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### **№ 87-Φ3: Political Machination or Procedural Reform?**

*Abstract: Law #87•Φ3 was signed by Russian President Vladimir Putin six months prior to the presidential election. #87-Φ3 rearranged the division of functions between the Investigator and the Procurator during the preliminary investigation. It also saw the creation of the Investigative Committee within the Procuracy, which would have exclusive supervision of all investigations within that branch. Because of the Committee’s personal jurisdiction over investigations involving individuals with official immunity and agents of Russia’s power structures, both Russian media and Western academy saw the law as being politically motivated by the upcoming transfer of power. This paper examines the political rationalizations for #87-Φ3 reforms and points out their flaws. While not denying validity of the law’s justifications, this paper posits that such explanations are unverifiable. The paper concludes by providing procedural justifications for #87-Φ3. #87-Φ3 is seen as a further step in Russia’s transition away from a Soviet Procurator-centered criminal procedure system and towards Judicial Oversight model consistent with adversarial principles.*

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### **Introduction**

Six months prior to the December 2007 Russian election, which would legitimize Dmitri Medvedev, Vladimir Putin’s heir apparent, as the President of the Russian Federation, the Russian Legislature passed a law named “From 6.5.2007 #87-Φ3.” Signed by Putin on June 5,

2007, it was due to take full effect in 90 days.<sup>1</sup> #87-Φ3 rearranged the division of functions between the Investigator and the Procurator during the preliminary investigation. It also created the Investigative Committee within the Procuracy and gave the Committee exclusive supervision of all investigations within that branch. Because of the Committee's personal jurisdiction over investigations involving individuals with official immunity and agents of Russia's power structures, both Russian media and Western academy saw the law as being politically motivated by the upcoming transfer of power.

After a brief description of the preliminary investigation as implemented in Russia, this paper examines the political rationalizations for #87-Φ3 reforms and points out their flaws. While not denying validity of the law's justifications, this paper posits that such explanations are unverifiable. The paper concludes by providing procedural justifications for #87-Φ3. In its rearrangement of the Procurators' relationship with the preliminary investigation, #87-Φ3 is seen as a further step in Russia's transition away from a Soviet Procurator-centered criminal procedure system and towards a Judicial Oversight model consistent with adversarial principles.

## **The 2001 Code**

The modern role of the Procurator in the Russian Federation still retains some of the Soviet conception of the Procurator's judicial functions. The Soviet system was centered on the Procurator as the guarantor of observance of citizens' rights during the judicial process: "[S]upervision over the exact execution of the laws of the USSR, the RSFSR [Soviet Republic of Russia], and autonomous republics in criminal proceedings shall be exercised by the USSR Procurator General both directly and through the RSFSR Procurator and other Procurators subordinate to him."<sup>2</sup> This approach has been deemed "Procuracy Supervision" in order to contrast it with the "Judicial Oversight" model of Western systems.<sup>3</sup> Under Procuracy Supervision, the Procurator was seen as the final arbiter in the realm of preliminary investigation. The Procurator had the power to vacate a criminal case,<sup>4</sup> and had final authority over a suspect's

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<sup>1</sup> From 6.5.2007 #87-Φ3 (2007), Konslutantplus.ru, <http://www.consultant.ru/online/base/?req=doc;base=LAW;n=38313;p=2>.

<sup>2</sup> Criminal Procedure Code of the RSFSR, Art. 25 (1972), reprinted in HAROLD J. BERMAN SOVIET CRIMINAL LAW AND PROCEDURE, THE RSFSR CODES (Harvard University Press 1972).

<sup>3</sup> A. Khaliulin and V. Nazarenko, *From Procuracy Supervision to Judicial Oversight*, STATUTES AND DECISIONS, vol. 21, no. 2, (M.E. Sharpe 2005).

<sup>4</sup> Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedure Code] RSFSR art 116.

pre-trial detention<sup>5</sup> and over the legality of searches and seizures:<sup>6</sup> "Appeals from actions of an agency of inquiry or an Investigator shall be made to a Procurator[.];<sup>7</sup> Appeals from actions and decisions of a Procurator shall be brought to a higher Procurator."<sup>8</sup> Even during the trial phase, the Procurator often had the final word over procedural legality; frequently trial courts' exercise of authority consisted merely of rubberstamping Procuratorial decisions.<sup>9</sup>

Judicial Oversight first entered Russian procedure after the Soviet collapse, when the Constitutional Court extended supervisory power over preliminary investigations to the courts.<sup>10</sup> In 1993 the new Russian Constitution declared that "judicial proceedings shall be conducted based on adversarial principles and equality of the parties."<sup>11</sup> In 1999 the Constitutional Court found the Constitution as granting individuals a right to appeal state preliminary investigation actions that substantially restricted their rights and freedoms. Then in 2001, with the passing of the Criminal Procedure Code of the Russian Federation, the legislature adopted Judicial Oversight principles directly into the Code of Criminal Procedure. In addition to courts expanding their jurisdiction to hear appeals, they were now required to authorize key state actions during the preliminary investigation, such as preliminary detentions and searches and seizures.<sup>12</sup>

Although the new Criminal Procedure Code's reforms also took away the Procurator's final word over the legality of investigative actions, these reforms also worked to consolidate the Procurator's powers over the investigative process from the perspective of the state: Procurators were given more powers over the actions of Investigators and inquiry officials, in that a criminal case could no longer be opened without an approval of the Procurator.<sup>13</sup> Following a Procurator's consent, preliminary investigation was to be conducted as directed by the

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<sup>5</sup> William Burnham and Jeffrey Kahn, *Russia's Criminal Procedure Code Five Years Out*, REVIEW OF CENTRAL AND EAST EUROPEAN LAW 33 (2008) I-93, at § 2.2, cites to UPK RSFSR arts. II, 89, 96 and 97.

<sup>6</sup> UPK RSFSR arts. 167, 168 and 218-220.

<sup>7</sup> UPK RSFSR art. 218.

<sup>8</sup> UPK RSFSR art. 220.

<sup>9</sup> Stephen C. Thaman, *The Nullification Of The Russian Jury: Lessons For Jury-Inspired Reform In Eurasia And Beyond*, 40 CORNELL INT'L L.J. 355, 357 (2007).

<sup>10</sup> A. Khaliulin and V. Nazarenko at 31.

<sup>11</sup> Burnham at § 2.2, citing to Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 123(3).

<sup>12</sup> Authorizations are required for detentions exceeding 48 hours and searches of residences, and of individuals when not incident to arrest. For detentions *see* Burnham and Khan at p. 11, citing to Ugolovno-Protssessual'nyi Kodeks [UPK] [Criminal Procedure Code] art. 10 [1]. For searches and seizures *see* Burnham at p. 46, citing to UPK Art. 29 [2]. For appeals *see* Khaliulin and Nazarenko at 32, citing to UPK art. 125.

<sup>13</sup> Burnham at § 2.2, citing to UPK art. 146.

Procurator.<sup>14</sup> A Procurator’s consent was also required prior to an Investigator’s petition to the courts in regards to court-authorized searches and pre-trial detention.<sup>15</sup>

The 2001 Code’s break with the Soviet model can be seen as taking away most of the Procurator’s power over the determination of the legality of the preliminary investigation and replacing it with the responsibility for that legality from the perspective of the state.

### **Preliminary Investigation in Russia**

The unique mechanics of the Russian preliminary investigation procedure can be clarified through a contrast and comparison with the French system that shares common origins with Russian procedure.

Under the 2001 code, the Russian preliminary investigation begins with a Procurator’s affirmation of an opened case by an Investigator or an Inquiry Official.<sup>16</sup> It ends after an “accusatory conclusion” – *obvintelnoe zaklyuchenie* is drawn up by an Investigator/inquiry official and submitted to the Procurator for review.<sup>17</sup> This consists of a review of the completeness of the investigation, a legality check on the process of the compilation of the criminal case, and an evaluation of the case’s ability to support an accusation in court.<sup>18</sup> Such review normally culminates in an equivalent to an indictment, when the Procurator certifies the case and forwards it to the court.<sup>19</sup>

The French investigation begins with an opening of the case by the police and the notification of the Procurator. French procedure directs that the Procurator oversee the initial investigation - the *enquete*.<sup>20</sup> Following the *enquete* the Procurator asks the Investigating Judge to begin and execute the official preliminary investigation, the *instruction preparatoire*.<sup>21</sup> After the *instruction preparatoire* is concluded, the Procurator asks the judge to certify the preparatory stage and forward the matter for an indictment.<sup>22</sup>

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<sup>14</sup> UPK art. 146.

<sup>15</sup> See art. 37 UPK (rewritten 6/5/2007).

<sup>16</sup> A. SMIRNOV AND K. KALINOVSKI, UGOLOVNI PROCESS, [THE CRIMINAL PROCESS] 351 (Knorus 2008).

<sup>17</sup> *Id.* at 467.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 467 to 468

<sup>20</sup> *Id.* at 350.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*; For detailed account of French preliminary investigation see Bron Mckillop, *Anatomy of a French Murder Case*, 45 AM. J. COMP. L. 527, 527 - 535 (1997).

Through the comparison it can be seen that in the post-2001 Criminal Procedure Code of the Russian Federation, the distinct French roles of the Procurator and the Investigative Judge were embodied in the sole Russian Procurator. The French division of labor is consistent with the principle of *ne procedat judex ex officio* – “one who investigates must not be the one to accuse.”<sup>23</sup> It must be noted that the 2001 Code’s reforms--in conforming to adversarial principles--took away the Procurator’s judicial functions, yet--in violation of *ne procedat judex ex officio*--gave the Procurator a bigger role in the beginning of the investigative process by providing for an approval of opened cases.<sup>24</sup>

Another difference between the Russian and the French system is the Russian provision for different types of investigative procedure for crimes of differing severity. Inquiry, or *doznanie*, is a simplified type of investigation that is performed on crimes of lowest and moderate severity.<sup>25</sup> *Doznanie* is performed by Inquiry Officials; in Russia, the term Investigator is reserved solely for officials that perform the full formal preliminary investigation.<sup>26</sup> Crimes investigated by such a simplified form of investigation are considered to be less complex and to pose less danger to society than those investigated through preliminary investigation.<sup>27</sup> Crimes such as assault,<sup>28</sup> battery,<sup>29</sup> violation of parental duties,<sup>30</sup> theft,<sup>31</sup> criminal fraud,<sup>32</sup> and animal cruelty<sup>33</sup> belong to this category. The term *doznanie* can be translated as “pre-knowing.”<sup>34</sup> Its origin lies in its initial conception as a stage that precedes the preliminary investigation stage through which the majority of the information gathering is conducted.<sup>35</sup> In France this stage is known as the *enquete*; it is conducted by the police, and it precedes the preliminary investigation conducted by the investigating judge.<sup>36</sup> In Russia this stage came to

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<sup>23</sup> Carlo Guarnieri, *Judicial Education as a Support to Judicial Independence and Major Justice Reform, in The Second International Conference on the Training of the Judiciary: Judicial Education in a World of Challenge and Change*, Ottawa, November 3rd, 2004, [www.nji.ca/nji/internationalforum/Guarnieri.pdf](http://www.nji.ca/nji/internationalforum/Guarnieri.pdf).

<sup>24</sup> Burnham at § 2.2.

<sup>25</sup> SMIRNOV AND KALINOVSKI, CRIMINAL PROCESS at 352, citing to UPK art. 150.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*; A. Smirnov and K. Kalinovski, KOMENTARI K UGOLOVNO-PROSESSUALNOMU KODEKSU ROSSII, POSTATEINI, [PER STATUTE, COMMENTARY TO CRIMINAL PROCEDURE CODE OF RUSSIA] 609 – 610 (Prospect 2008).

<sup>28</sup> Ugolovnyi Kodeks [UK][Criminal Code] art. 112.

<sup>29</sup> UK art. 115.

<sup>30</sup> UK art. 156.

<sup>31</sup> UK art. 158.

<sup>32</sup> UK art. 159.

<sup>33</sup> UK art. 245.

<sup>34</sup> *Doznanie* – pre-knowing, *do* – pre and *znanie* – knowing.

<sup>35</sup> SMIRNOV AND KALINOVSKI, CRIMINAL PROCESS at 354.

<sup>36</sup> SMIRNOV AND KALINOVSKI, CRIMINAL PROCESS at 350.

supplant the preliminary investigation for lesser-severity crimes.<sup>37</sup> As in France it is conducted mainly by the police, as the majority of inquiry officials in Russia are employees of *militia*, a branch of the Ministry of Internal Affairs, which constitutes the regular Russian police force.<sup>38</sup> The full preliminary investigation is conducted on the rest of the crimes, the ones considered to be the most severe.<sup>39</sup>

Another aspect of Russian procedure that can be contrasted with regular law enforcement as it is preformed in France is the jurisdiction of various investigative agencies over various types of crimes.<sup>40</sup> This concept is analogous to the divisions in jurisdictions of various federal investigative agencies in the United States, such as the FBI, the DEA and the ATF. In Russia it is known as investigative jurisdiction.<sup>41</sup> There are two types of investigative jurisdictions: subject matter and territorial.<sup>42</sup> Subject matter jurisdiction controls which investigative agency has jurisdiction over a type of crime, while territorial investigative jurisdiction controls which regional branch of an investigative agency covers the investigation for a specific instance of a crime.<sup>43</sup>

Note that “investigative jurisdiction” is a separate concept from the kind of investigation performed. Few exceptions aside, most investigative agencies perform both inquiries and preliminary investigations.<sup>44</sup> The Procuracy does not have an inquiry branch; its Investigators perform inquiries under exceptional circumstances.<sup>45</sup> Agencies such as MVD, FSB, and FSKN handle a full range of crimes. Some narrowly focused agencies handle inquiry investigations of specific types of crimes--such as customs violations and fire safety--letting the bigger agencies handle the more serious violations in these categories.<sup>46</sup>

The majority of formal preliminary investigations are handled by Investigators of the Ministry of Internal Affairs or MVD.<sup>47</sup> *Militia* Investigators handle such crimes as grievous

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<sup>37</sup> SMIRNOV AND KALINOVSKI, CRIMINAL PROCESS at 354.

<sup>38</sup> See SMIRNOV AND KALINOVSKI, CRIMINAL PROCESS at 358.

<sup>39</sup> SMIRNOV AND KALINOVSKI, CRIMINAL PROCESS at 352

<sup>40</sup> SMIRNOV AND KALINOVSKI, CRIMINAL PROCESS at 356, citing to UPK art. 151.

<sup>41</sup> See UPK art. 151.

<sup>42</sup> SMIRNOV AND KALINOVSKI, CRIMINAL PROCESS at 357.

<sup>43</sup> *Id.*

<sup>44</sup> See SMIRNOV AND KALINOVSKI, CRIMINAL PROCESS at 357.

<sup>45</sup> These circumstances concern the personal jurisdiction exception, explained in detail below. Procuracy Investigators perform inquiry investigations on cases they have personal jurisdiction over. UPK art. 155 [1] [b].

<sup>46</sup> See UPK art. 151.

<sup>47</sup> SMIRNOV AND KALINOVSKI, CRIMINAL PROCESS at 357.

bodily harm committed while under excitation and in self defense,<sup>48</sup> statutory rape and molestation,<sup>49</sup> burglary,<sup>50</sup> theft, fraud and racketeering as related to organized crime,<sup>51</sup> money laundering,<sup>52</sup> sale or purchase of illegally obtained goods,<sup>53</sup> and some contraband related crimes.<sup>54</sup>

Two other notable investigative agencies are the FSB and the FSKN. The Federal Security Service also known as FSB is the successor to the Soviet KGB. Its Investigators handle crimes that can be conceived of as perpetrated against the state as a whole rather than a specific individual. The FSB handles crimes such as contraband activity by state officials<sup>55</sup> and those involving terrorism<sup>56</sup> and espionage.<sup>57</sup> FSKN handles investigations related to drug enforcement, specifically crimes relating to the possession, manufacture, or sale of drugs<sup>58</sup> and drug precursors.<sup>59</sup>

In terms of subject matter jurisdiction, Investigators of the Procuracy handle crimes that are considered to pose the greatest threat to society, such as murder, kidnapping, and rape.<sup>60</sup> They are also responsible for a wide range of cases falling under their control, under the personal jurisdiction exception to the investigative jurisdiction rules.<sup>61</sup> Through personal jurisdiction, the Procuracy is assigned investigations of people whose official immunity status entitles their investigations to greater oversight in the chain of command, depending on their status. Individuals entitled to official immunity include members of the Federation Council (upper house of the legislature), State Duma (lower house of the legislature), a Federal Judge or a Juror, a Procurator, an Investigator, a lawyer, or the President of the Russian Federation.<sup>62</sup> Procuracy Investigators also handle investigations dealing with crimes committed by agents of the other

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<sup>48</sup> UK arts. 113 and 114 respectively.

<sup>49</sup> UK arts. 134 and 135 respectively.

<sup>50</sup> UK art. 151.

<sup>51</sup> UK arts. 158, 151 and 163 respectively.

<sup>52</sup> UK art. 174.

<sup>53</sup> UK art. 175.

<sup>54</sup> UK art. 188 [1].

<sup>55</sup> UK 188 [2]

<sup>56</sup> UK arts. 205, 205.1, 205.2.

<sup>57</sup> UK arts. 275, 276, 283.

<sup>58</sup> UK arts. 228 [2], 228.1.

<sup>59</sup> UK art. 232 [2].

<sup>60</sup> SMIRNOV AND KALINOVSKI, CRIMINAL PROCESS at 357, citing UPK art. 151. Murder can be found in UPK under art. 105, kidnapping under art. 126, rape under art. 131.

<sup>61</sup> UPK art. 155 [1] [b].

<sup>62</sup> Following #87-Φ3, Investigative Committee's Head's approval is required for opening of criminal cases against individuals with highest form of official immunity. UPK arts. 447, 448.

investigative agencies that are related to their official duties.<sup>63</sup> <sup>64</sup> The final key exception is universal jurisdiction through which a Procurator can withdraw any case from another agency's jurisdiction and give it to a Procuracy Investigator.<sup>65</sup>

## **The 2007 Reforms**

In 2007, Vladimir Putin's last year in power as the President of the Russian Federation, and the year during which the election determining his successor was held, saw the first major reforms in Russia's Code of Criminal Procedure since the implementation of the 2001 code. #87-Φ3 rearranged the division of functions between an Investigator and a Procurator during the preliminary investigation and created the Investigative Committee within the Procuracy. Signed in early June, the law was due to come into effect in 90 days.<sup>66</sup>

#87-Φ3 takes control over the preliminary investigation away from the Procurator.<sup>67</sup> The Procurator's consent to the opening of a criminal case has been limited to a right to refusal within 24 hours of receiving a resolution of the opening of the case, which is to be sent by the Investigator immediately after opening. Refusal can be made on the grounds that the opening of the case is illegal or that it is unsupported by evidence; there are no extensions of the 24-hour window.<sup>68</sup> The Procurator loses all input on the handling of the case by the Investigator. All of the Procurator's powers over the direction of the case, such as his consent of Investigator's petitions for actions requiring court authorizations have been transferred over to the Head of the Investigative Body.<sup>69</sup> The only way a Procurator can influence the direction of the investigation is through a refusal to certify the Investigator's accusatory conclusion. Upon refusal of the case, it is sent back for further investigation instead of being forwarded to the courts for trial.<sup>70</sup>

#87-Φ3 also creates the Investigative Committee Under the Procuracy of the Russian Federation. The Investigative Committee is the hierarchy of investigative bodies within the

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<sup>63</sup> UPK art. 155 [1][c].

<sup>64</sup> SMIRNOV AND KALINOVSKI, CRIMINAL PROCESS at 359. The only exception to Procuracy's personal jurisdiction concerns the above-mentioned types of individuals that are accused of espionage related crimes; those cases are assigned to FSB Investigators. *Id.*

<sup>65</sup> SMIRNOV AND KALINOVSKI, CRIMINAL PROCESS at 359, citing UPK art. 37 [2] [12].

<sup>66</sup> See note 1.

<sup>67</sup> See UPK art. 144.

<sup>68</sup> UPK art. 146 [4].

<sup>69</sup> UPK art. 39.

<sup>70</sup> UPK art. 146.

Procuracy. #87-Φ3 strips the control over the preliminary investigation from the Procurator and hands it over to the Head of an Investigative Body.<sup>71</sup> All decisions of an Investigator in regards to a preliminary investigation are subject to the approval of the Head of the Investigative Body. An Investigator can appeal the head's decisions to the head of the higher order investigative body.<sup>72</sup> This schema combined with the facts that (a) the head of the hierarchy, the First Assistant to the Procurator General is nominated by the president and can be appointed and removed only through legislation by the Federation Council,<sup>73</sup> (b) the First Assistant will have full discretion as to the appointment of his subordinates, and (c) the fact of the Committee's financial independence<sup>74</sup> makes the Investigative Committee a part of the Procuracy in name, but an independent investigative agency in function. The only input that a Procurator has into a preliminary investigation aside from his ability to deny certification of an Investigator's accusatory conclusion is through his oversight function as a guarantor of citizens' rights. This oversight is greatly diminished since the Procurator has lost all control over the course of the investigation. Whenever the Procurator is put on notice of a rights violation during an investigation, his or her only option is to notify the Investigator of the violation and to appeal to the Head of the Investigative Body if the Investigator's response is unsatisfactory.<sup>75</sup> The appeals can be made all the way up to the Procurator General, although the Procurator must wait for an unsatisfactory response prior to appealing to the next ranking head. The only temporal limitation on a response to a Procurator's appeal is that it be made within a reasonable time.<sup>76</sup>

It must be noted that these reforms concerned the full formal preliminary investigation only, leaving Procuratorial control of inquiry intact.<sup>77</sup>

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<sup>71</sup> UPK art. 39.

<sup>72</sup> *Id.* at [3].

<sup>73</sup> Ruslan Kadrmatov, *Sledstvie Veli ... Genprokuraturu RF Lishili chasti Polnomchii ee Razdvoili* Investigation Was Led By ... [*The Procuracy of RF is Stripped From Some of its Obligations and is Split in Half*], LENTA.RU, May 11, 2007, <http://Lenta.ru/articles/2007/05/11/sledstvie/>.

<sup>74</sup> Policy Paper, Stephen Blank, *THE PUTIN SUCCESSION AND ITS IMPLICATIONS FOR RUSSIAN POLITICS*, p. 34 (Institute for Security and Development Policy, February 2008).

<sup>75</sup> UPK art. 37 [6].

<sup>76</sup> Aleksandr Aleksandrov, *Zhivoi Ugolok: Uchenni Disput Pro Prokurorski Nadzor ei Sledstvenni Komitet*, [*Animal Corner: Academic Dispute Over Procuratorial Oversight And The Investigative Committee*], <http://iuaj.net/modules.php?name=News&file=article&sid=372&mode=&order=0&thold=0>, retrieved on 6/02/2009.

<sup>77</sup> Kadrmatov, May 11, 2007.

## **Raison d'Être and/or Politics**

The legislation's drastic impact on the criminal process in Russia and the speed with which it was implemented (the legislature first heard the law at the end of March with Investigators stopping taking Procurators orders by early September of the same year) raised eyebrows in both Russian media and western academic press.<sup>78</sup>

Russia's mainstream media was quick to point out that the legislation did not fully conform to the motivations underlying its existence. Reform of the investigative process has been brought up before, but such reform saw a creation of a unified investigative service, one that would subsume the different agencies, such as MVD, FSB and FSKN, in order to address the problems brought about by their overlapping jurisdictions. While this law was officially characterized as a first step towards such a service, by taking away Procuratorial control over the opening and direction of criminal cases in the investigative agencies, it was actually seen as playing a dividing rather than a unifying function. As a result, the investigative agencies saw a gain in independence and not the other way around.<sup>79</sup> Also, the official goal of putting a check on the Procuracy's control over both the investigative and the accusatory parts of the criminal process was contrasted with the legislation's effect of freeing the investigations agencies of legal oversight by the Procuracy and the current inability of the courts to implement judicial oversight.<sup>80</sup> The commentators were further puzzled by the Procurator General's official support of the legislation despite its weakening the Procuracy's strength as an institution and the widespread discontent within the Procuracy.<sup>81</sup> Due to the above inconsistencies the mainstream media saw political considerations as being primary to the official explanations put forth by the administration and in the legislature.

Aleksandr Bastrykin, who was Putin's university classmate, and who indeed became the head of the Investigative Committee, was seen as the primary candidate for the position. With that nomination individuals with personal relations to Putin would be at the head of every one of Russia's power structures ensuring stability during the transfer to the new presidency. Once

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<sup>78</sup> The legislation was set to take effect 90 days (*see* note 1) after passing. To determine whether this is eyebrow raising quick, contrast to the 2001 Code, which was passed in December 2001 and became effective on July 1<sup>st</sup> of the next year (around 180 days). <http://www.consultant.ru/online/base/?req=doc;base=LAW;n=70219#p73> (Russian Legal Database, link is to law implementing the 2001 code).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

Putin's classmate Bastrykin became the head of the Investigative Committee under the Procuracy, he joined Putin's ex-FSB colleagues, Nicolai Patrushev and Victor Cherkesov, who headed the FSB and the FSKN respectively, Putin's university classmate Aleksey Anichin, who headed the MVD, and Andrei Belianinov, Putin's colleague at the KGB in East Germany, who headed the Federal Customs Service.<sup>82</sup>

The only two Western academic publications to address the subject saw #87-Φ3 as primarily politically motivated. In *Law As Politics: The Russian Procuracy And Its Investigative Committee*, Ethan Burger and Mary Holland addressed the committee as "a creature of politics, not law."<sup>83</sup> The authors saw Vladimir Putin, throughout his career, as using the Procuracy as an instrument for consolidation of wealth and political power. In a realm permeated with corruption, Putin has wielded the Procuracy's power to selectively prosecute regional politicians as enforcement of his drive to yoke Russia's federal regions and municipalities under his vertical axis of power.<sup>84</sup> Similarly, the Procuracy has been used to perform massive wealth transfers through nationalization and re-sale of *illegal* assets. The authors saw Yukos affair as the most notable example of this policy, where at the time, Russia's richest man, Mikhail Khodorkovsky, was imprisoned, with his company Yukos declared bankrupt and its \$100 billion in assets resold to the highest bidder.<sup>85</sup> In Burger's and Holland's opinion, the creation of the Investigative Committee and the naming of Aleksandr Bastrykin to its head was a move that further streamlined the president's control of the political investigations process by bypassing Yuri Chaika, the Procurator General.<sup>86</sup>

In THE PUTIN SUCCESSION AND ITS IMPLICATIONS FOR RUSSIAN POLITICS, Stephen Blank saw the decision to cut out the Procurator General out of the investigations process as a move

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<sup>82</sup> Kadmatov, May 11, 2007.

<sup>83</sup> Ethan Burger and Mary Holland *Law As Politics: The Russian Procuracy And Its Investigative Committee*, 2 COLUM. J.E. EUR. L. 143, 185 (2008).

<sup>84</sup> "The Procuracy selectively prosecuted corrupt officials whom the government disfavored. Vladivostok's former mayor fits this description, as does the mayor of Volgograd. By contrast, Moscow Mayor Yuri Luzhkov is well placed enough that he has engaged in extremely questionable activities more than ten years without legal challenge (citations omitted)." *Id.* at 170.

<sup>85</sup> The Yukos expropriation is especially important because the assets were so enormous; the Presidential Administration's and Procuracy's methods against Yukos, its owners and employees, so severe; and the prosecutions have had such symbolic impact both in Russia and abroad. Former economic adviser, Andrei Illarionov, characterized the seizure and reselling of Yukos' assets to Rosneft as "the biggest scam of 2006." He said, "this falls under the category of what people call the sale of stolen property." These actions against Yukos undermined property rights, discouraged investment and sparked capital flight. (citations omitted) *Id.* at 175.

<sup>86</sup> *Id.* at 185.

motivated by power struggles within Kremlin's *siloviki* clans. *Siloviki* literally translates to "strongmen" and refers to heads of power structures, such as the investigative agencies and the Procuracy, that make up rival Kremlin clans. Bank and other commentators saw the clans as an instance of a feudal system of power based on political patronage and control of rent-generating governmental institutions. Previously this system has been implemented through the workings of the Communist Party, and prior to that, through intrigue within the Tsar's courts. Succession has always been a problematic aspect of such systems, as it realigns the pyramid of power structured on personal patronage.<sup>87</sup> Bank viewed the appointment of an individual loyal to Putin as the head of the Investigative Committee as a hedging of Putin's and his protectees' positions within his successor Medvedev's administration against political ambitions of rival *siloviki* through the threat of political investigation and prosecution.<sup>88</sup>

### **The Verifiability Principle**

The Verifiability Principle holds that a statement is only meaningful if it is tautological or if it is empirically verifiable.<sup>89</sup> The problem with political rationalizations, such as the ones presented for #87-Φ3 above, is that without reliable sources of information, such as documents made public through the Freedom of Information Act in the United States, these rationalizations are more akin to axioms rather than empirical statements. The premises are to be assumed for the validity of the argument. Like the problem of evil in theology, where the presence of cruelty in the world can either be seen as a logically inconsistent with the existence of God or, instead, as a necessary hardship provided by a benevolent deity to promote spiritual growth, the validity of such rationalizations can neither be confirmed or denied through observation. Because #87-Φ3 was passed in a climate of a *siloviki* struggle for the incumbent presidency its *raison d'etre* must be necessarily connected to that struggle, with observations consistent with such a rationalization proving the point, and with contrary observations instead evidencing miscalculation on the behalf of the *siloviki*.

Every observation supporting a political rationalization can be countered with an equally valid counter-observation. The Russian media's speculation that the Investigative Committee's

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<sup>87</sup> Bank, p. 1-8.

<sup>88</sup> *Id.* at 24-25.

<sup>89</sup> Encyclopedia Britannica, <http://www.britannica.com/EBchecked/topic/626091/verifiability-principle>, retrieved on May 4, 2009.

formation and heading by Aleksandr Bastrykin was motivated by Putin's desire to stabilize the power structures through the installment of his university classmate<sup>90</sup> can be countered by the destabilizing results of these events. Soon after taking control of the Investigative Committee, Aleksandr Bastrykin proceeded to make two high-profile arrests and detentions--that of General Bulbov, the right hand man to FSKN head Victor Cherkosov,<sup>91</sup> and that of Sergey Storchak, the Assistant Minister of finances. The Procuracy publicly questioned and opposed the arrests, both in the media and in the courts.<sup>92</sup> In regards to the reaction by FSKN, Cherkosov publicly denounced his first general's arrest and blew the whistle on the *silovki's* struggle for power, which up until that point, no official had ever been publicly acknowledged.<sup>93</sup>

If the Kremlin's intent was to stabilize the relations between the power structures, then this scheme can be considered a failure. As the Investigative Committee's actions saw an unraveling of an internal power struggle into a full-blown war waged in the media, the courts and the streets.<sup>94</sup>

Burger and Holland saw the Bulbov and Storchak affairs as further proof of their thesis that "the Russian Presidential Administration under former President Vladimir Putin misused the Procuracy for political purposes."<sup>95</sup> The Bulbov and Storchak affairs are addressed in detail and presented as continuations of the Kremlin's use of criminal investigations for political purposes. Yet, the details of these affairs evidence chaos rather than orchestrated manipulation for political

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<sup>90</sup> The fact that Bastrykin was Putin's university classmate is not indicative of anything in particular. Chaika who's authority under this theory Bastrykin was supposed to undercut can also be seen as connected to Putin, as it was reported that it was Putin then acting as Prime Minister who championed Chaika for the position of Minister of Justice in 2001 and later named him to the Procurator General position as president in 2006. Lenta.ru, <http://Lenta.ru/lib/14159398/>, retrieved on 6/4/2006.

<sup>91</sup> Burger and Holland see this arrest as well as murder of two individuals connected to the FSKN as payback by the FSB for FSKN's involvement in the 'three whales' scandal during which high ranking FSB officials were implicated in smuggling and money laundering. Burger and Holland at 172, 186.

<sup>92</sup> In regards to both Bulbov and Storchak's arrests, the Procuracy filed petitions for dismissal. Burger and Holland at 185 – 191; Aleksandr Aleksandrov, *Zhivoi Ugolok: Mezhdru Tuchami ei Morem Gordo Reet Tov. Bulbov*, [*Animal Corner: Between a Rock and a Hard Place, Mr. Bulbov Stands Firm*], <http://iuaj103.valuehost.ru/modules.php?file=article&name=News&sid=340> retrieved on 6/02/2009.

<sup>92</sup> Kadrmatov, May 11, 2007. Two months after the creation of the Investigative Committee the Procuracy relying on its function as the gaurantor of citizens rights and overseer of the legality of the criminal process, launched a wide scale audit into Investigative Committee's compliance with the law. Burger and Holland along with Russian commentators see this audit as countermove in the Procuracy's struggle against the Investigative Committee. Burger and Holland at 188.

<sup>93</sup> Victor Cherkosov, Warriors Must Not Turn into Traders, Kommersant, <http://www.kommersant.ru/doc.aspx?DocsID=812840>, trans. at [http://www.robortamsterdam.com/2007/10/viktor\\_cherkosov\\_on\\_the\\_spy\\_wa.htm](http://www.robortamsterdam.com/2007/10/viktor_cherkosov_on_the_spy_wa.htm), retrieved on 6/4/2009.

<sup>94</sup> See n. 87 and 88.

<sup>95</sup> Burger and Holland at 143.

gain. In terms of institutional control, #87-Φ3 is a destructive rather than a consolidating force. The investigative organs of the various power structures no longer need the Procuracy's consent to open criminal cases; consequently these structures become fully independent in terms of the legality of their institutional actions. True, in terms of investigative jurisdiction, the Investigative Committee retains the upper hand through personal and universal jurisdiction exceptions.<sup>96</sup> These exceptions make the Investigative Committee the preferred method for political investigation, as personal jurisdiction gives it control over investigation of individuals with official immunity and of agents of the power structures, while universal jurisdiction reserves for the Investigative Committee the right to investigate any case period.<sup>97</sup> Yet as a political weapon, the Investigative Committee will only give you so much, as it is still up to the Procuracy to prosecute the case in court. As of today, neither Storchak's and Bulbov's cases have yet to proceed to the trial phase, approximately one and a half years after their arrests.<sup>98</sup> This can be compared to Khodorkovsky, cited by Burger and Holland as an earlier victim of the Kremlin's abuse of its powers, who was convicted and sentenced in the same period of time, under the supervision of a unified Procuracy.<sup>99</sup>

The fact that #87-Φ3 splits the previously united investigative and accusatory powers makes both the Investigative Committee and the Procuracy a *per se* less-effective political weapon than a unified Procuracy. By creating the Investigative Committee, #87-Φ3 creates a new institutional player whose concerns need to be accommodated prior to its participation in the implementation of any political objective. While this does not mean that #87-Φ3 is indeed a

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<sup>96</sup> It must be pointed out that when it comes to jurisdiction #87-Φ3 is still deferential to the Procurator under some circumstances. Per UPK art. 37 [2] [12] cases transferred between investigative agencies in accordance with subject matter and personal jurisdiction are to be transferred through a Procurator. Also per same section, under universal jurisdiction a Procurator has a power to withdraw any case from an investigative agency and transfer it over to the Investigative Committee. It is interesting how Storchak's case got in the hands of the Investigative Committee without the support of the Procuracy with whom the committee was feuding. Storchak was charged with attempt to commit large scale fraud falling under art. 159 [4] of the Criminal Code. Per art. 151[2][3] this crime falls into the subject matter jurisdiction of the MVD. The Investigative Committee does not have personal jurisdiction per [2][1][b] of the same art. as Storchak is not entitled to official immunity, or per [2][1][c] as Storchak is not an agent of an investigative agency or other agencies falling under the subsection. This means that the Committee got the case through universal jurisdiction which requires a Procurator to transfer the case to the Investigative Committee body.

<sup>97</sup> For limitations on this right *see* note 96.

<sup>98</sup> Storchak was arrested on 15<sup>th</sup> of November, 2007. LENTA.RU, Sergei Storchak, bio page, <http://Lenta.ru/lib/14185567/>, retrieved on May 5, 2009. Bulbov was arrested on 5<sup>th</sup> of October, 2007. LENTA.RU, Aleksandr Bulbov, bio page, <http://Lenta.ru/lib/14184728/>, retrieved on May 5, 2009.

<sup>99</sup> Khodorkovsky was arrested on 25<sup>th</sup> of October, 2003 and convicted and sentenced to 9 years on 31<sup>st</sup> of May, 2005. LENTA.RU, Mikhail Khodorkovsky, bio page, <http://Lenta.ru/lib/14159417/full.htm>, retrieved on May 5, 2009.

creature of law rather than politics, its creation is not an elegant fit into Burger's and Holland's thesis either.

As to Bank, his thesis suffers from the same problem. In his paper, Bank refers to the creation of the Committee as the "icing on the cake" of Kremlin's machinations, aimed at insuring the survival of vested players through the succession process: "[G]iven Bastrykin's personal loyalty to Putin, it seems clear that Putin is manipulating the 'power vertical' to ensure that he and his appointments hold on to power in Medvedev period by upholding the threat of investigation and prosecution over all officials and politically interested personages."<sup>100</sup> Considering #87-Φ3's effects on the Criminal Procedure Code, such a statement would have been more appropriate had the legislature started out with two divided institutions and fused them into the same organ under the control of Putin's longtime colleague Procurator General Yuri Chaika.<sup>101</sup> Because, as the head of the Investigative Committee Bastrykin has no prosecution power what so ever, it seems that Putin and his protectees would have been better hedged under Chaika's supervision of a unified Procuracy.

### **Procedural Considerations**

Leaving politics aside, in terms of procedural innovation, #87-Φ3 can be seen as another step in Russia's transition from Procuracy Supervision to Judicial Oversight initiated with the collapse of the Soviet Union and enshrined in the 2001 Criminal Procedure Code.<sup>102</sup> While #87-Φ3 retains art. 37's provision that the Procurator shall "exert supervision over the procedural activity of the bodies of inquiry and of the bodies for the preliminary investigation" as to preliminary investigations, this oversight loses any vestiges of judicial functions that it had retained from Procuratorial Supervision under the Soviet model. The Procurator can no longer determine the legality of an Investigator's action; he can only voice his objections and hope that they are considered in the investigative organ. While it is true that through this reform a private party loses a practical avenue to voice its objections over the Investigator's actions, this is done to steer such complaints towards the courts, which is the appropriate avenue for resolution of such disputes. Considering the current accusatory functions of the Procurator as well as historic

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<sup>100</sup> Bank at 24 - 25.

<sup>101</sup> See note 86.

<sup>102</sup> See *supra* The 2001 Code section of this paper.

functions of this institution in the Russian society, where its objectives have been and still are intertwined with the objectives of the state, a Procurator is not capable of exercising true due diligence when arbitrating private parties' appeals of Investigators actions.<sup>103</sup> According to pre-#87-Φ3 statistics for 2007, courts remedied a greater fraction of private complaints than the Procurators.<sup>104</sup> In terms of proportion, the difference between the two is not great; Procurators remedied every sixth objection filed by a private party in regards to preliminary investigations, whereas the courts remedied every fifth. Given the conditions in Russia, where the courts are still often overly deferential to the state,<sup>105</sup> the proximity of the statistic is indicative of the lacking of objectivity in the courts and not the other way around. While this is a problem of its own, it does not mean that the Procurator is a more proper venue for such appeals.<sup>106</sup>

#87-Φ3 can also be seen as a step away from the 2001 Code's violation of the principle that holds that investigation and accusation should not be vested in the same body - *ne procedat judex ex officio*. Under this principle, a prosecutor's desire to obtain a conviction is seen as interfering with the impartial truth-finding functions of an Investigator.<sup>107</sup> Russian commentators saw the Procurator's release from investigative functions as allowing for a more efficient oversight of the legality of Investigators actions through the right to deny certification to investigations deemed as illegal. In this sense, #87-Φ3 can overcome institutional biases that could have previously contributed to a Procurator overlooking such violations.<sup>108</sup>

The segregation of branches is also pertinent to the problem of corruption, as criminal investigation is not only a tool used by the politically powerful as per Burger and Holland, but

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<sup>103</sup> See SMIRNOV AND KALINOVSKI, COMMENTARY TO THE UPK at 134.

<sup>104</sup> Mikhail Silnov, *Sledstvenni Komitet: Pervie Itogi Reformirovaniia Sledstvia, [Investigative Committee: First Conclusions in Regards to Investigative Reforms]*, <http://blogs.privet.ru/community/femida/49188298>, retrieved on May 7, 2009, citing to statistics from Supreme Court of the Russian Federation website at [http://www.cdep.ru/statistics.asp?search\\_frm\\_auto=1&dept\\_id=8](http://www.cdep.ru/statistics.asp?search_frm_auto=1&dept_id=8), retrieved on May 7, 2009.

<sup>105</sup> Stephen C. Thaman, *The Nullification of the Russian Jury: Lessons For Jury-Inspired Reform in Eurasia and Beyond*, 40 CORNELL INT'L L.J. 355 (2007); Yelina Kvurt, *Selective Prosecution In Russia – Myth or Reality?*, 15 CARDOZO J. INT'L & COMP. L. 127 (2007); Jeffrey Kahn, *Vladimir Putin and the Rule of Law in Russia*, 36 GA. J. INT'L & COMP. L. 511.

<sup>106</sup> Russian commentators point to the greater volume of appeals heard by Procurators than courts, 521,480 to 43,903 in 2007 arguing that following #87-Φ3 as the sole practical avenue for these complaints the courts will not be able to handle the same volume as the Procurators. See *supra* Silnov; SMIRNOV AND KALINOVSKI, COMMENTARY TO THE UPK at 134 citing to Obshestvenni Verdict, 'Public Verdict,' 6/28/2007, <http://control.hro.org/okno/pr/2007/06/28.php>.

<sup>107</sup> *Ne procedat judex ex officio*, is implemented differently in various systems, for example, in France the prosecutor, upon finding serious presumptions that a crime has occurred, officially requests for the investigative judge to investigate it. See Bron Mckillop, *Anatomy of a French Murder Case*, 45 AM. J. COMP. L. 527, 534 - 535 (1997).

<sup>108</sup> SMIRNOV AND KALINOVSKI, COMMENTARY TO THE UPK at 134.

promotes business interests throughout the spectrum all the way down to the small business entrepreneur.<sup>109</sup> #87-Φ3 can be seen as impeding this process by increasing the scope of actors that need to be on the take.<sup>110</sup> Russian media has also speculated that the conflict between the Procuracy and the Investigative Committee is over the splitting of this “pie,” rather than the underlying political machinations.<sup>111</sup> It is interesting that the 2001 Code’s decision to bring in Procurator’s consent was also seen as motivated by anti-corruption considerations -- to curb “contracted for” case openings. The Procuracy claimed that such consent was responsible for up to 10% reduction in baseless case initiation.<sup>112</sup> Leaving Procuratorial control over the inquiry can also be seen as deference to the previous reform as inquiry officials are generally lower paid than Investigators.<sup>113</sup>

Corruption aside, if the two branches are able to resolve their conflicts, the separation of powers can result in proper checks and balances that enable each to motivate the other to properly perform their functions. Commentators have criticized Procurators for the low quality of cases presented in court.<sup>114</sup> This is often caused by poor investigations, which in turn is enabled by sympathetic courts.<sup>115</sup> As far as these problems are caused by the intermingling of the investigative, the prosecutorial, and the judicial branches, #87-Φ3 is a step towards solving these problems. The branches will not properly check each other while the Procurator identifies with the Investigator and the courts identify with the Procurator. These cross identifications would not have ceased while the Procurator performed both investigative and judicial functions. By segregating the prosecution from the investigation and by eliminating the Procurator’s vestigial judicial functions, #87-Φ3 sets up a system that is capable of proper functioning,

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<sup>109</sup> See Sergei Mihalich, Nadzor Na Oba Vashi Doma, [Oversight over both of your houses], NOVAYAGAZETA.RU, 12/20/2007, <http://www.Novayagazeta.ru/data/2007/97/>, retrieved on 6/7/2009.

<sup>110</sup> *Id.*

<sup>111</sup> See note 104.

<sup>112</sup> Burnham at 10.

<sup>113</sup> Inquiry Officials of Moscow’s GAI – Russia’s equivalent to Highway Patrol, a branch of MVD earn around 16 thousand rubles a year. <http://www.spbvoditel.ru/2009/03/23/033/>, retrieved 6/11/09. Investigators in the Investigative Committee are earning around 40 thousand rubles a year. KOMMERSANT.RU, <http://www.kommersant.ru/doc.aspx?DocsID=802110>, retrieved on 6/11/09. Although, MVD Investigators earn less than their counterparts in the Investigative Committee, many are hired while still not having completed their legal education. A recent job posting for an MVD Investigator, required that applicants to be at least completing their legal educations, offering around 25 thousand rubles a year. <http://www.funkyjob.ru/vacancy/25665268.html>, retrieved on 6/11/09. A ruble is equivalent to about \$.03.

<sup>114</sup> See Thaman at 370 – 372, note 103.

<sup>115</sup> *Id.*

whether or not this system is properly implemented is up to the officials overseeing these institutions.

## **Conclusion**

Without access to reliable sources of information, speculations about the political origins of #87-Φ3 can never be confirmed nor denied. Closer to unverifiable axioms than to empirical propositions, they are of limited academic use. However, if examined procedurally, then #87-Φ3 is consistent with a series of post-Soviet reforms moving Russian procedure closer to modern adversarial principles embraced in the West. #87-Φ3 can be conceived of as a remedy towards systemic Russian ills, such as inept preliminary investigation and biased judiciary. Whether or not #87-Φ3 can be considered to be a success, only time will tell, and will depend on the desire and effectiveness of the officials implementing it.