Vladimir Burtsev, in 1908 Lopukhin revealed the identity of a famous police secret agent Evno Azef. In 1912, Lopukhin was amnestied, returned to Moscow, and was promoted to a position of Vice Director of Siberia Trade Bank. In 1923 he emigrated, and died in 1928 being a member of a board of directors of an international commerce bank in Paris. See details of the case in: BORIS NIKOLAEVSKY, ISTORIA ODNOGO PREDATELYA. TERRORISTY I POLITICHESKAYA POLITSIYA [A STORY OF A TRAITOR: TERRORISTS AND POLITICAL POLICE] (1999) (1932). Anatoly Kukanov, *A.A. Lopukhin - zhertva obstoyatel'stv ili soznatel'ny dissident [A.A. Lopukhin - a Victim of Circumstances or a Conscientious Dissident]*; ZHANDARMY ROSSII (POLITICHESKY ROZYSK V ROSSII XV-XX VEK [RUSSIA'S GENDARMERIE: POLITICAL SEARCH IN RUSSIA 15-20TH CENTURIES] 437-46 (2002); K.N. MOROZOV, PARTIYA SOTSIALISTOV-REVOLIUTIONEROV V 1907-1914 GG. [PARTY OF SOCIALIST REVOLUTIONARIES IN 1907-1914] (1998); ANNA GEIFMAN, ENTANGLED IN TERROR: THE AZEF AFFAIR AND THE RUSSIAN REVOLUTION (2000).

12. It is also indicative that Boris Savinkov, one of the most well-known Russian terrorists, considered Lopukhin “trustworthy,” because he “broke up with his [social] environment.” JEAN LONGE & GEORGY ZILBER, TERRORISTY I OKHRANKA [TERRORISTS AND OKHRANKA] 67 (Sovetskaya Rossia rev. ed. 1991) (1924).

13. Jonathan W. Daly, *On the Significance of Emergency Legislation in Late Imperial Russia*, 54 SLAVIC REV. 602, 603 (1995) [hereinafter Daly, *Significance*]. The article was subsequently used in Daly’s remarkable monograph JONATHAN W. DALY, AUTOCRACY UNDER SIEGE: SECURITY POLICE AND OPPOSITION IN RUSSIA 1866-1905 (1998) (citing Jonathan W. Daly, *On the Significance of Emergency Legislation in Late Imperial Russia*, 54 SLAVIC REV. 602, 603 (1995) [hereinafter DALY, AUTOCRACY]).

II. EUROPEAN EXAMPLES OF CONSTITUTIONAL CRISES AND EMERGENCY STATUTES

In reality, neither the fact of issuance of the Emergency Law in Russia, nor its substance, nor its use, was unique. Adoption of special statutes regulating the legal regime of a state of emergency was a common trend of European lawmaking (Prussia, Austria-Hungary, Spain, etc.) in the middle and second half of the nineteenth century.

Russia's traditional "European role model," France, was the first country on the continent that passed the first statute in this sphere. Following declaration of a state of siege (*etat de siege*) in Paris in June-October 1848, a special act was adopted on 9 August 1849. The emergency law was repeatedly invoked throughout the second part of the nineteenth century, including during the period of 1871–1876 when nearly all territory of the country was under a state of siege, and led to repressions of a much greater magnitude than in Russia. A new French law on a state of siege was adopted on 3 April 1878, the year after the issuance of the first Russian law on the procedure of military assistance to civil authorities¹⁴ and three years before the issuance of the first Russian law on a state of emergency.¹⁵ In Clinton Rossiter's conclusion, "[n]o instrument of crisis government conform[ed] so closely to the theory of constitutional dictatorship as the famed and widely-imitated state of siege" in France.¹⁶

On 19 October 1878, a notorious emergency Anti-Socialist Law (*Sozialistengesetze*) was adopted in Germany, as probably the most important repressive law of Bismarck's chancellorship. In twelve years of the law's existence, a state of siege was declared and repeatedly extended against 'socialists' in Berlin, Potsdam, Leipzig, Hamburg, Scharlottenburg, and the districts of Telt, Niderbarnim, and Ost-Havelland. The law banned all Social Democratic associations, meetings, and newspapers. By 1890, about 1,500 people were sentenced to more than 800 years' imprisonment.¹⁷

A scholar of emergency regimes in nineteenth century Latin America correctly argues that "parallel studies of Spain, France, Italy, Germany, Portugal, and the United States would find regimes of exception, methods of repressing ethnic and religious minorities, political opposition to rising labor movements, and claims of defending the constitutional order."¹⁸

14. POLNOE SOBRANIE ZAKONOV ROSSIJSKOI IMPERII [PSZ] [COMPLETE COLLECTION OF LAWS OF THE RUSSIAN EMPIRE] II, v. LII, 1877, No.57748.

15. See, e.g., OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 26-32 (2006).

16. ROSSITER, *supra* note 3, at 129.

17. Anti-Socialist Law (October 21, 1878), http://www.germanhistorydocs.ghi-dc.org/pdf/eng/713_Anti%20Socialist%20Law_218.pdf (complete English text of the law and statistics of repressions from the web site of German History in Documents and Images (GHDI), an initiative of the German Historical Institute in Washington, DC).

18. BRIAN LOVEMAN, THE CONSTITUTION OF TYRANNY 7 (1993).

Needless to say, European states resorted even more cruelly, massively, and regularly to emergency measures in their colonial possessions in Africa and Asia.¹⁹

The Russian understanding of the essence of emergency powers was by no means unique either. It was similar to generally accepted views in the European (“continental”) legal tradition.

“In life of each state such critical moments occur,” Professor N.M. Korkunov of St. Petersburg University²⁰ wrote in his *Comparative Study of State Law of Foreign Countries*, “when integrity and even existence of a state can depend on a single minute, when the state cannot think about some far away general goals, but rather save itself by any means.”²¹ After that, N.M. Korkunov made a logical conclusion, comparable by its laconic definition to the famous Cicero’s maxim, “[s]elf-restriction of the power with law cannot go to such extreme, when the state would bring its own existence as prey to this principle.”²² The scholar argued that just like “a right of self-defence” is recognised and enjoyed by “private persons,” the same right should be exercised by “state authorities” and concluded, “[i]n cases of extreme external or internal danger, state power should undertake emergency measures of defence, including temporary restrictions of civil rights.”²³

“State necessity is superior to individual freedom,” agreed his colleague Vladimir M. Gessen, Professor of St. Petersburg University, deputy of the III and IV Dumas, and member of the Central Committee of the Constitutional Democracy Party (“kadet”). “If in normal circumstances of state and social life a contemporary state recognises and guarantees individual freedom, then in emergency circumstances it makes it

19. See, e.g., NASSER HUSSAIN, *THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW* (2003).

20. For more on Nikolay Mikhailovich Korkunov, his writings, and legal views see George L. Yaney, *Bureaucracy and Freedom: N.M. Korkunov’s Theory of the State*, 71 *AM. HISTORY REV.* 468-86 (1996).

21. N.M. KORKUNOV, *SRVINITELNIY OCHERK GOSUDARSTVENNOGO PRAVA INOSTRANNYKH DERZHAV. CHAST’ PERVAYA. GOSUDARSTVO I EGO ELEMENTY [COMPARATIVE STUDY OF STATE LAW OF FOREIGN COUNTRIES. PART ONE. STATE AND ITS ELEMENTS]* 148-49 (1906).

22. Cicero (106-43 BC) formulated his famous maxim: “Social necessity is the supreme law” (*Salus populi [or Salus rei publicae] suprema lex esto*) (III, 4, 8) in an unfinished dialogue *On Laws (De Legibus)*; begun approximately in 52 BC). M. TVLLI CICERONIS, *DIALOGI: O GOSUDARSTVE – O ZAKONAKH [ON STATE. ON LAWS]* 135 (I.N. Veselovsky et al. eds., 1966).

23. KORKUNOV, *supra* note 21, at 148-49. See, e.g., N.M. KORKUNOV, *OBSCHAYA TEORIA PRAVA [GENERAL THEORY OF LAW]* (2000) (Another famous book recently translated and published in the U.S. in the ‘Law Classic’ series).

subordinate to the interests of security and maybe even of the existence of the state.”²⁴

The views reflected in the citations of Korkunov and Gessen are hardly different from the dominating position on the subject of this study in the European law of the second half of the nineteenth century, represented in the works of such German, French, and Swiss legal scholars as Edgar Loening, Johann Kaspar Bluntschli, Lorenz von Stein, and Maurice Block.

III. RUSSIAN EMERGENCY LAW OF 1881

Analysis of the Russian Emergency Law of 1881 should be started with putting it into a more general context of Russian law of the pre-Soviet period, with a special reference to those facts that are often ignored or dismissed as not fitting into an image of Russia as a land of a “thousand years of terror and repressions.”

Demonization of Russian history by both Communist and some Western authors is amazing indeed. Coverage of the reign of Ivan IV, or Ivan the Terrible (1547–1584), is one of numerous examples. Even his nickname “the Terrible,” “*le Terrible*,” or “*der Schreckliche*,” is not just a wrong translation of “Grozny” (which actually means “the Stern”), but also a pejorative term that was introduced to European historiography by Ivan IV’s (or rather, Russia’s) opponents in France, Lithuania, and Poland.²⁵ In reality, Ivan IV—one of the most educated European monarchs of the Middle Ages, known in his inner circle as an “English tsar” who proposed marriage to Queen of England Elizabeth I (but was rejected),²⁶ owner of the largest library in Europe, and who, like Thomas Jefferson in the U.S., doubled the territory of the country—can be called “Terrible” only in the sense that his despotism is terribly exaggerated.

In an account by the leading Russian scholar on Ivan IV, as a result of “mass terror” during thirty-seven years of his rule, from three to four thousand people out of an approximately ten million person Russian population were executed.²⁷ For comparison, in the same sixteenth century in England (with a smaller population than in Russia), seventy two thousand tramps and beggars (former peasants who lost their land) were executed during the reign of Henry VIII.²⁸ In the Netherlands, during the reign of Kings Karl V

24. V.M. GESSEN, ISKLUCHITEL'NOE POLOZHENIE [A STATE OF EXCEPTION] 109 (1908). See also V.M. GESSEN, LEKTSII PO POLITSEISKOMU PRAVU [LECTURES ON POLICE LAW] 97 (1908).

25. See R. WIPPER, IVAN GROZNY [IVAN THE TERRIBLE] 202-11 (J. Fineberg, trans., 1947).

26. See John Vincent, “Ivan The Terrible Rude (Letter To Elizabeth I Found)”, THE TELEGRAPH (London) (Feb. 1, 2003), <http://www.freerepublic.com/focus/f-news/1051442/posts>.

27. See R.G. SKRYNNIKOV, IVAN GROZNIY [IVAN THE TERRIBLE] 191 (1975).

28. See I.N. OSINOVSKIY, THOMAS MOORE 62 (1974).

and Philip II, the “number of victims [of the Inquisition] . . . reached 100,000.”²⁹ On 23 August 1572, another contemporary of Ivan IV, French King Karl IX personally participated in the slaughter of more than three thousand Huguenots in the Massacre of St. Bartholomew, whose only “crime” or “sin” was that they belonged not to Catholicism, but to Protestantism. In other words, during one night in France, approximately the same number of people were killed as during twenty–seven years of Ivan IV’s reign. But the Massacre of St. Bartholomew continued, and during the two week slaughter about 30,000 Protestants were murdered.³⁰ In 1542, 500 “witches” were burned in Geneva alone.³¹

All in all, in the estimation of Vadim Kozhinov, in the sixteenth century, “in the main countries of Western Europe (Spain, France, the Netherlands, England) . . . at least 300,000–400,000 people were executed,”³² unless we trust a new 2004 783-page study of Vatican scholars downsizing the Inquisition.³³ That doesn’t mean that we should admire and glorify Ivan IV for the fact that under his reign “only” 3,000–4,000 people were executed. But there was nothing “uniquely Russian” about Ivan IV’s terror. On the contrary, even now, Henry VIII, Philip II, and Karl IX are highly respected kings in their countries, whereas in Russia, Ivan IV has been damned for centuries. Vadim Kozhinov reminded his readers that, when in 1862 a monument commemorating one thousand years of Russian history was erected in Novgorod, there was no room for Ivan IV among 109 figures of Russian tsars, military commanders, and heroes. Needless to say, the Russians have never built a monument to Ivan IV personally.³⁴

IV. THE GOLDEN AGE OF RUSSIAN LAW

The last half–century of the Imperial rule has a deserved reputation as the “Golden Age” of Russian law. The Law of 17 April 1863 abolished corporal punishment in the civil institutions, army, and fleet (save through

29. See I. R. GRIGULEVICH, *ISTORIA INKVIZITSII* [HISTORY OF INQUISITION] 271 (1970).

30. See S.G. LOZINSKIY, *ISTORIA PAPTVA* [HISTORY OF THE PAPACY] 305 (1961).

31. See E.B. CHERNYAK, *SUDYII ZAGOVORSCHIKI* [JUDGES AND PLOTTERS] 185 (1984).

32. See VADIM KOZHINOV, *ISTORIA RUSI I RUSSKOGO SLOVA. SOVREMENNIY VZGLYAD* [HISTORY OF RUSSIA AND THE RUSSIAN LANGUAGE: A MODERN VIEW] 29 (1997), available at http://www.hrono.ru/libris/ruslovo_01.html.

33. See, e.g., *Vatican to release study on Inquisition*, CATHOLICCULTURE.ORG, (June 4, 2004), <http://www.catholicculture.org/news/features/index.cfm?recnum=30105>; Bootie Cosgrove-Mather, *Vatican Looks Back At Inquisition: Research Provokes Varied Reactions Among Religious Leaders*, CBS NEWS (June 16, 2004), <http://www.cbsnews.com/stories/2004/06/15/world/main623253.shtml>; *Vatican downgrades Inquisition toll*, MSNBC (June 15, 2004), <http://www.msnbc.msn.com/id/5218373/>.

34. KOZHINOV, *supra* note 32 at 32–33.

peasant courts).³⁵ Anatole Leroy-Beaulieu (1842–1912), a French scholar, member of the Academie des Sciences Morales (since 1887), Professor of the Free School of Political Science (and its Director in 1906–1912), and author of a three-volume study *The Empire of the Tsars and the Russians*, termed the Russian criminal code of the nineteenth century “probably the mildest code in Europe.”³⁶ Leroy-Beaulieu was not the only foreign observer who came to such a conclusion. Before him, Albert F. Heard, an author of two remarkable articles in *Harper’s New Monthly Magazine* in 1887–1888 (and apparently living in Russia in those years),³⁷ used the same words to characterise the Russian penal code as “one of the mildest in Europe.”³⁸

In the opinion of Marc Szeftel, one of the most distinguished American specialists in Russian Imperial Law, Russia’s Charter on Criminal Procedure (*Ustav ugolovno go sudoproizvodstva*) of 20 November 1864³⁹ “may be considered as the Russian parallel to the Habeas Corpus Act.”⁴⁰ Another American scholar correctly observed that in the last decades of the Imperial rule, “the Russian legal profession flowered, producing distinguished practitioners, judges, and legal scholars, successfully challenging in several celebrated jury trials an absolutist autocracy.”⁴¹

35. 2 N.S. TAGANTSEV, *RUSSKOE UGOLOVNOE PRAVO* [RUSSIAN CRIMINAL LAW] 1031 (2nd ed. 1902)

36. 2 ANATOLE LEROY-BEAULIEU, *THE EMPIRE OF THE TSARS AND THE RUSSIANS* 394 (Zenaide A. Ragozin trans., 3d Fr. ed. 1894).

37. Albert F. Heard, *Russia of To-Day*, *HARPER’S NEW MONTHLY MAGAZINE*, Mar. 1887, at 579; Albert F. Heard, *Justice and Law in Russia*, *HARPER’S NEW MONTHLY MAGAZINE*, May 1888, at 920 [hereinafter Heard, *Justice*].

38. Heard, *Justice*, *supra* note 37, at 930 (reminding American readers that capital punishment was abolished in Russia by Queen Elizabeth in 1753 and that even though the laws of Finland recognized the death penalty, “not an execution has taken place since its cession to Russia in 1809.”)

39. *SVOD ZAKONOV ROSSIYSKOY IMPERII* [SZ] [CODE OF LAWS OF THE RUSSIAN EMPIRE] art. 4.

40. Marc Szeftel, *Personal Inviolability in the Legislation of the Russian Absolute Monarchy*, 17 *AM. SLAVIC AND E. EUR. REV.* 1, 2 (1958). Surprisingly, even though Marc Szeftel, Professor Emeritus of the University of Washington, included four works by Richard Pipes (*RUSSIA UNDER THE OLD REGIME* among them) in a 45-page list of sources in his fundamental study of the first Russian Constitution, he not only never gave a single citation from any publication by Pipes, but even didn’t mention his name anywhere in the book, including its last subchapter dedicated exclusively to an overview of main studies in the U.S. and other countries of the world of the last period of history of the Russian Empire.

41. WILLIAM E. BUTLER, *RUSSIAN LAW* 28-29 (1999) [hereinafter *RUSSIAN LAW*]. “Even to the revolutionary, the legal profession in Russia has its attraction as a channel for effectuating political and social change.” WILLIAM E. BUTLER, *SOVIET LAW* 22 (1st ed. 1983) [hereinafter *SOVIET LAW*]. Vladimir Lenin took courses at the Law School of Kazan’ University and was a *magna cum laude* graduate from the Law School of St. Petersburg University. Despite the fact that his brother was executed as a terrorist, Lenin didn’t have a problem being admitted to the bar and becoming a practicing attorney.

Whereas in England at the end of the eighteenth century, according to William Blackstone, the number of “capital statutes,” or the laws imposing capital punishment “without benefit of the clergy; or, in other words, to be worthy of instant death,” was “no less than a hundred and sixty,”⁴² and by the beginning of the nineteenth century it had reached two hundred and twenty-three.⁴³ Capital punishment was abolished from Russian codes during the thirteenth and most of the twelfth and fourteenth centuries, under Elizabeth from 1742 to 1754, and up until 1775 when Catherine the Great used it against six participants of the Emelyan Pugachev rebellion.⁴⁴ From then on until the execution of the five leaders of an armed mutiny (so-called Decembrists) in July 1826,⁴⁵ nobody was executed for political offenses, either.⁴⁶ Since 1812, the death penalty applied for some military crimes, but not for common crimes — like murder or rape — though this was frequently the case abroad.⁴⁷

According to probably the most comprehensive study on capital punishment in Russia, a 500-page work by S. Usherovich, the number of persons executed (for both criminal and political offenses) during the reign of Alexander I (1801–1825) was twenty-four, of Nicholas I (1825–1855) was forty-one, and of Alexander III (1881–1894) was thirty-three⁴⁸ (including fourteen terrorists).⁴⁹ Vadim Kozhinov continued the list, adding

42. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 18 (photo. reprint 1979) (1765) (with an introduction by Thomas A. Green).

43. 1 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 4 (1948).

44. KOZHINOV, *supra* note 32, at 35, available at http://www.hrono.ru/libris/ruslovo_01.html.

45. See, e.g., N. EIDELMAN, CONSPIRACY AGAINST THE TSAR: A PORTRAIT OF THE DECEMBRISTS (1985). The authorities could hardly find somebody who would agree to execute the Decembrists who were to be hanged (‘to die by the rope’) or simply know how to do it. Eventually, when the would-be executioner was found, he appeared to be so inexperienced that three out of five ropes tore and three victims fell down on the ground.

46. PETER H. JUVILER, REVOLUTIONARY LAW AND ORDER: POLITICS AND SOCIAL CHANGE IN THE USSR 25 (1976).

47. See Will Adams, *Capital Punishment in Soviet Criminal Legislation, 1922-1965: A Code Content Analysis and Graphic Representation*, in ON THE ROAD TO COMMUNISM: ESSAYS ON SOVIET DOMESTIC AND FOREIGN POLITICS 79, 79-121 (Roger E. Kanet & Ivan Volgyes eds., 1972).

48. See S. USHEROVICH, SMERTNYE KAZNI V TSARSKOI ROSSII [DEATH PENALTY IN TSARIST RUSSIA] (1933). See also Donald Rawson, *The Death Penalty in Late Tsarist Russia: An Investigation of Judicial Procedures*, RUSS. HIST., Spring 1984, at 44-45; S.S. Ostroumov, *Repressii tsarskogo pravitel'stva protiv revoliutsionnogo dvizhenia v Rossii v period imperializma (ugolovno-statisticheskoe issledovanie)* [Repressions of Tsarist Government Against Revolutionary Movement in Russia in the Period of Imperialism: Criminal Statistical Study] 3 VESTN. MGU 35-41 (1976). See also ALEXANDER S. MIKHLIN, THE DEATH PENALTY IN RUSSIA 8-17 (W.E. Butler trans., Simmonds & Hill Publ'n, Kluwer Law Int'l 1999).

49. One of the fourteen terrorists sentenced to death for his participation in assassination attempt on Alexander III was Alexander I. Ulyanov, older brother of Vladimir

thirty-one terrorists executed under the reign of Alexander II (1855–1881). All in all, between the mid-eighteenth and late nineteenth centuries, the number of those sentenced to death and executed in the Russian Empire was equal to 135 in “mainland” Russia and about 1,500 in Poland (after the Polish rebellion).⁵⁰

For comparison, it was in 1785 that the last “witch” was sentenced to death and executed in Switzerland.⁵¹ In the years of Jacobean terror in France (1793–1794) from 70,000 to 500,000 people were arrested, and 17,000 of them were sentenced to death and executed on a guillotine.⁵²

A modern British scholar opines: “What the Holocaust and the Gulag are for us, the violence of the French Revolution was for the nineteenth century: events that alter our understanding of politics and indeed of human nature.”⁵³ In just one week of revolutionary events in Paris in June 1848, the number of those sentenced to death and executed under French martial law was at least 11,000.⁵⁴

Similarly, there are no exact figures of how many people perished as a result of violent suppression of the Paris Commune in May 1871. The

I. Ulyanov-Lenin, a founder of the Soviet state. M.N. Gernet, *Narodovol'tsy na eshafote* [*Execution of Members of the People's Will*], PRAVO I ZHIZN', July 1922, at 78-84.

50. This figure doesn't include the number of those who were killed in riots and disturbances. In 1861, the year of serfdom abolishment, there were 1,889 cases of protests in the Russian countryside. In 937 of them (49 per cent), the army was called 'to assist civil authorities.' However, the use of weapons was extremely rare - in three cases only. (See R.V. Narbutov, *Pravovoe regulirovanie ispol'zovaniya vooruzhennykh sil dlya obespechenia obshchestvennogo porядka i bezopastnosti v dorevolutsionnoy Rossii* [*Legal Regulation of Use of the Army for Maintenance of the Public Order and Security in Pre-Revolutionary Russia*], SOVETSKOE GOS. I PRAVO, Dec. 1991, at 141. The latest study by Peter Koshel which contains a full list of executions between 1878 and 1890: 1878 - 1, 1879 - 16, 1880 - 5, 1881 - 5, 1882 - 4, 1883 - 1, 1884 - 4, 1885 - 1, 1886 - 5, 1887 - 5, 1888 - 0, 1889 - 3, 1890 - 2. In 1901-1905 this number was equal to 93; twenty of them were for military crimes. See P.A. KOSHEL, *ISTORIA NAKAZANIY V ROSSII. ISTORIA ROSSIYSKOGO TERRORIZMA* [HISTORY OF PUNISHMENTS IN RUSSIA. HISTORY OF RUSSIAN TERRORISM] 82 (1995) [hereinafter KOSHEL].

51. CHERNYAK, note 31, at 191. In England, the last witch trial was reportedly held in 1944. Old Bailey Court in London used 'anti-witchcraft' act of 1795 (!) against a famous medium, Helen Dunken, and sentenced her to a nine-month imprisonment. See *Reabilitatsia ved'my* [*Rehabilitation of a Witch*], MOSCOWSKIY KOMSOMOLETS, Feb. 5, 1998, at 3.

52. CHERNYAK, *supra* note 31, at 200.

53. ROBERT TOMBS, *FRANCE 1814-1914* 9 (1996).

54. An interesting Russian connection deserves mentioning here. In 1847, a Russian writer Alexander Herzen emigrated from Russia, which, in his opinion, was the 'concentration of the evil', and whose biggest crime was the execution of five Decembrists. In about a year, right before Herzen's eyes 11,000 participants of the Paris rebellion were executed. The poor writer nearly went insane and wrote to his friends in Russia: "I wish God let the Russians take Paris over, it's high time to finish this stupid Europe! . . . I am ashamed of France . . . But what is the most terrifying is that not a single Frenchman is ashamed of what's going on . . ." KOZHINOV, *supra* note 32, at 35. See also SERGEI ERLICH, *ISTORIA MIFA: "DEKABRISTSKAYA LEGENDA" HERTZENA* [HISTORY OF A MYTH: A "DECEMBRISTS' LEGEND" OF HERTZEN] (2006).

number of those who were taken prisoners was “nearly 50,000”⁵⁵ or “probably exceeded 50,000.”⁵⁶ It is estimated that “somewhere near 2,500 were killed on the barricades” and overall between 15,000 and 40,000 Parisians became victims of the Thiers regime⁵⁷ — “a massacre unparalleled in nineteenth-century Europe.”⁵⁸

A contemporary French historian, however, testified that the actual number of victims was higher: the municipal council of Paris paid the expenses for burial of 17,000 corpses; but a great number were killed outside of Paris.⁵⁹ But was not the end of the story yet. “The slaughter was followed by the transportation New Caledonia of some 5,000 of those considered most dangerous.”⁶⁰

It was long after the end of the Cold War that a Western scholar could recognise the obvious:

[a]nyone imagining the course of Russian pre-modern history to have been particularly barbarous or bloodstained should remember the near absence, in comparison with Western lands, of witch-hunting, crusading, institutionalised capital punishment (abolished under Elizabeth in the mid-eighteenth century) . . . [t]he brutal episodes in the reigns of Ivan the Terrible or Peter the Great were traumatic because [they were] uncharacteristic.⁶¹

As in other countries of Europe, the adoption of a special statute regulating emergency powers and states of emergency was a natural and inalienable element of the Russian transition to a constitutional monarchy and the rule of law.⁶² It became possible after Alexander II (1855–1881),

55. J.P.T. BURY & R.P. TOMBS, *THIERS 1797-1877: A POLITICAL LIFE* 208 (1986).

56. EDWARD S. MASON, *THE PARIS COMMUNE: AN EPISODE IN THE HISTORY OF THE SOCIALIST MOVEMENT* 288 (reprt. Howard Fertig, 1967) (1930). Eight-hundred and fifty women were arrested during or after the street fighting. “Along with the women were arrested 651 children under the age of 16, all of whom had taken part in the defense of the Commune. Thirty-eight were between the ages of 7 and 13.” *Id.* at 291-292.

57. *Id.* at 292-294.

58. TOMBS, *supra* note 53, at 19.

59. *See, e.g.*, HENRY LISSAGARY, *HISTORY OF THE PARIS COMMUNE OF 1871* 321 (Eleanor Marx trans., New Park Publications 1976) (1876).

60. TOMBS, *supra* note 53, at 19. *See also* THOMAS MARCH, *THE HISTORY OF THE PARIS COMMUNE OF 1871* (1896).

61. ROBIN MILNER-GULLAND, *THE RUSSIANS* 228 (1997).

62. Among other Russian and foreign scholars, this view is shared by Jonathan W. Daly, arguing that “Alexander’s reform placed Russia firmly on the road toward the rule of law, meaning, inter alia, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, . . . or even of wide discretionary authority on the part of the government.” Daly, *Significance*, *supra* note 13, at 604 (quoting A. V. Dicey, Introduction to the Study of the Law of the Constitution 202 (8th ed. 1927)). Dicey’s commentaries have always been well known in Russia. *See, e.g.*, A.V. DICEY, *OSNOVY*

known in Russian history as the Tsar–Liberator, abolished serfdom in 1861 and instituted Russia’s first significant abridgement of monarchical authority and its earliest affirmation of the civil rights of persons by means of his Reform of Province and District (*Gubernia i Uezd*) Self–Government and Judicial Reform of 1864.⁶³ The latter crucial act effectively created an independent judiciary, thus significantly weakening the autocrat. It also restricted arbitrary arrest, established strict criminal procedure, and placed the investigation of all crimes under the supervision of the Procuracy (*prokuratura*), an agency of the Ministry of Justice. It is so indicative that a leading Soviet historian, P.A. Zaionchkovskiy, had to recognise that “the apogee of administrative–police arbitrariness” in Russia happened not *after* adoption of the Emergency Law of 14 August 1881, but rather *before* it—at the end of 1879.⁶⁴

On 24 January 1878, a member of the “Land and Freedom” (*Zemlia i volia*) terrorist group (founded in late 1876), Vera Zasulich, made an attempt on the life of General Fyodor F. Trepov (son of Emperor Nicholas I, born out of wedlock), Governor of Russia’s capital St. Petersburg, and severely crippled him.⁶⁵ On 4 August 1878, Sergei Kravchinsky stabbed the Chief of Russian Gendarmerie, N.V. Mezentsev, to death. The next August, the “People’s Will” (*Narodnaia volia*) revolutionary movement was founded. Their program included plans to assassinate ten to fifteen “pillars of the current government” in order to provoke panic, paralyse the autocracy, and pave the way for revolution.⁶⁶

GOSUDARSTVENNOGO PRAVA ANGLII [INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION] (1891).

63. See, e.g., BUTLER, RUSSIAN LAW, *supra* note 41, at 28.

64. P.A. ZAIONCHKOVSKIY, KRIZIS SAMODERZHAVIA NA RUBEZHE 1870-1880-X GODOV [CRISIS OF AUTOCRACY AT THE END OF THE 1870S - IN THE BEGINNING OF THE 1880S] 91-98, 113, 124 (1964) [hereinafter ZAIONCHKOVSKIY] (An English edition of the book was also published with a new introduction by Gary M. Hamburg. PETER A. ZAIONCHKOVSKY, THE RUSSIAN AUTOCRACY IN CRISIS, 1878-1882 (Gary M. Hamburg ed., trans., Academic International Press 1979).).

65. Deborah Hardy was certainly right when saying that the Zasulich’s case was ‘unique’ and that it “set a new course for the Russian revolutionary terrorists,” See DEBORAH HARDY, LAND AND FREEDOM THE ORIGINS OF RUSSIAN TERRORISM, 1876-1879 59-60 (1987). In March 1878, Zasulich was acquitted in a jury trial. The acquittal of Zasulich is an indication that in the 1870s rights of the jury were firmly protected. There was no reason for the jury members in Russia to be afraid of tsarist persecution for their decision to acquit a terrorist. The country had made a significant progress in its transition to the rule of law. Ironically, it was the same way that led Russia to a national disaster of 1917. See P. A. Alexandrov & Judge A. F. Koni, Speeches At the Trial of Vera Zasulich (1878), in SUD PRISYAZHNYKH V ROSSII: GROMKIE UGOLOVNYE PROTSESSY 1864-1917 [JURY TRIALS IN RUSSIA: LOUD CRIMINAL PROCESSES, 1864-1917] 281, 281-316 (S. M. Kazantsev, comp. 1991).

66. 1 VLADIMIR BURTSEV & S. M. STEPNIAK, ZA STO LET (1800-1896): SBORNIK PO ISTORII POLITICHESKIKH I OBSHESTVENNYKH DVIZHENIY V ROSSII [A HUNDRED YEARS (1800-1896): A COLLECTION OF ARTICLES ON HISTORY OF POLITICAL AND SOCIAL MOVEMENTS IN RUSSIA] 151-54 (1897).

Alexander II survived six assassination attempts. On 19 November 1879, terrorists bombed the tsar's train and killed and wounded dozens of innocent people. Another well-known failed attempt was an explosion in the Winter Palace, the tsar's residence, detonated by Stepan Khalturin on 5 February 1880. The powerful blast destroyed two floors and killed and wounded about 70 people, but the tsar and his family escaped again. The explosion proved to be the last straw.⁶⁷ A week later, Alexander II created the Supreme Executive Commission for the Preservation of the State Order and Public Tranquillity (*Verkhovnaia Rasporiaditel'naia Komissiiia po okhraneniu gosudarstvennogo poriadka i obschestvennogo spokoistvia*) and authorised the head of the Commission, Count Mikhail Loris-Melikov, to "give any regulations and take any measures . . . for the preservation of state order and public tranquillity in St. Petersburg and other localities of the [Russian] Empire."⁶⁸

In the next year, the police arrested nearly all of the major activists of the People's Will. The organisation did not carry out any terrorist acts between February 1880 and 1 March 1881, when the seventh and the last desperate attempt at regicide became a "success." The Russian Tsar Alexander II was murdered.⁶⁹

Life and history can truly be richer than human imagination. Could anybody have envisioned that a few hours before his assassination, Alexander II had given his Royal approval to a plan for creating a "Constitution" (known as "Constitution of Count Loris-Melikov") and an elective proto-parliament ("Joint Commission") with consultative functions?⁷⁰ The project was to be considered by the Council of Ministers on 4 March, but the assassination of the tsar drastically changed the mood

67. See, e.g., ZAIONCHKOVSKIY, *supra* note 64, at 148, 227.

68. For more on the Supreme Executive Commission for the Preservation of the State Order and Public Tranquillity and the system of political security and investigation in Russia see, for example, Z. I. PEREGUDOVA, *POLITICHESKIY SYSK ROSSII 1880-1917* [POLITICAL INVESTIGATION IN RUSSIA: 1880-1917] (2000). See also L.M. LYASHENKO, *TSAR'-OSVOBODITEL'. ZHIZN' I DEYANIA ALEKSANDRA II* [TSAR-LIBERATOR. LIFE AND WORK OF ALEXANDER II] (1994).

69. For more on Alexander II and his time, see a remarkable study by a famous Russian historian of the nineteenth century, SERGEY S. TATISHEV, *IMPERATOR ALEKSANDR VTOROY. EGO ZHIZN' I TSARTSVOVANIE* [EMPEROR ALEXANDER II: HIS LIFE AND REIGN] (1996).

70. As a classic example of double standards of Russian revolutionaries, consider this: when in July 1881, four months after assassination of the Russian tsar, the U.S. President James A. Garfield was murdered, the Executive Committee of the 'People's Will' issued a public statement, saying: "We express our deep condolences to the American people and consider our duty on behalf of Russian revolutionaries to protest against violent actions like a life attempt of Gito." See G.E. MIRONOV, *ISTORIA GOSUDARSTVA ROSSIYSKOGO. ISTORIKO-BIOGRAPHICHESKIE OCHERKI* [HISTORY OF THE RUSSIAN STATE: HISTORICAL AND BIOGRAPHICAL ESSAYS] 487 (1995).

and postponed the long awaited and so desperately needed constitutional reforms in the country.⁷¹

On 14 August 1881, five and a half months after the assassination of the Russian tsar, his successor, Alexander III, signed an act drafted by the Committee of Ministers. It was the law “On Measures for the Preservation of the State Order and Public Tranquillity” (*O merakh k okhraneniuu gosudarstvennogo poriadka i obschestvennogo spokoistvia*).⁷²

In its opening paragraphs, the decree asserted that ordinary laws had proved insufficient to preserve order in the empire so it had become necessary to introduce certain “extraordinary” procedures. Contrary to what is said by critics of emergency legislation in the Russian Empire, the Ordinance of 1881 did *not* extraordinarily increase the discretionary powers of the Administration. It actually limited and diminished them, because the adoption of the Ordinance meant an annulment of all previous emergency decrees (*ukaz*), which had been issued amid the terrorist campaign to murder Alexander II at the end of the 1870s and invested vast arbitrary power in the Governors–General.⁷³ As it was acknowledged in an official report of 1895, by adoption of the 1881 Emergency Law, the authorities hoped to systematise (“to unify”) the “repressive measures employed

71. N.I. LAZAREVSKY, LEKTSII PO RUSSKOMU GOSUDARSTVENNOMU PRAVU [LECTURES ON RUSSIAN STATE LAW. VOL.1. CONSTITUTIONAL LAW] 102-03 (1910).

72. SVOD ZAKONOV ROSSIYSKOY IMPERII [SZ] [CODE OF LAWS OF THE RUSSIAN EMPIRE] Aug. 14, 1881. In his attempt to reveal another devilish uniqueness and Byzantine slyness of the Russian state and law, Richard Pipes discovered a kind of a conspiracy even in the fact *how* the Ordinance was published. “In a manner *characteristic of Russian legislative practices*, in the official Collection of Statutes and Ordinances this momentous piece of legislation is casually sandwiched between a directive approving minor alterations in the charter of the Russian Fire Insurance Company and one concerning the administration of a technical institute in the provincial town of Cherepovtsy.” PIPES, *supra* note 9, at 305 (emphasis added). Actually, that quite typical for all (or nearly all) countries of the world when a position of a new piece of legislation in a collection of statutes is predetermined either by the date when this law was adopted and its registration number (in legal periodicals and annual collections: Public Law in the U.S., Public General Acts in Great Britain, etc.) or by the alphabetical order (in most selections of the legislation). It’s a common practice, and there is nothing “characteristic of Russian legislative practices” in it.

73. For instance, one of such *ukaz* (issued on 2 April 1879, after another regicide attempt) granted the Governors–General the right to transfer to martial courts any persons whose actions were deemed potentially “harmful to public order and tranquillity,” to arrest or banish any person, to close any periodical publication, and, as if that were insufficient, “to take *any* measures . . . deemed necessary for the preservation of tranquillity.” See ZAIONCHKOVSKIY, *supra* note 64, at 87 (emphasis added). The positions of three new (‘temporary’) Governors-General (in St.Petersburg, Khar’kov, and Odessa) were created and added to the existing three (in Moscow, Kiev and Warsaw). Each of them was empowered to subject to his authority the three to five provinces constituting a local military district which, taken together, comprehended 21 of the 50 provinces of European Russia, plus the ten of the Polish Kingdom.

against anti-government elements,”⁷⁴ rather than to introduce any *new* measures.

The Emergency Law established two forms of a state of emergency, or a “state of exception” (*iskluchitel'noe polozhenie*), as it was called in Russia: “reinforced security” (or “reinforced protection,” *usilennaia okhrana*) and “extraordinary security” (or “extraordinary protection,” *chrezvychainaia okhrana*). It also contained “rules for places not declared in a state of exception.”⁷⁵ The law fully concentrated the struggle against subversion in the hands of the Ministry of the Interior (MVD) where it has largely remained since.

Reinforced security (RS), as a milder form of a state of emergency, could be declared by MVD upon a request of city and provincial governors. The Governors-General were also able to impose it on their own authority, but such decision was still subject to approval by the MVD.⁷⁶ RS could be introduced for a period of up to one year.

Extraordinary security (ES) required both the Committee of Ministers' and the Emperor's sanction,⁷⁷ and lasted only six months. Reestablishment of any form of a state of emergency required a formal decree.⁷⁸

In regions under a state of RS, the Governors-General (or Governors in provinces lacking one), while retaining the powers enumerated above, were authorised:

- to issue binding orders enforceable with penalties of up to three months' imprisonment or a 500 rouble fine;⁷⁹
- to forbid social, public, and private gatherings;
- to shut down commercial and industrial enterprises either for a specific period or for the duration of the emergency;
- to deny individuals the right to reside in their jurisdictions (*vospreschat' prebyvanie*);⁸⁰ and
- to transfer to military courts *any* case in the interest of preserving order.⁸¹

74. OBZOR DEIATEL'NOSTI DEPARTAMENTA POLITsii ZA TSARSTVOVANIE V BOZE POCHIVSHEGO GOSUDARIA IMPERATORA ALEKSANDRA III (1 MARTA 1881 - 20 OKTIABRYA 1894 GG.) [A REVIEW OF ACTIVITIES OF THE POLICE DEPARTMENT UNDER THE LATE EMPEROR ALEXANDER III (1 MARCH 1881 - 20 OCTOBER 1894)] [hereinafter GARF] (STATE ARCHIVE OF THE RUSSIAN FEDERATION) 102 (1895).

75. SVOD ZAKONOV ROSSIYSKOY IMPERII [SZ] [CODE OF LAWS OF THE RUSSIAN EMPIRE] Aug. 14, 1881, art. 28-31.

76. *Id.* at art. 7.

77. *Id.* at art. 9.

78. *Id.* at art. 12.

79. *Id.* at art. 15.

80. *Id.* at art. 16.

Police and gendarmerie were permitted:

- to detain any person “inspiring substantial suspicion” from the point of view of state security, but for only two weeks (one month with permission from the governor); or
- to search any premises on pure suspicion of involvement in the commission of a state crime.⁸²

Finally, provincial and city governors were authorised to declare any non-elective local officials employed by the *zemstva*, city governments or courts as “untrustworthy” or “politically unreliable” (*neblagonadezhnyi*) and to order his instantaneous dismissal.⁸³

Under a state of ES, the Governors-General retained all of the prerogatives conferred by RS and were further authorised:

- to create special military-police units with broad powers for the restoration of order;
- to transfer to military courts entire categories of state crimes;
- to sequester any private property or source of income “harmful to state or public security”;
- to issue binding administrative orders and to impose fines of up to 3,000 roubles for failure to comply with them;
- to declare any crimes liable to administrative punishment of the same magnitude just mentioned;
- to remove from office any civil servant (even locally elected officials, as distinct from hired employees) up to and including rank four (*deistvitel'nyi statskii sovetnik* or *General-Maior*);
- to prohibit *zemstvo* and other public-institution meetings;
- to suspend newspapers and other publications; and
- to close schools and other educational institutions for up to one month.⁸⁴

81. SVOD ZAKONOV ROSSIYSKOY IMPERII [SZ] [CODE OF LAWS OF THE RUSSIAN EMPIRE] Aug. 14, 1881, art. 17.

82. *Id.* at art. 21

83. *Id.* at art. 20.

84. *Id.* at art. 26(a)-(i).

Unlike the 5 April 1879 law on the Governors–General, the Emergency Law contained no *carte blanche* provision that allowed them to take “any measures deemed necessary for the preservation of tranquillity.”

The section establishing “rules for places not declared in a state of exception” was a peculiar feature of the Emergency Law, distinguishing it from similar legislation in other European countries of the nineteenth century. It empowered *all* police and gendarme authorities in any locality of the Russian Empire:

- to search, arrest and detain for up to seven days persons suspected of involvement in the planning or perpetration of state crimes, or of belonging to illegal organisations;
- to propose the exile (*vysylka*) of such persons for up to five years;⁸⁵
- upon obtaining the consent of the Ministry of Justice, to transfer to military courts specified state–crime cases, as well as cases of violent resistance to, or physical attacks against, administrative officials in their line of duty,⁸⁶ if only a state of reinforced or extraordinary security was declared *anywhere* in the Empire.⁸⁷

Ninety–five years later, a norm similar to the last provision of the Russian Emergency Law was included into the Constitution of India. The Constitution (Forty–Second Amendment) Act (adopted on 18 December 1976) consisted of fifty–nine articles and was the biggest amendment ever made to the Indian Constitution (it was also larger than constitutions of some countries of the world). Articles 48, 49, and 52 of the act made a number of changes to Part XVIII of the Constitution (“Emergency Provisions.”) According to the articles, even if a state of emergency is *not* declared in some “part of the territory of India,” an emergency regime (including extension of powers of federal authorities, suspension of certain rights and freedoms, etc.) can still be extended to “any State or Union territory,” and “if and in so far as the security of India or any part of the territory thereof is threatened by activities or in relation to the territory of India in which the Proclamation of Emergency is in operation.”⁸⁸

In other words, if a state of emergency is declared in Amritsar (in Punjab), an emergency regime can be extended to Delhi, located in several hundred miles from Punjab, if the President of India “is satisfied” (upon an “advise” of the Prime Minister, as determined by the Constitution under

85. *Id.* at art. 29, 32–36.

86. *Id.* at art. 31.

87. See V.F. NEKRASOV, A.V. BORISOV, M.G. DETKOV, ET AL, *ORGANI I VOISKA MVD ROSSII. KRATKIY ISTORICHESKY OCHERK* [ORGANS AND TROOPS OF THE MINISTRY OF INTERNAL AFFAIRS. A BRIEF HISTORICAL ESSAY] 27–28 (1996); Szeftel, *supra* note 40, at 150.

88. MAHENDRA P. SINGH, V.N. SHUKLA’S CONSTITUTION OF INDIA 816–17 (8th ed. 1990).

Article 74) that events in Amritsar “threaten . . . security” of the capital of India.⁸⁹ Similarly, if a state of exception was declared in Moscow, an emergency regime could be extended to Vladivostok in the Russian Far East, on the coast of the Pacific Ocean.

In sum, the Emergency Law of 1881 (a) placed the system of extra-legal arrest and punishment under the supervision of the home minister (but granted him fewer prerogatives than the director of the Supreme Executive Commission of 1880); (b) extended the right to arbitrary arrest to the regular police (but strictly defined the period of detention), and (c) empowered Governors and Governors-General to subject political suspects to administrative exile (but less extensively and with shorter terms of exile than under the 5 April 1879 law) and to transfer them to military courts.

Although the Law was defined as “temporary,” it was renewed in 1884 for another period of three years and then regularly afterwards.

V. IMPLEMENTATION IN THE EARLY TWENTIETH CENTURY

As far as the implementation of the Emergency Law of 1881 is concerned, on 4 September 1881 a state of “reinforced security” was declared in ten provinces (most notably, in St. Petersburg and Moscow), and several smaller localities in three other provinces of the Russian Empire (compared to 21 provinces and Poland affected by the edict of 5 April 1879!).⁹⁰ In 1901–1902, the reinforced security was extended to include two full provinces, and parts of six other provinces, plus three major cities.

War with Japan (1904–1905) and especially the first (failed) Russian “revolution” of 1905–1907 made the government, on the one hand, implement the Emergency Law more actively, and, on the other hand, initiate drastic legal and social reforms, culminating in the Emperor’s Manifesto “*On Improvement of the State Order*” of 17 October 1905, instituting a constitutional monarchy with the first elected Russian Parliament (the State Duma).

By January 1907, in Daly’s count, martial law was in effect in fifty-seven different localities across the empire, including twenty-one provinces, twenty-five districts, nine cities, and along two railroads, where it remained in force until gradually lifted between 1908 and 1913, especially in 1908–1909.⁹¹ In 1906–1907, a state of extraordinary security was established in Moscow, St. Petersburg, and fifteen other localities.

89. *Id.* at art. 74. See the complete text of the 42nd Amendment on the official “India Code” web site, <http://indiacode.nic.in/coiweb/amend/amend42.htm>.

90. SOBRANIE UZAKONENIY I RASPORIAZHENIY PRAVITEL’STVA, IZDAVAEMYE PRI PRAVITEL’STVUIUSHEM SENATE [COLLECTION OF BY-LAWS AND RESOLUTIONS OF THE GOVERNMENT, ISSUED UNDER THE GOVERNING SENATE] 1881, No. 94, 1554-1555 (Russ.).

91. Daly, *Significance*, *supra* note 13, at 623 (quoting GARF, *supra* note 65). See also PRAVO, March 12 1906.

Overall, Michael Gernet (1874–1953), a distinguished Russian scholar and author of a fundamental five-volume study of the Russian penitentiary system, counted sixty *guberniyas* and *oblasts* which had been placed under reinforced and extraordinary protection in 1905–1907, and twenty-five *guberniyas* and *oblasts* where martial law had been introduced. However, by 1914 there was no martial law anywhere in the Russian Empire, extraordinary protection was in effect only in one isolated case (in Yalta and its district, around the Emperor's summer residence in the Crimea on the Black Sea) and reinforced protection existed in just a few localities.⁹²

The normalisation of the situation was abruptly interrupted and drastically changed because of the imminence of the war with Germany. The assassination of Archduke Franz Ferdinand in Sarajevo on 28 June 1914 provided Austria–Hungary with an excuse to take aggressive actions against Serbia. Bound by treaty to Serbia, Russia announced mobilization of its vast army in her defense, and simultaneously introduced martial law (in its eastern and southern provinces), or a state of ES, throughout the whole Empire. The decision was quite understandable given the forthcoming German declaration of war against Russia on 1 August 1914.

It is a debatable question whether or not a broad imposition of a state of emergency (in its different forms) in Russia in the years of the first revolution of 1905–1907 was justified. There are two main reasons that probably allow us to give an affirmative answer.

The first of them is more of a “technical” character; it concerns the quantity of law enforcement personnel of the Russian Empire. Police forces in tsarist Russia have always been microscopic, miserably diminutive, and chronically understaffed. It is important to remember that at the turn of the twentieth century, rural areas of the largest country on earth (populated by more than 90 million peasants at that time) were policed by only 8,456 ordinary police sergeants and constables. In 1900, a regular rural policeman could have a “beat” of 1,800 square miles and 50,000–100,000 people.⁹³ “Even in 1914 there were fewer than 15,000 gendarmes throughout the empire”⁹⁴ Jonathan W. Daly makes an interesting comparison, noticing that, in 1897, France had about forty percent more policemen than Russia, even though France at that time was a “country with three times fewer people and forty times less territory.”⁹⁵

Indeed, Vera Figner, a famous revolutionary, “symbolising,” in the words of another legendary terrorist, Boris Savinkov, “the best traditions of

92. See 5 M.N. GERNET, *ISTORIA TSARSKOY TUR'MY* [HISTORY OF TSARIST PRISON] 90 (1956).

93. See NEIL B. WEISSMAN, *REFORM IN TSARIST RUSSIA: THE STATE BUREAUCRACY AND LOCAL GOVERNMENT, 1900-1914* 10-11 (1981).

94. D. C. B. Lieven, *The Security Police, Civil Rights, and the Fate of the Russian Empire, 1855-1917*, in *CIVIL RIGHTS IN IMPERIAL RUSSIA* 235, 240 (Olga Crisp & Linda Edmonson eds., 1989).

95. DALY, *AUTOCRACY*, *supra* note 13, at 9.

the revolutionary movement,”⁹⁶ recalled that “in Petersburg itself, propaganda, agitation, and organisation were carried on a broad scale. The lack of police–nagging and of round–ups by the Gendarmerie . . . was very favourable to work among the students and the workers.”⁹⁷

Figner’s testimony is definitely accurate. One may recall the sad recognition of deputy head of the tsarist “secret police” (so–called Third Department) Shultz that “it was impossible to find police–spies and plain–clothed agents in Russia.”⁹⁸ And how large was the total staff of the central apparatus of the Third Department itself, known to modern readers thanks to numerous “terrifying” stories about it running like a trend through writings of many Western and liberal Russian authors? At the time of its creation on 3 July 1826, the Third Department had sixteen (!) persons; at the height its activity in 1873 it had fifty–eight, and when the Department was abolished by Alexander II (on 6 August 1880), it had seventy–two persons, including full–time officers, agents and contractors.⁹⁹ “A ridiculously small number for even the remotest *Cheka* (Lenin’s secret police—the future KGB) provincial headquarters in the country,” Alexander Solzhenitsyn sarcastically observed.¹⁰⁰ Solzhenitsyn’s observation remains valid even when taken into account that the head of the Third Department was also automatically the chief of the Gendarmerie Corps. In 1826, the Corps consisted of not more than 4,278 persons for the whole empire.¹⁰¹

The Russian penitentiary system was too soft and ineffective. Quite typical is the example of Felix Dzerzhinsky, future founder and first head of the *Cheka*. Between 1897 and 1917 (to be precise, in 1897, 1900, 1905, 1906, 1908, and 1912), he was arrested six times; three times he was sentenced to Siberian exile and each time escaped penalty, once after serving just seven days of a life sentence.¹⁰² Over the course of a single

96. See R.A. Gorodnitsky & G.S. Khan, *Pismo B.V. Savinkova V.N. Figner*, in 18 MINUVSHEE: ISTORICHESKIY AL’MANAKH 195, 195 (1995).

97. VERA FIGNER, ZAPECHATLENNIY TRUD [PRESERVED LABOUR] 174 (1921).

98. See A.A. Levandovsky, *Smertelny Schyot* [*Deadly Count: Assassination of Alexander II*], in TSAREUBIISTVA: GIBEL ZEMNYKH BOGOV [REGICIDE: MURDER OF EARTHLY GODS] 414 (N.V. Popov ed., 1998).

99. See Vladlen Izmozik, *Politicheskyy rozysk vedyot Tret’ye Otdelenie (1826–1880 gody)* [*Political Search is Exercised by the Third Department (1826–1880)*], in ZHANDARMY ROSSII (POLITICHESKY ROZYSK V ROSSII XV–XX VEK [RUSSIA’S GENDARMERIE: POLITICAL SEARCH IN RUSSIA 15–20TH CENTURIES]) 253 (2000).

100. 3–4 ALEKSANDR I. SOLZHENITSYN, THE GULAG ARCHIPELAGO, 1918–1956: AN EXPERIMENT IN LITERARY INVESTIGATION 10 (Thomas P. Whitney trans., Harper & Row 1974–75). See also P.S. SQUIRE, THE THIRD DEPARTMENT: THE POLITICAL POLICE IN RUSSIA OF NICHOLAS I (1968); S. MONAS, THE THIRD SECTION: POLICE AND SOCIETY IN RUSSIA UNDER NICHOLAS I (1961).

101. V.E. PETRISCHEV, ZAMETKI O TERRORIZME [NOTES ON TERRORISM] 192 (2001).

102. See GEORGE LEGGET, THE CHEKA: LENIN’S POLITICAL POLICE 22–23 (1981). The situation was quite typical. In 1902–1913, Iosif Stalin, for instance, was arrested and sentenced to exile six times, but evaded penalty four times. For more on Dzerzhinsky’s prison experience see GERNET, *supra* note 92, at 304–319.

year beginning in October 1905, there were 1,951 robberies (with seven million roubles confiscated); in 1,691 of these cases, the revolutionaries escaped detention.¹⁰³

On 1 March 1917, several days after the beginning of the so-called “Bourgeois Revolution in Russia,” a Moscow mob stormed Butyrki prison and released its inhabitants, including Dzerzhinsky, who had been serving his sentence there. A very informative study by Lennard Gerson contains an apparent mistake when the author writes about “*hundreds of political prisoners . . . released from their cells*” in Butyrki in March 1917.¹⁰⁴ Most inhabitants of prisons were ordinary criminals, such as murderers, thieves,

103. See ANNA GEIFMAN, *THOU SHALT KILL: REVOLUTIONARY TERRORISM IN RUSSIA, 1894-1917* 21-22 (1993). In her remarkable study, Geifman uses an interesting tactical approach. First, agreeing with certain views and clichés expressed by more ‘authoritative’ authors, she seems to be unwilling to openly argue against them, but rather, gives facts and arguments which draw a completely different picture. For instance, Geifman notes that one of such ‘authorities,’ Walter Laqueur, is “entirely justified in cautioning against sweeping definitions that claim . . . that all terrorists are criminals, moral imbeciles, mentally deranged people or sadists (or sado-masochists).” *Id.* at 167. However, Geifman then dedicates a whole chapter of her book (Chapter 5 “The ‘Seamy Side’ of the Revolution”) proving quite the opposite. *Id.* Consider the following observations: “a number of [revolutionaries] were recognized by contemporary medical experts as ‘unconditional degenerates’” *Id.*; “the personality of Kamo presents a striking example whose derangement became a catalyst for violent behavior that . . . happened to take revolutionary form” *Id.*; “the emotional problems experienced by the terrorists covered the entire range of mental illness” *Id.* at 168; “a significant percentage of active Russian terrorists . . . made one or more attempts on their own lives” *Id.*; “psychological instability [of the revolutionaries] . . . became increasingly common” *Id.* at 169; “a large number of assassins and expropriators experienced (and were frequently treated for) emotional breakdowns of varying severity” *Id.*; “many terrorists were described by their fellow radicals as ‘turbulent and unbalanced’, ‘hysterical’, or ‘suicidal’, and some were openly recognized as ‘completely abnormal’” *Id.* at 170; “numerous cases of revolutionary violence involving behavior classifiable only as sadistic” *Id.* at 171; “sometimes physical illness or disfigurements produced an escalating self-loathing projected by the afflicted individual onto others, resulting in increasing frustration ultimately expressed in violent acts that were later rationalized as political actions. Sexual abnormalities [like an incident involving a young hermaphrodite whose gender ambiguity was discovered following his arrest for the political murder of a police official] undoubtedly played a role in driving certain individuals to bloodshed as well” *Id.* at 172. It is hard to accuse Geifman of being biased or opinionated. However, there are numerous similar examples that were left out of her book. Dzerzhinsky himself was described by his contemporaries as an “almost epileptically nervous” person who was possessed by two childhood dreams: to become a Roman Catholic priest, and to find a magic cap that would make him invisible and give him power, as he said, “to slay all the Russians.” See V. Mitskevich-Kapsukas, *Iz Vospominaniy F. E. Dzerzhinskogo* [F.E. Dzerzhinsky Remembered], in 9 PROLETARSKAIA REVOLYUTSIA 55 (1926). In his adult life, Dzerzhinsky was able to partially accomplish only the latter dream. A publication of a contemporary Russian scholar contains an impressive list of active revolutionaries who ended their lives in a suicide or a mental institution. See A.I. Suvorov, *Politichesky Terrorizm v Rossii XIX-Nachala XX Vekov. Istoki, Struktura, Osobennosti* [Political Terrorism in Russia in the 19th—the Beginning of the 20th Centuries: Reasons, Structure, Peculiarities], 7 SOTSIOLOGICHESKIE ISSLEDOVANIA 54, 59 (2002).

104. LENNARD D. GERSON, *THE SECRET POLICE IN LENIN’S RUSSIA* 15 (1976) (emphasis added).

burglars, etc. Alexander Solzhenitsyn gave an exact figure (taken from local newspapers of that period) of political prisoners released from the Tambov Prison: “[t]he February Revolution, which opened wide the doors of the Tambov Prison, found there political prisoners in the number of . . . seven (7) persons.”¹⁰⁵ It is very unlikely that Butyrki contained many more “political prisoners” than the Tambov Prison or any other jail in the Russian provinces. The fact that Dzerzhinsky was known in Butyrki as “Prisoner 217” does not necessarily mean that there were “hundreds of political prisoners” in that or any other prison in Russia.

The elegance and ease with which Dzerzhinsky, Trotsky, Stalin and many other revolutionaries in Russia were able to escape Siberian exile is also unquestionable proof of mildness and “liberalism” of the penitentiary system in Tsarist Russia, especially when compared to the system later created by the Bolsheviks.¹⁰⁶

The second reason justifying a broad imposition of a state of exception in 1905–1907 is more substantive. In the beginning of the twentieth century, social and political threats to the Russian state order were truly grave. It would be fair to say that this was the bloodiest period in the whole previous history of Russia, except during times when the country was at war. Critics of Russia never miss this opportunity to highlight the number of people sentenced to death in the 1900s. Indeed, according to official statistics, in seven months of existence of “field courts–martial” (19 August 1906–April 1907), 683 persons were sentenced to death. The “field courts–martial” were not the only institution that could try offenders and sentence them to death. According to S.A. Stepanov’s calculation, the general number of capital punishments in 1906–1907 was equal to 1,102, and in 1906–1909 equalled 2,694. P. Koshel’s numbers are smaller: 245 in 1906, 624 in 1907, 1,340 in 1908, and 540 in 1909.¹⁰⁷ After the peak in 1907–1909, the number of death sentences gradually went down to 116 in January–March of 1910 (as compared with zero to twelve annually before 1906).¹⁰⁸ Of course, not all of those persons were actually executed. In many cases, death sentences were changed to long prison terms. According to official

105. SOLZHENITSYN, *supra* note 100, at 11.

106. As another example, it can be mentioned that the daily norm for the Decembrist prisoners sent to Nerchinsk in Siberia after their soup-opera ‘revolution’ in 1825 was 118 pounds of ore to be mined and loaded every day. When a Russian writer and poet Varlam Shalamov trudged the same weary route as the Decembrists a hundred years later, the norm had gone up 240 times, to nearly 29,000 pounds. Jo Durden-Smith, *Beware of “Nice Foreigners”* ST. PETERSBURG TIMES, Oct. 1996, at 7-13.

107. S.A. STEPANOV, ZAGADKI UBIYSTVA STOLYPINA [MYSTERIES OF STOLYPIN’S ASSASSINATION] 34 (1995); KOSHEL, *supra* note 50, at 82. Gernet’s estimation of 5,000 to 7,500 executions in 1907-1909 is the largest one, with the biggest (fifty per cent) discrepancy. GERNET, *supra* note 92, at 7.

108. See Rawson, *supra* note 48, at 37.

Russkie vedomosti, for instance, out of seventy-one people sentenced to death in March 1910, the number executed was fifteen.¹⁰⁹

As a comparison with the Stalin period, according to the latest and most reliable statistics (based on archival evidence), in 1921 through 1953, the repressive agencies (*Cheka*, OGPU, NKVD and MVD) persecuted 4,060,306 people for political reasons; as many as 799,455 of them were sentenced to capital punishment by firing squad. A tidal wave of persecutions swept the country in 1937–1938, when 1.3 million Soviet citizens were sentenced to hard labour under Article 58 of the Criminal Code (“counterrevolutionary crimes”), and more than a half of them (682,000) were executed. At least forty million people were sentenced to prison terms in 1923–1953. As many as 2.6 million languished in prisons in 1950, and another 2.3 million lived in special settlements (according to data from the late 1940s).¹¹⁰

Still, the figure of 2,694 (those who were sentenced to death from 1906–1909) is really terrifying, for it was larger than the number of people who had been executed in all of the previous history of Russia. The fact that the number of executions in the Russian Empire in 1906–1909 was more than ten times smaller than in Paris in May 1871 is hardly an excuse here.

One possible explanation, however, is the number of victims among Russian citizens who were assassinated by terrorists. The “systematic extermination of the most evil or prominent individuals in the government” and the “mass extermination of the government and in general of individuals by whom is preserved or might be preserved one or another structure that we deplore” had traditionally been major goals of revolutionaries in Russia since “Land and Freedom.”¹¹¹ In only sixteen months (from February 1905 to May 1906), 1,273 “exploiters” and “tsarist dogs” were murdered, including eight Governors and Governors–General, five Vice Governors and Counsellors, four Generals, fifty-one land owners, fifty-four entrepreneurs, twenty-nine bankers, twenty-one *polizeimeisters*, 554 policemen and police officers, 265 gendarmes and gendarme officers, 257 guards, eighty-five civil servants, and twelve clergymen.¹¹² According to official statistics, in 1906–1909 this figure was equal to 5,946.¹¹³ The

109. MIRONOV, *supra* note 70, at 726.

110. 30 *oktyabrya - Den' politicheskikh zaklyuchennykh* [October 30: Political Prisoners Day], ROSSIISKIYE VESTI, Oct. 30, 1997. See also J. Arch Getty et al., *Victims of the Soviet Penal System in the Pre-war Years: A First Approach on the Basis of Archival Evidence*, 98 AM. HIST. REV. 1017, 1017-49 (1993).

111. HARDY, *supra* note 65, at 48.

112. For a complete list see N.N. Ansimov, *Okhrannye otdelenia i mestnaya vlast' tsarskoy Rossii v nachale 20 v.* [Security Police and Local Government in Tsarist Russia in the Beginning of the 20th Century], 5 SOVETSKOE GOS. I PRAVO 120, 122 (1991).

113. STEPANOV, *supra* note 107, at 34. An expert from Jerusalem University, Leonid Priceman, gave a slightly smaller number of the terrorists' victims in Russia between 1905 and May 1909: 2,691 persons killed and 3,029 wounded. Ivan Batevsky, *Terrorism: A Threat to Humanity*, 4 JUSTICE BELARUS, April 2001 (citing Leonid Priceman, *Yad Terrora*

general number for the 1900s was approximately 17,000 (!),¹¹⁴ including Minister of People's Education (a former Professor of Roman Law and President of the Moscow State University) Nikolay Bogolepov (14 February 1901), Ministers of the Interior Dmitry Sipyagin (2 April 1902) and Viacheslav von Plehve (15 July 1904), Great Duke (uncle of Emperor Nicholas II, the Governor-General of Moscow) Sergei Alexandrovich Romanov (4 February 1905), and finally—after nine previous attempts—the Prime Minister of Russia (and simultaneously Minister of the Interior) Peter Stolypin (1 September 1911).¹¹⁵

The first Russian Constitution (Basic State Laws of 23 April 1906)¹¹⁶ reformed, *inter alia*, the legal mechanism of a state of emergency. Article 15 of the Constitution drastically reduced the number of those who possessed a right to introduce a state of emergency. Before April 1906, martial law could be declared not only by the Emperor, but also by the Chief Commander of the Army, while reinforced protection (but not extraordinary protection) could be declared by the Minister of the Interior. The declaration of either form of a state of emergency became strictly a privilege of “Supreme Administration” from April 1906 on: “[o]ur Sovereign the Emperor declares localities to be under martial law or in a state of exception” (*iskluchitel'noe polozhenie*).¹¹⁷ The last Article in Chapter 2 of the Constitution (“On Rights and Responsibilities of Russian

[*Poison of Terror*], NEZAVISIMOE VOENNOE OBOZRENIE, Aug. 22, 1996, at 16-17), available at <http://www.justbel.info/2001-4/art14.htm>.

114. KOZHINOV, *supra* note 32, at 128. As a result of her calculations Anna Geifman came to the same conclusion: “Close to 17,000 individuals became victims of revolutionary terrorism.” GEIFMAN, *supra* note 103, at 20-21. At least two non-Russian scholars reveal a detail that other authors prefer not to touch upon: by 1900, almost thirty percent of those arrested for political crimes were Jews; while in 1903 only seven million (or 2.3 per cent) of the total population of the Russian Empire were Jewish, they comprised approximately fifty per cent of the revolutionary parties' membership. LEONARD SCHAPIRO, RUSSIAN STUDIES 266 (Ellen Dahrendorf ed., 1986); GEIFMAN, *supra* note 103, at 21. GEIFMAN, *supra* note 103, at 34 (“Anyone who espoused patriotic, nationalist, or progovernment views could be labelled a member of the Black Hundreds (*Chernosotenets*), against whom violent acts were justified.”).

115. During one of previous attempts on Stolypin's life, his dacha was bombed, 29 persons murdered and 27 crippled, including Stolypin's 15-year-old daughter and his two-year-old son. See M.P. BOK, P.A. STOLYPIN: VOSPOMINANIYA O MOYEM OTSE [P.A. STOLYPIN: MEMORIES ABOUT MY FATHER] (Liberty Pub. House 1990); STEPANOV, *supra* note 107, at 34; ALEKSANDR BOKHANOV, NICKOLAY II [NICHOLAS II] 266-68 (1997). Also see a recent study: V.M. ZHUKHRAI, TERROR: GENII I ZHERTVY [TERROR: GENIUSES AND VICTIMS] 177-217 (2002).

116. See generally MARC SZEFTTEL, THE RUSSIAN CONSTITUTION OF APRIL 23, 1906: POLITICAL INSTITUTIONS OF THE DUMA MONARCHY (1976) (the most authoritative study of the first Russian Constitution in English; also containing its complete translation).

117. *Id.* at 86.

Subjects”)¹¹⁸ left to “special laws” the determination of what rights and freedoms could be suspended on a territory declared “under martial law or a state of exception.” Since neither Article 15 nor Article 41 defined conditions under which a state of emergency was to be declared, the evaluation of those conditions, as well as deciding whether and when to place a locality under any form of a state of emergency, remained within the Emperor’s discretion.

Like most other constitutions adopted in the nineteenth to early twentieth century, the Basic State Laws of the Russian Empire of 1906 also contained a provision confirming the right of the “Sovereign Emperor,” as the head of the state, to exercise “legislative action” if it was required by “extraordinary circumstances.”¹¹⁹

The institution of emergency decrees as a surrogate form of a “state of emergency” was a component of the constitutional law of many countries of the world, including Austria, Bulgaria, Denmark, Spain, Portugal, Turkey, Montenegro, Japan, Argentina. The institution of emergency decrees was an integral part of legal systems of the majority of German states, where it was known as *Nothverordnungen*: Angalt, Baden, Braunschweig, Waldek, Württemberg, Gessen, Lippe, Oldenburg, Reiss, Sachsen–Altenburg and Sachsen–Weimar, Saksonia, Schaumburg–Lippe, Schwartzburg–Zondersgauzen, and Schwartzburg–Rudolfstadt.¹²⁰

Comparative analysis of the constitutional provisions contained in Article 87 of the Russian Constitution of 1906 shows that Russian emergency regulations were better defined and less “authoritarian” than respective provisions of many European constitutions.

Emergency decrees of the Russian Emperor could be issued only “whilst the State Duma is in recess,” and could not introduce any changes or alterations “in the Fundamental Laws, in the statutes of the State Council and State Duma or in the regulations governing elections to the Council and the Duma.” Moreover, an emergency decree could not operate indefinitely. According to the same Article 87, “[s]hould such a measure not be

118. FUNDAMENTAL LAWS OF THE RUSSIAN EMPIRE [CONSTITUTION] Apr. 23, 1906, art. 41, in MARC SZEFTTEL, THE RUSSIAN CONSTITUTION OF APRIL 23, 1906: POLITICAL INSTITUTIONS OF THE DUMA MONARCHY (1976).

119. *Id.* at art. 87.

120. The texts of the Constitutions are given in a number of collections. See, e.g., CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: A SERIES OF UPDATED TEXTS, CONSTITUTIONAL CHRONOLOGIES AND ANNOTATED BIBLIOGRAPHIES (A.P. Blaustein & G.H.Flanz, eds., 1971) (containing the most complete collection in English); *Oceana Law*, OXFORD UNIVERSITY PRESS, <http://www.oup.com/online/us/law/oceanalaw/?view=usa#ccwo> (last visited Nov. 17, 2010). Constitutional provisions regulating the institute of emergency decrees in German state and some other countries of the world are also given in A.M. MAGAZINER, CHREZVYCHAINO-UKAZNOE PRAVO V. ROSSII (ST. 87 OSN. ZAK.) [LAW OF EMERGENCY DECREES IN RUSSIA (ART.87 OF THE BASIC LAWS)] 153-72 (M.M. Stasulevich 1911).

introduced into the Duma as a bill within two months from the date of its next meeting . . . it loses force.”¹²¹

VI. RUSSIAN EMERGENCY LAW IN HISTORICAL CONTEXT

At the turn of the twentieth century, Russia was passing through a painful period of long awaited large-scale social reforms and rapid economic growth. “Give us twenty years of peaceful development,” Prime Minister of Russia Peter Stolypin declared in his famous speech, “and you won’t recognise the country.”¹²² His credo was, “[w]e need great Russia, not great calamities.”¹²³ Four years before his assassination, in a speech in the Duma on 13 March 1907, Stolypin defended the use of emergency measures, including martial courts, against revolutionary terrorists. The words of Stolypin deserve a full citation for they contained the most complete rationale for the use of emergency powers in pre-Bolshevik years:

We have heard here accusations against the government . . . We have heard that it is a shame and disgrace for Russia that such measures as field courts-martial have been resorted to . . . But when in danger, the state must revert to the most rigorous, the most exceptional measures in order to avert disintegration. This was, this is, and this will be so always and everywhere. This is the principle of human nature that lies in the nature of the state itself. When a house burns, gentlemen, you break into a strange apartment, you break the doors, you break the windows. When a person is sick, he is treated by poisons. When a murderer attacks you, you kill him. This system is recognized by all states . . . Gentlemen, there are fateful moments in the life of a state, when . . . one must choose between the integrity of theories and the integrity of the fatherland . . . I am asking myself . . . has the government the right with regard to its faithful servants, who are subjected to deadly danger every moment, to make an open concession to the revolution? After having considered this question, after having weighed it thoroughly, the government came to the conclusion that the country expects from it a demonstration not of weakness but of faith. We wish to believe, we must believe, gentlemen, that we will hear words of appeasement from you, that you will stop the bloody madness [of the revolutionary terror], that you will pronounce the word which will force us all to start, not the destruction of Russia’s historical building, but its rebuilding, remodelling and adornment.¹²⁴

121. SZEFTTEL, *supra* note 116, at 99.

122. See, e.g., *Stolypin, Petr Abramovich*, CHRONOS http://www.hrono.info/libris/stolypin/stpn1_04.html.

123. *Id.*

124. SAMUEL KUCHEROV, COURTS, LAWYERS AND TRIALS UNDER THE LAST THREE TSARS 207 (Greenwood Press 1974) (1953) (citing GOSUDARSTVENNAYA DUMA, VTOROY SOZYV: STENOGRAFICHESKIY OTCHET (1907)).

It is always a problem and a challenge for any transforming and modernising (or, in Stolypin's words, "rebuilding and remodelling") society to keep preserving law and order using exclusively liberal methods. This observation is particularly relevant to the situation in such an enormous, multi-ethnic, multi-religious, and multi-linguistic country as the Russian Empire at the end of the nineteenth and in the beginning of the twentieth centuries. In the final count, it is not "excessive" use of emergency powers in pre-revolutionary years in Russia that should be criticised, but, on the contrary, a lack of sufficient and effective employment of it.

What amazes observers is that "Russia's rulers permitted unrest and disorder—in the midst of a major war—to grip the entire country before taking decisive measures."¹²⁵ Until 1905, a strong form of the state of emergency ("extraordinary security") was never introduced, and scarcely any "political criminals" received a punishment harsher than administrative exile. The Russian "government unsheathed its mightiest weapons only as the crisis reached its apex. Then, almost as if to compensate for earlier dilatoriness, it resorted to the harshest form of emergency legislation: martial law" (*voennoe polozhenie*).¹²⁶

When writing about the Russian Emergency Law, Richard Pipes agreed with Peter B. Struve that "the real difference between Russia of that time and *the rest of the civilised world* lay "in the omnipotence of the political police" which had become the essence of the Russian monarchy."¹²⁷

In reality, at the turn of the twentieth century, Russia was no longer an absolute monarchy given the independent judiciary, free press,¹²⁸ elective parliament, and local self-governments. In the opinion of William E. Butler, one of the most authoritative English-speaking specialists in Russian law, the Criminal Code (*Ugolovnoe ulozhenie*) of 1903 "represented the most advanced statement of criminal jurisprudence in Europe," and a draft Civil Code (*Grazhdanskoe ulozhenie*) of 1910–1913 "achieved the same standard of technical and substantive proficiency."¹²⁹

As mentioned before, the 1906 Basic State Laws contained a separate chapter "On Rights and Responsibilities of Russian Subjects" whose fifteen

125. Daly, *Significance*, *supra* note 13, at 621.

126. *Id.* at 621-22.

127. PIPES, *supra* note 9, at 331 (emphasis added).

128. See P.A. KROPOTKIN, ZAPISKI REVOLUTSIONERA [NOTES OF A REVOLUTIONARY] (1988) (concerning 'revolutionary literature' as well. Other examples include a book by Petr Alexeevich Kropotkin (1842-1921), a famous Russian anarchist and decisive enemy of 'tsarism', which was first published in London in 1902, but officially reprinted in Russia already in 1906 and 1907).

129. BUTLER, RUSSIAN LAW, *supra* note 41, at 29; BUTLER, SOVIET LAW, *supra* note 41, at 22. For the text of the Criminal Code of 22 March 1903, see ROSSIYSKOE ZAKONODATEL'STVO 10-20 VEKOV. TOM 9. ZAKONODATEL'STVO EPOKHI BURZHUAZNO-DEMOKRATICHESKIKH REVOLYUTSIY [RUSSIAN LAW OF THE TENTH-TWENTIETH CENTURY. VOL.9. LAW OF THE PERIOD OF BOURGEOIS-DEMOCRATIC REVOLUTIONS] 271-320 (O.I. Chistyakov, ed., 1994) [hereinafter ROSSIYSKOE].

articles (Art. 27–41) could be called the Russian Bill of Rights.¹³⁰ They included all customary freedoms except the right of petition.

According to the Constitution, no one could be:

- a) “prosecuted for a criminal action otherwise than in a manner determined by law”,¹³¹
- b) “placed under guard [arrested] otherwise than in the cases determined by law”,¹³²
- c) “tried and punished except for criminal actions foreseen by penal laws in force at the time of the perpetration of these actions.”¹³³

“Everyone’s domicile” and “property” were declared “inviolable.”¹³⁴ “Every Russian subject” had the right:

- a) “to choose freely his place of residence and his occupation, to acquire and to transfer property and to travel freely [without molestation, *besprepyatstvenno*] beyond the limits of the State”,¹³⁵
- b) “to hold meetings, peacefully and without arms, for purposes not contrary to laws”,¹³⁶
- c) “within the limits fixed by law”, to “express his thoughts orally and in writing, as well as disseminate them in print or otherwise”,¹³⁷
- d) “to form societies and unions for purposes not contrary to laws”,¹³⁸
- e) to “enjoy freedom of religion [*svoboda very*].”¹³⁹

Foreigners who sojourned in Russia also enjoyed “the rights of Russian subjects within the limitations fixed by the law.”¹⁴⁰ Trial by jury was not specifically mentioned in this list of rights, but it had already been a part of Russian legislation since the judicial reform of 1864.

130. SVOD ZAKONOV ROSSIYSKOY IMPERII [SZ] [CODE OF LAWS OF THE RUSSIAN EMPIRE] Aug. 14, 1881, art. 27–41. *See also* Szeftel, *supra* note 116, at 88–90.

131. SVOD ZAKONOV ROSSIYSKOY IMPERII [SZ] [CODE OF LAWS OF THE RUSSIAN EMPIRE] Aug. 14, 1881, art. 30.

132. *Id.* at art. 31.

133. *Id.* at art. 32.

134. *Id.* at art. 33, 35.

135. *Id.* at art. 34.

136. *Id.* at art. 36.

137. SVOD ZAKONOV ROSSIYSKOY IMPERII [SZ] [CODE OF LAWS OF THE RUSSIAN EMPIRE] Aug. 14, 1881, art. 37.

138. *Id.* at art. 38.

139. *Id.* at art. 39.

140. *Id.* at art. 40.

Even before adoption of the Constitution of 1906, the police and interrogating officers were operating under constraints. “After the judicial reform of 1864, and *definitely after 1881*, the security police had no judicial or punitive functions,” D. Lieven rightly asserted.¹⁴¹ A.I. Spiridovich recalled that “the arrest of each person, even under the *Okhrana*’s [emergency] rights, had to have serious causes,” and that the “arrest in particular of a member of the *intelligentsia* or a student would lead to immediate telephone calls from the Procuracy asking for reasons; in the event of a prolonged period of detention under arrest, the Procuracy would press hard for the suspect’s release.”¹⁴² In an objective assessment of an American scholar, “the late imperial Russian polity was a regime in transition from absolutism to constitutionalism” and the Emergency Law was a “sign of that progression,” a sign of Russia’s “uneasy transition from an absolutist to a constitutional order.”¹⁴³

Marc Szeftel’s criticism of the Emergency Law for the fact that it allegedly “obviously *failed its purpose*, when it became evident that it could not *prevent* the major disorders of 1905,”¹⁴⁴ is hardly relevant. In fact, Szeftel’s comment is a mirror reflection of statements by certain dogmatic scholars of the Communist period. Indeed, some Soviet jurists argued that emergency legislation and a state of emergency (as a legal institution) inevitably “*lead*” to “arbitrary rule, police repression, and governmental abuse,” whereas Szeftel claims that the emergency law failed to “*prevent*” disorders.¹⁴⁵

In reality, “[n]o statute can *guarantee* the successful resolution of [*any*] crisis,” exigency, or emergency; but what a law *can* and *should* do is to provide a “structure politically conducive to a solution.”¹⁴⁶ It is not a “purpose” of the legal mechanism of a state of emergency in *any* country of the world to “*prevent*” disorder. Moreover, as it was indicated in the 1985 “Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,” a state of emergency is not supposed to be of a “preventive nature” and “may not be imposed merely because of an apprehension of potential danger.”¹⁴⁷ In Professor Szeftel’s defence, however, it might be stated that his excellent book was

141. Lieven, *supra* note 94, at 239 (emphasis added).

142. A.I. SPIRIDOVICH, ZAPISKI ZHANDARMA [NOTES OF A GENDARME] 75-76 (1928).

143. DALY, AUTOCRACY, *supra* note 13, at 39.

144. Szeftel, *supra* note 40, at 150 (emphasis added).

145. *Id.* (emphasis added).

146. Note, *The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power*, 96 HARV. L. REV. 1102, 1120 (1983).

147. United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985), available at <http://www.unhcr.org/refworld/docid/4672bc122.html>. See generally *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 7 HUM. RTS. Q. 3 (1985).

published four years before the issuance of the UN report and eight years before formulation of the “Siracusa Principles.”

Again, it was not the harshness and toughness of the Russian emergency law or alleged “administrative arbitrariness” in its implementation that accelerated the end of the Russian Empire and that deserves condemnation, but rather neglect and carelessness of the authorities (especially by the State Duma) and their inability to apprehend real and actual danger presented to the state and society by revolutionary terrorism.

P.N. Durnovo, head of the Police Department (1884–1893) and the Ministry of the Interior (1905–1906) repeatedly underlined the many weaknesses of law enforcement agencies in Russia, and five years before the revolution (on 26 January 1912) rhetorically exclaimed, “[I]et any of us ask himself if order is guaranteed under the present extremely weak police force.”¹⁴⁸ In February of 1914, in his famous memorandum,¹⁴⁹ Durnovo warned that the war with Germany, which actually was to begin in five months, would lead to radical social revolution if necessary protective measures were not undertaken. Mikhail Menshikov, a leading Russian journalist of the pre-revolutionary period (who was executed by Bolsheviks in 1918), in a series of articles titled *An Offensive Struggle* (1911), criticised the government and noted that even the official legal term “protection” (*okhrana*) bespoke of a totally inadequate (“defensive”) rather than a more decisive (“offensive”) character of the counter-terrorist and counter-revolutionary measures in the country.¹⁵⁰ Neither of those warnings, nor Machiavelli’s prophecy about the states that will be ruined “when grave occasions occur,” if “in time of danger” they “cannot resort to a dictatorship,”¹⁵¹ was ever appreciated by the government of Nicholas II.

CONCLUSION

Extreme liberal reforms of the Provisional Government (formed after the February 1917 “bourgeois revolution”) and irresponsible concession of the last tsar to declare his abdication had a suicidal effect and removed the last obstacles on the way of the Bolsheviks to power. It is no surprise that democratic “achievements” of the Provisional Government were warmly

148. Lieven, *supra* note 94, at 240.

149. D. C. B. Lieven called the memorandum “the most impressive document produced by an imperial official in the last years of the old regime.” *Id.* at 251.

150. MIKHAIL MENSHIKOV, NATSIONAL’NAYA IMPERIA [NATIONAL EMPIRE] 394-404 (2004).

151. NICCOLO MACHIAVELLI, *THE PRINCE AND THE DISCOURSES*, 201 (McGraw-Hill 1950). It’s remarkable that this maxim of Machiavelli was used by Clinton L. Rossiter as an epigraph to his book on *Constitutional Dictatorship*. It’s also noteworthy that in Arthur Selwyn Miller’s conclusion, “‘Constitutional Machiavellism’ has always been followed in the United States.” Arthur Selwyn Miller, *Democratic Dictatorship: The Emergent Constitution of Control*, in *CONTRIBUTIONS IN AMERICAN STUDIES*, No. 54, xv. (1981).

praised by the leader of the October Revolution Vladimir Lenin, who called “new” Russia, “the freest, most progressive country in the world.”¹⁵²

Thanks to, first, the lack of political will by the tsarist regime and its shy unwillingness to decisively fight grave enemies of the Russian society, and second, a fatal misunderstanding of national interests of Russia by the Provisional Government (February–October 1917), the mechanism of self-preservation of the Russian state was never effectively implemented and was ultimately destroyed—with Russia herself.

152. 31 V.I. LENIN, *Doklad na Sobranii Bolshevikov*, in POLNOE SOBRANIE SOCHINENIY [COMPLETE WORKS] 103, 106 (Gosudarstvenoe Izdatelstvo Politicheskoi Literatury, 5th ed. 1962) (1917).