

Experiences of Law in Contemporary Russia

Report and analysis of a workshop held at
Wolfson College, Oxford
4 October 2012

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The Foundation for Law, Justice and Society

in association with **the Centre for Socio-Legal Studies**
and **Wolfson College, University of Oxford**

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Introduction

The third and last in the series of workshops on Russian legal culture organized by the Foundation for Law, Justice and Society was held on 4th October at Wolfson College, and focused on the lessons to be drawn from two illustrative case studies. The first, presented by Varvara Andrianova, explored how law is experienced in the lowest level of court in Russia, presided over by a Justice of the Peace. The second case study was presented by Gilles Favarel-Garrigues, who analysed how and why anti-corruption policies in Russia are instrumental at every level in the struggles for power that characterize Russian politics, economics, and society alike. After discussion, William Simons presented a general account of Russian legal culture, and Marina Kurkchiyan summarized the themes that had been developed at the previous two workshops, in order to identify from the empirical studies broader patterns in Russian legal culture.

Discussing the findings of her research, Varvara Andrianova pointed out that ordinary people in Russia tend to form a uniformly negative image of both the courts and their judges, even before they have any personal experience of the court. She also made the significant point that most people retain the negative image afterwards, regardless of how their case is treated. The reason for such a hostile presupposition is the general perception that a court is just one among many bureaucratic departments of the government. That being so, it is preordained that the outcome of any case will be determined by the success or otherwise the litigant has had in cultivating an informal relationship with the judge. The manner in which the courts are administered and run provides ample grounds to support this popular perception, since litigants are free to consult the judge at any time prior to the hearing, the hearing itself is held in a private office, and the proceedings are not recorded.

Ms Andrianova then posed the question that puzzles many researchers who inquire into Russian legal culture: if the image of the court remains negative and inspires such little confidence among

the people, why is there a steady increase in the number of cases brought to court? In answer to the question, she analysed the number of cases by the type of case, and found that the increase can be explained by the growing use of the court by government departments. They habitually resort to it as a payment collection agency for utility bills, taxes, and other debts owed to the state but which have proved difficult to collect. She added that, although one should always treat Russian statistics with caution, the evidence is strong and the pattern seems to be clear.

Referring to her separate study of the courts of Justices of the Peace in Russia, Kathryn Hendley supported some of Varvara Andrianova's observations and went on to highlight some specific aspects of the role and performance of Russian Justices of the Peace. She stressed the extreme overload of cases that judges routinely have to deal with, and the all but nonexistent legal representation of the litigants. Even in the small minority of cases in which litigants are represented through legal aid, the performance of the lawyers proves to be of low standard. In almost all cases, the judges have little alternative to expanding their role as adjudicator. They provide advice to litigants about how to shape a case and how to present it in court. In practice, the informal advisory role often degenerates into pedagogical lecturing — a Soviet legacy that continues to be practised in the Russian courts.

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Gilles Favarel-Garrigues offered his observations of legal practices from a radically different area of social relationship, exposing the complex interplay between law and power in Russia. Giving an account of the various anti-corruption and anti-money laundering policies introduced and implemented during the Putin era, he made the point that the need for these measures could not be understood merely as a product of the local legal culture. There was a need also to appreciate the impact of the international standards that Russia had to comply with, reinforced by the climate of international opinion. He noted that in response to international pressure, the Russian government had developed a considerable amount of financial intelligence and sensitive information on almost all of the major economic actors in Russia — even though this was still a time when ‘good money’ had still to be distinguished from ‘bad money’. The accumulated stock of information, together with the expert channels established in order to obtain it, had then become a powerful lever.

However, the practice of financial intelligence gathering is not confined to government. Its value is universally recognized as an effective way to destroy opponents. As a consequence, financial intelligence has been used in recent years as a weapon in power struggles at every level: between agencies within the government itself, between the regime and disobedient oligarchs, and especially between the major companies engaged in the various extractive and raw materials industries. The same weapon has now been taken up by the opposition, exemplified

by the Alexei Navalny movement. Gilles Favarel-Garrigues suggests that this development might become an interesting turn in the popular revolt against corruption.

To introduce the concluding session of the workshop, William Simons led the discussion towards a more general overview of the Russian legal culture. He suggested a series of issues that need to be addressed if law is ever to be appreciated as an unconditional social value under Russian conditions. His experience of working in the private law sector in Russia suggests that there is a lack of appreciation of law as a comprehensive body of data that has to be systematically collected and analysed. Without the widespread use and understanding of such a dataset, law appears to be a random and arbitrary event to those who experience it. The failure to treat law as a continuously evolving body of knowledge with open and universal access, under constant scrutiny and review, left Russian legal education with an outdated technique of learning. Russian law graduates are often not equipped to understand law as an intellectual enterprise in its historical context, still less to contribute to an adequate scholarly literature about it.

The workshop was brought to a close by Marina Kurkchiyan, who summarized and commented on the dominant themes that had emerged from the three workshops: how law works in contemporary Russia; what it means to the people; and why things work as they do within the courts, the legal profession, and their clients in society. ■

Experiences of Law in the Courts of Justices of the Peace

Varvara Andrianova, Centre for Socio-Legal Studies, University of Oxford

Courts of Justices of the Peace are the lowest courts in the system of justice of the Russian Federation. They hear over 90 per cent of all cases brought to courts in Russia, including civil, criminal, and administrative matters. The jurisdiction of these courts extends across the cases that do not involve complex legal matters and can be resolved by the parties and the judges without the presence of attorneys.

My research was conducted in Russia in Summer 2010, Autumn 2011, and Summer 2012. This qualitative study was designed to gain an in-depth understanding of how Russian people interact with courts of Justices of the Peace. The primary questions pursued during this research were: how do people perceive the most accessible courts in Russia; how do they describe their interaction with courts (documentation, procedure, accessibility); how do people prepare for court hearings; and what do they think about Justices of the Peace? Open-ended interviews were conducted with 112 people and nine Justices of the Peace, and thirty-seven hearings were observed. This study was conducted in courts, and therefore is limited to the investigation of ideas of people who actually appeared in court for a variety of reasons: people looking for advice from judges or court staff; people appearing for legal hearings in civil, administrative, or criminal matters; as well as people considering bringing their problems to court and evaluating their chances. I was able to observe both formal hearings and informal pre-trial conferences, or personal meetings between the judges and ordinary people. The informality of pre-trial conferences, held in private reception hours of Justices of the Peace, offered a unique view into how people interact with the judges and perceive their legal problems in the context of the institutions of Russian courts of Justices of the Peace.

People and courts

The main themes emerging from my findings in relation to the interaction between people and courts suggest that people have a sceptical and unfavourable opinion of the courts in general. Courts are seen as part of the state apparatus, primarily designed to protect the interests of state officials and people in power.

People refer to courts as another bureaucratic office of the government, and, when questioned about state involvement in court activity, tend to avoid this issue, emphasizing instead that their interests are small and they do not get involved in state matters. Whether these sentiments are caused by the awareness of the role of the state in highly publicized controversial cases or by a deeply rooted fear of the state could provide an interesting topic for future research. Regardless of the reasons, people's deep distrust and sense of uncertainty in dealing with their local courts is apparent. Expressions such as: 'I don't know if it will work, I talked to the judge and everybody, but you really never know if it (the system) will work out'; 'They say we can go to courts now, but it's the same Soviet courts really, you have to do everything yourself and you don't even know how it will turn out' were repeated by almost all respondents.

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While it is inexpensive to file claims in the courts of Justices of the Peace, people may incur further expenses if they need expert analysis or the services of attorneys. Professional legal representatives are becoming more commonplace in Russia, and small offices of qualified legal representatives appear to respond to the demands of contemporary life. They appear in local commercial centres and specialize in small private business issues, customer protection,

housing, inheritance, and land-related issues. Information about the availability of legal services is usually spread by word of mouth.

In the Russian courts of Justices of the Peace a very recent initiative put in force in early 2011 introduced free legal assistance to specific groups of incapacitated and underprivileged people. When asked about their eligibility for free legal assistance and their knowledge of its existence, most of my follow-up respondents stated that they were not aware of free legal aid, as getting anything free in Russia is very problematic. Some people stated that they would prefer to pay for quality legal assistance rather than get something free and provided by the government.

My observations were that people tend to be more or less legally active regardless of their age or gender. Instead, recourse to the courts seems to be driven by individual dispute-solving personalities, which can range from argumentative, legalistic, and extraverted to passive, reserved, and introverted. Judges emphasized their role in discouraging older people from involvement with the courts, arguing that the elderly should receive help from relatives rather than deal with these matters alone.

People and judges

The perception of judges in the eyes of ordinary people is closely related to the views of courts discussed above. People tend to equate judges with the courts and personify power vested in their positions. Individual judges are perceived and approached as local *chinovniki* (mandarins) in positions of power. People try to build personal relationships with the judges during private reception hours, as well as in the courtrooms. The standard procedure of keeping no audio record or transcript of pre-trial and court hearings makes these meetings susceptible to a variety of means of influencing the outcome of cases.

Popular expectations of how cases should be run demands special attention. The respondents considered court procedure as something very specific and personal to their cases. One of the respondents in the regional court commented: 'I just needed to talk to the judge to know what I need to do. For me it was very important, because I could describe my case and she told me exactly what I need to do'. Another claimant in the regional court

commented that she did not know how the cases are handled for other people, but she is happy that she met a good judge who told her what to do. The common perception seems to be that court procedure is something that can be worked out with the judge and therefore changes from case to case, depending on the relationship with the presiding judge.

The importance of personal reception hours in courts of Justices of the Peace cannot be overestimated. While it is hard for people who share a Western notion of judicial independence to imagine that a judge could be visited for an informal conference any time before the hearing, it is a common practice in Russian courts of Justices of the Peace. Free access to the judges is said to remove the barriers between judges and the people and allow judges to act as advisors and mediators. While this explanation can be accepted as an ideological justification for the accessibility of judges, it also raises considerable suspicion about the moral standing of the judges and their infallibility to bribes and pressure behind the closed doors of the courtroom. Interviewed judges commented that they uphold the moral standards of their profession and are constantly checked. Ordinary people, however, have a different image of the way justice is reached, as evidenced by the following comments from respondents: 'You know why some people with money and political standing win in courts, we don't even need to question that', 'I am sure that if I were a big businessmen or somebody in local government, everything would be solved much faster and without all the fuss', and 'We all know how to make things work for you, I think everybody knows that ... it seems that only poor people come to court to argue'.

Court as the last resort?

There is a view among socio-legal scholars that people in any country tend to take their cases to court when all other options are exhausted. Research in the Russian courts produced slightly different results. People who decided to bring their claims to court approached this action as only one of the options of resolving their problem, and involvement of the court was carefully considered. It is hard to estimate the number of cases in which people use personal connections in order to solve their problems, as people try to avoid discussing these topics. It is undeniable from their responses,

however, that other means of pressure on their opponents exist. One of the respondents in a regional court stated: 'There are other ways to get things done, but everywhere you need money. If you cannot resolve the case on human terms (*po-chelovecheski*) you have to look for other ways'. With few exceptions, people in Russian courts approach their legal problems with a range of possible means of resolution. The decision to engage the local courts was often made only after delicate balancing of the personal relationship with the judge and the legal strength of the case.

In light of the negative views of the lower courts and judges, how can one explain the growing number of cases heard in Russian courts of Justices of the Peace? Looking at statistics reflecting court activity in the last five years, we can see that there has been a consistent growth in civil cases heard by Justices of the Peace. People came to courts for a variety of reasons. The most easily definable group were people who turn to courts as the only agency that can solve their problem. This can be said about cases related to family dissolution in Russia, cases related to traffic violations, and other cases in which courts are considered to be the appropriate agency. People can also be summoned to court as defendants or respondents in a large number of matters, from debt and repossession claims to eviction and small criminal offences.

However, the breakdown of the civil law category of cases suggests that while some traditional groups of case remain static, a considerable increase can be noticed in cases initiated by the state against private citizens (see Table 1), particularly cases involving collection of utility payments and collection of taxes due. This suggests that courts are used more actively as a collection agency by the state, rather than as a forum for dispute resolution, which would undermine claims that the increasing number of cases in Russian courts is evidence of increased confidence in, and use of, the law by ordinary people.

While the Russian government is eager to claim the increase in the overall number of cases as a positive indicator of the development of *pravovoye gosudarstvo* (rule of law state) in Russia, this would appear to overlook the nature of these cases. While courts of Justices of the Peace become more commonplace in Russia and play a useful role in serving the increasing number of private businesses and protection of consumer and private property rights, these developments are overshadowed by the increasing burdens of law enforcement and policing imposed on the courts. This conflation of the roles of law enforcement agencies and the courts is one of the most persistent problems of the Russian system of justice, and this relationship does not escape the attention of the people. ■

TABLE 1: Number of cases decided in Russian courts of Justices of the Peace from 2007 to 2011, categorized by parties involved

Year	Legal entity vs. Citizen	Citizen vs. Citizen	Citizen vs. Legal entity	Citizen vs. State	State vs. Citizen
2007	4,745,000	1,224,000	839,800	223,800	2,236,000
2008	6,137,000	1,265,000	728,100	134,800	3,159,000
2009	7,897,000	1,297,000	1,023,000	107,300	4,228,000
2010	8,440,000	1,192,000	1,014,000	98,400	6,384,000
2011	6,916,000	1,193,000	1,740,000	83,300	5,005,728

The Challenges Facing Russian Justices of the Peace

Kathryn Hendley, *University of Wisconsin Law School*

Like Varvara Andrianova, I have been carrying out research in the Russian Justice of the Peace courts (JP courts) for the past few years. Her research examines these courts from the perspective of litigants; my analysis will shift the focus to the judges.

Justices of the Peace (JPs) are selected in the same way as other Russian judges. Vacancies are publicized and candidates present themselves to the qualification commission. My research suggests that most candidates are either former judicial clerks (*pomoshchniki*) or veterans of the criminal justice system. Practicing attorneys (*advokaty*) are rarely selected. Most JPs view their appointment as the first step in their judicial career. After surviving their three-year probation period, they are typically angling for an appointment to a higher court. Many find the workload of the JP courts to be overwhelming in that it requires them to keep up-to-date on almost all areas of law, but whilst the working day may be just as long as at the higher courts, judges are able to specialize, which is appealing.

As Andrianova notes, the JP courts hear the vast majority of all cases that come to the Russian courts. The authorizing legislation limits their jurisdiction to relatively simple cases, with the goal of freeing up the district (*raionnye*) courts to spend more time handling complex civil cases and serious crimes. Notwithstanding their mundane nature, the sheer number of cases coming through the JP courts presents serious challenges to JPs in terms of docket management. They are required to handle cases expeditiously, typically within several months. For the most part, JPs comply with the statutory deadlines. Court administrators keep statistics about JPs' compliance, and any deviation can result in informal sanctions, such as delays in promotions and/or failure to get regular salary increases. The recent law that allows disgruntled litigants to sue for damages when their cases are unreasonably delayed only adds to the pressure on JPs. Procedural mechanisms that allow for a form of plea bargaining in criminal cases and for certain types of

straightforward civil cases to be resolved without a full hearing have proven helpful in clearing the dockets of the JP courts.

Judges find themselves in a difficult position. They are prohibited from offering legal advice, but are deeply committed to ensuring an even-handed process.

The bulk of cases at the JP courts are civil and administrative. Relatively few of the participants in these cases are represented by counsel. Because most litigants are legal neophytes, JPs are often called on to help them through the process. As Andrianova points out, litigants look to JPs to guide them through the process. Judges find themselves in a difficult position. They are prohibited from offering legal advice, but are deeply committed to ensuring an even-handed process during which both sides have an opportunity to present their stories. This is both a moral duty and a practical obligation because they fear that any case in which both sides are not fully aired will be reversed. Reversals are treated as 'mistakes' and as a stain on the record of any JP. Further complicating matters is the lingering Soviet legacy of judges as pedagogical agents. As I observed cases, I saw many examples where judges appeared to cross the line by providing mini-tutorials on the law. Afterwards, these JPs told me that they felt they had no choice but to help out. They always insist that their help falls short of acting as a lawyer. They point out that few litigants have the wherewithal to hire lawyers.

As Andrianova mentions, there are several initiatives aimed at expanding access to legal expertise for

litigants in Russian courts. How these will play out remains to be seen. Of course, merely having a lawyer in the room will not necessarily make a difference if these lawyers fail to represent their clients vigorously. My experience in the JP courts suggests that many Russian lawyers are little more than the proverbial 'potted plant'. Though the procedural codes have been reformed to embrace

adversarialism, lawyers rarely take on the responsibility of mounting an affirmative case, leaving it to judges to ferret out the facts. This suggests that Russia's roots in the civil law legal tradition are trumping these legislative reforms. Once again, only time will tell whether Russia's effort to empower parties to take responsibility for their cases will take hold. ■

Repression of Economic Crime and Power Strategies in Russia

Gilles Favarel-Garrigues, *Centre d'Etudes et de Recherches Internationales, Sciences-Po*

Since the late nineties I have been working on issues of economic crime and policing in Russia. Inspired by the two previous reports on Russian legal culture, I would like to offer some thoughts on the use of disclosure and potential repression of economic crime as a weapon in power strategies.

My first point may be understood as a comment on the cultural explanation of Russian legal practices and attitudes towards the law, which has been emphasized during the first workshop.¹ It would be an exaggeration to consider the repression of economic crime in Russia in the 2000s merely as a product of a particular legal culture. Clearly culture matters, but the role that the international norms implemented in Russia have played in this field is also striking. Repression of economic crime has evolved since Putin came to power and has benefited from the intertwining of international and national agendas on this issue. Indeed, since the beginning of the 2000s, the Russian government has been zealously committed to implementing international standards in the field of anti-corruption and especially anti-money laundering (AML) policies. It certainly does not mean that corruption and money laundering are a thing of the past, but it means that the policy toolkits have had a strong impact on the reconfiguration of power relationships.

Since the beginning of the 2000s, the Russian government has been zealously committed to implementing international standards in the field of anti-corruption and especially anti-money laundering (AML) policies.

In practice, international anti-money laundering standards encompass a set of institutions, norms, and practices which promote and legitimize the use of business intelligence, of governmental and private databases, and of close connections

between private entrepreneurs and law-enforcement officials. In other terms, implementing the fight against dirty money within banks or insurance companies on a daily basis relies ultimately on legal and informal professional practices. These international standards concern most countries in the world, but they were implemented in Russia in a particular political context, when Putin came to power. In the early 2000s the Russian government was looking for a solution in order to recentralize law enforcement agencies and especially intelligence on private firms. It aimed at exploiting the legal vulnerability of the elite by fixing the boundary between 'clean' and 'dirty' money and by managing the transformation of economic illegalities into economic crime, according to Michel Foucault's classic distinction.² As a result, anti-corruption and anti-money laundering drives played a key role in power strategies.

Benefiting from some legitimacy at national and international levels, disclosure and potential repression of economic crime have obviously been employed as weapons by the government in order to eliminate non-compliant businessmen or to intimidate them. This is well known, but it is worth emphasizing the great role that the Russian financial intelligence unit has played in collecting intelligence, for instance during the first Khodorkovsky and Lebedev trials, or during governmental crackdowns on private banks in 2004 and 2006.

Threatening of disclosure and repression of economic crime has also helped law enforcement officials at local level to pressure entrepreneurs and to racket firms and shops.³ The judicial harassment of businessmen is still a sensitive issue. In such cases,

law enforcement officials may act as their own bosses as well as providers of security for private clients. The latter option connects the use of compromising information to corporate disputes. Businessmen facing arbitrary judicial decisions attempt to get organized and denounce unfair investigations and trials launched by their competitors.⁴ They try to find some public support. Of course they present themselves as victims, which may be true or not, but no one doubts it is possible in Russia to use a mix of public and private resources in order to disclose economic illegalities and eliminate a competitor.

My research has led me, unexpectedly, to get in touch with a particular kind of lawyer taking part in economic disputes and using legal knowledge, business intelligence, and state contacts to protect their clients' interests. I was interested in the enforcement of legal decisions about economic disputes in the late 2000s in Russia. As Hendley has shown in her works, arbitrazh courts have fundamentally changed during the 2000s and have gained a pretty good reputation. Many reforms and experiments have been launched in order to increase professionalism and impartiality.⁵ However, the issue of enforcement of arbitrazh court decisions is still problematic.

As state employees, bailiffs are responsible for implementing court decisions, which often means seizing debtors' assets. However, for a number of institutional reasons, bailiffs' efficiency depends on the case they deal with. In the most successful cases, they are backed by private enforcers hired by the claimant. These private enforcers work as independent lawyers or within law firms, legal consulting firms, or debt-collecting agencies. Often bringing experience from law enforcement agencies and a degree in the law, they offer their professional know-how in order to assist the bailiffs in their activity. This common work reflects an informal public-private partnership in which bailiffs and private enforcers co-execute judicial decisions.

Private enforcers do not hide that they are able to intimidate people. They know how to find sensitive information thanks to the connections they maintain in their previous jobs and to the illegal use of governmental databases on Russian citizens and

firms. However, they are careful to distinguish themselves from racketeers of the 'wild nineties', presenting themselves as 'intellectuals' and often showing a deep interest for psychology.

Compared to Volkov's 'violent entrepreneurs' of the 1990s, private enforcers' professional skills are based less on the ability to resort to violence than on a mix of up-to-date legal knowledge, privileged access to law enforcement officials, and an ability to find sensitive information. Such a mix of legal and informal skills reminds me of the paradox identified at the first workshop concerning the urge for Russian businessmen to act legally and illegally at the same time.⁶ They use business intelligence and administrative resources in order to enforce the law, protect their clients' interests, and find out how to destabilize competitors and to organize raids against other firms.

The fact that they present themselves as lawyers invites us to think about the formation of legal professions in post-Soviet Russia. It is exaggerated to consider Russia as a 'land of lawyers', as one interviewee once said, but this term nevertheless refers, in the firms, as much to the people who work on securing the legal aspect of their activity as to the people whose address books, rich in police, legal, or administrative contacts, constitute their main source of legitimacy. Indeed, most former Federal Security Service (FSB) or Ministry of Internal Affairs (MVD) officers working in private firms or the legal department of big firms hold a law degree. Such dual roles may invite us to set aside the conventional opposition between 'law' and 'force', 'legal' and 'informal', oppositions found in numerous analyses of social change, and to focus instead on the complementarity of legal and *silovye* (coercive) methods.

These reflections about disclosure and repression of economic crime as weapons in power strategies lead me to a last remark. Since the late 2000s these weapons are not reserved for the government, law enforcement agencies, and firms: they are also used by 'non-systemic' opponents. Alexei Navalny's Rospil project, disclosing corruption in the state bid (*goszakaz*) system, raises questions about the potential reversibility of these weapons. As a threat to 'crooks and thieves', Navalny acts in the name of

justice against the state: 'a big part of my motivation, when everyone is afraid, is to judge in the name of all the people.'⁷ Navalny presents himself as being at war with corrupt people: he believes that, 'sooner or later [he] will punish them all!'⁸ Based on law and sensitive information found in open sources, the Rospil project has achieved success, for instance by forcing the Ministry of Health and Social Development to cancel a dubious bid.

In spite of the opinion we may have of Navalny, his judicial populism, and his personal motivations, I believe his actions should be taken seriously, as they may reveal an evolution of the use of law in contemporary Russia. Deprived of 'administrative resources', the Rospil project represents a non-governmental initiative which is succeeding in challenging state officials' interests. A trend had

already been observed in commercial courts during the 2000s: suing the state (for instance about a property or land ownership issue) has become common practice in contemporary Russia, and it has often proved successful. But Navalny's project is different for at least two reasons. Firstly, because there is a community between the citizen and the state, in that the cases are publicized and mediatized. Secondly, the complaints deal with corruption schemes, and make possible popular challenges to the corruption of state officials through the courts, in the name of a 'common good' (or a 'social good', as was mentioned in the first workshop). However, in Navalny's activity, law is an instrument not employed in the name of the defence of law as a social good, but in the name of justice as a social good, which has more worrying implications. ■

'Missing Links' and 'Mixed Bags'

William Simons, *Institute of Constitutional and International Law and Centre for EU-Russian Studies, University of Tartu*

The captivating picture of contemporary Russian legal culture set forth in the results of the prior workshop has prompted me to think about things which I have observed in the private law sector and experienced among the many points in Russian law and society which comprise legal culture.

First, I shall outline these data and tools. What I then will argue is that when these data are properly collected and assessed, and when these tools properly are applied, there should be outcomes which can positively affect the view of law in Russia as a social good, law as a counterweight to informal institutions, and also the problematic issue of defining and applying discretion in Russian law.

The data set upon which my gaze as a lawyer is fixed is that of Russian case law. However, I do not mean to suggest that this is the only place at which lawyers (and others) can find data about whether or not law in Russia is becoming a social good, etc. There are numerous other data (and tools) which should be used with precision in further considering the development of legal culture in Russia. Three of these tools will also be mentioned below: legislative history, legislative hearings, and scholarly writings.

The data set on Russian case law

In the past, accessibility in Russia to case law (not that it is 'law' in the sense it usually has in Anglo-Saxon jurisdictions) was limited by traditions of legal practice and culture, even in the post-1991 era following the Committee of Constitutional Supervision's 1990 landmark case No.12 in which secret laws relating to fundamental rights were proclaimed unlawful under Soviet (*sic*) law.

However, the situation gradually has improved. Since 2008, these data are publicly available under Russian Federation (RF) law, in principle, for the whole of the judicial system. Even before this law went into effect, my late colleague in Leiden, Dr Ger van den Berg, took this comprehensive approach in his 2003 work annotating the RF Constitution with all the holdings of the Constitutional Court (and its predecessor Committee) from 1990 to 2001.

Nevertheless, my quite recent experience is one in which Russian lawyers cling stubbornly to antiquated Soviet techniques for collecting and analysing these data. They research the use of law randomly: a case or two here or there, from the commentaries or even from electronic databases. Alas, they never seem to use complete data sets ('complete' in terms of time and jurisdiction); or if they do, they never seem to properly explain that to others. As a result, their assessments of the role and the rule of law cannot be other than incomplete. The changes which they might propose (or which others would make) on such bases are sure to be similarly deficient.

Russian lawyers cling stubbornly to antiquated Soviet techniques for collecting and analysing data.

In arguing that the data contained in Russian case law, when accessed fully and assessed systematically, will aid lawyers and others to begin viewing law as a social good and strengthen the use of formal institutions, I am aware that this represents but one step along a rocky path forward: i.e., legal research for attorneys in courtrooms and for scholars in the literature.

Education

Enhanced accessibility to and assessment of data on law's use (and on its limitations) needs to be emphasized at an earlier stage than only in the literature for scholars or the pleadings for judges (although, clearly, these are crucial points at which to do so). This also should be brought to the fore on the stage of law faculties. Once key actors in and outside the classrooms begin to appreciate that data must be full rather than partial and that follow-up is crucial, quality of law as a social good and strength of law may start to become apparent to a wider circle.

For the present however, the view that I have of today's legal education in Russia is of a system with many dedicated educators but stuck in the same bog in which Russian lawyers find themselves of using outdated techniques to support their thinking and their use of law.

Russian legal educators, in my view, are not yet fully aware of the relevance of these precise data, of the need to compile them with logical methodology so that evidence can be presented in a far more convincing way in Russian courtrooms than it usually is today. The growing literature about case law as a form of precedent in Russia does point in the right direction; but this per se is not going to be enough to pull educators, students, attorneys, and judges out of that bog. This is because lawyers in Russia cite cases in a way that often misses the point. The goal is not merely to cite a case here or there which one randomly has discovered. Rather, it should be to consider the entire universe of relevant cases in helping to resolve a dispute, analyze a legal doctrine, or formulate a norm.

However, a remedy is not only to be engineered in law schools. Here, something also needs to be devised for the 'teaching culture' of faculties of business, economics, and management. After all, the 'Brandeis brief' contained a mere two pages in which points of law were addressed; the remaining 100-plus pages were evidence offered to the court from other disciplines.

Legislative histories

Legislative histories represent an underused tool with which to help invigorate legal culture in Russia. While there is at least one comprehensive source of legislative history (Rumiantsev 2007-2010)⁹ for the RF Constitution, for example, it is very hard to find one for the Russian 'Economic Constitution' (as the Russian Civil Code often is called).

Legislative hearings

Legislative hearings remain largely closed – only now is the OPB (an impact-assessment tool already seen for several decades in the EU) coming 'on stream' in Russia (albeit in the Ministry of Economic Development and not the Ministry of Justice). Yet it seems, for the present, to be largely unused in the occasionally quite heated 2012 national discussions about reforming the RF Civil Code.

However, I argue that until more use is made of the OPB tool, Russian legislation will not be as open to input from a wide cross-section of society as it could and should be. And when legislation is unclear or contradictory in its goals, it should be not surprising that lawyers will be reluctant to refer to broad principles in their pleadings for court hearings and that judges will be unlikely to accept and use such arguments in their judgments.

Scholarly literature

Scholarly literature is usually not referred to in Russian judicial judgments; this is also a tool which could help to bring the wider world into the courtroom. In turn, this should make the results easier to recognize and understand when they are presented to the outside world.

Discretion

Adoption of the data and tools that I am pinpointing here should also produce not insubstantial gains in terms of an enhanced understanding of how to approach discretion in Russian law.

One telling example is the conscious restriction of areas of discretion in the 1994 RF Civil Code. This observation supports the characterization of discretion as problematic in Russian law. The cleansing efforts of the draftspersons notwithstanding, there are a number of principles in Russian laws which continue to involve discretion.

The doctrines of the 'bases of the legal order and morality' and 'public policy' are two such principles. While the cases in which these (perhaps specialist) doctrines can be applied relate only to some and certainly not to all of Russia's legal fabric, the fact that occasionally they will be part of 'law in action' in Russia raises the consideration of them, in my view, far above any level of academic nitpicking.

But there are others which clearly form part of the core of Russian civil law (and not only that in Russia of course): 'reasonableness', 'reasonable term', 'good faith', 'fairness', and 'abuse of rights' being additional examples. And some of these are the subject of proposed revisions during the 2012 round of redrafting of the RF Civil Code; to my mind, this only underscores their relevance in the legal culture discussions. Yet without these 'missing' data and

tools, it will remain virtually impossible to adequately assess the way(s) in which such key concepts are being applied in practice.

As the reader surely will appreciate by this point, the term 'missing' is a form of shorthand. It is not that these data and tools do not exist. Rather, the need is one of accessing them and assessing the results obtained in the ways in which I have highlighted here. The resulting picture should be one of more logic and less arbitrariness. To date I believe, Russian lawyers usually have in their mind the latter (arbitrariness) rather than the former (logic or 'reasonableness') when they hear the words 'discretion' and 'law' used together.

Wildcards

Some of the wildcards, which will surely come to the mind of the reader as she contemplates using these data and tools more fully, are those of bribery and corruption. Here, I concede that my optimism will be put to the test. Russians seem to be more and more open these days about the need to shake off this practice. But the 'when and how' of doing so, short of a storm of protest, are not apparent to me at least. The taxi-driver wisdom in Russia is that there are more bureaucrats now in Russia than there were at the beginning of the 1990s, and bureaucrats are renowned for their fondness for perks.

Naturally, there are other obstacles which should not be overlooked in order to reach the goals of having law more widely viewed as a social good in Russia, of strengthening legal institutions, and of bringing 'discretion' in from the cold. While this is not an exhaustive list, the obstacles include: (a) the newness of the 2008 full-access policy; (b) the formalism and the belief that law is a 'science'; (c) the general culture-bias in Russia which considers 'arguing' (as lawyers should be able to do in classrooms and especially in the interests of their clients) as something which is not very cultured; and (d) Russians in positions of power who raise their voice in emotion at the sign of a problem (and immediately search for the 'guilty party') but who are often seen to fail in providing any meaningful solution or follow-up in the future.

The workshop proceedings show us many meaningful, positive developments in Russian legal culture. These developments — along with the basic European and international fundamental rights and freedoms enshrined in the 1993 RF Constitution, a bedrock of the practice of the RF Constitutional Court and, often, of the two other court systems in Russia (courts of general jurisdiction and the arbitration [commercial] courts) — should nudge most observers cautiously but, also, optimistically into the future. ■

Russian Legal Culture: Concluding Remarks

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Thinking back through the discussions during the three workshops, it is clear that we would all agree that law does matter in Russia. As we are told by legal historians and contemporary researchers alike, it has been used extensively for several centuries, not just by the political and economic elites but by businesses large and small and by ordinary citizens too.

Today Russians in general are legally knowledgeable and skilful at negotiating the law. The formal use of Russian legal institutions is increasing. The legal industry as a whole is thriving, and there is convincing evidence for that assertion in the statistics on the number of legal services and lawyers, the number of litigations in all courts, and the continuing intensity of the law-making process. Even the most powerful individuals and organizations in Russia, who might at one time have reached for more direct means to achieve their ends, are now resorting to civilized law in recognition that it is an acceptable tool by which to apply their power. And in the legislative sphere the institutional reforms of the legal industry seem to be adequate, at least at the formal level, if not (yet) at the level of efficiency (although some might be inclined to dispute that view).

In many different parts of the legal system, there are significant differences in the way in which law works and in its potential for achieving a just outcome.

However, the picture is uneven. In the really big cases when prominent individuals, major companies, and serious political interests are all involved, it is certainly the case that law breaking is not the main reason why people are put in prison. Scrutiny of the protection of minority rights reveals a frustrating picture, and in contemporary Russia the law is repeatedly abused. Systematic observers of everyday civil cases would see that judges mostly do their best to resolve the conflicts brought before them. Generally speaking, the legal system is

supportive, especially so in that it usually works on the basis of a locally constructed understanding of fairness. In commercial cases that are routine and do not involve big money and politics (the majority of cases) the legal system works much better than its popular image would suggest. It is a demonstrable fact that most of the time, fair redress of grievances is available to most of the litigants.

In considering how to describe this unevenness, some scholars have resorted to the term 'the duality of Russian legal culture' in order to distinguish between how the law works for those in power and how it works for the rest of the society. However, it is inadequate to suggest that only two categories exist. The reality is much more complex. In many different parts of the legal system, there are significant differences in the way in which law works and in its potential for achieving a just outcome. Our workshops aimed to explore that multiplicity and to scrutinize the roots of that unevenness. Along with many smaller insights and useful ideas, a number of overlapping general themes emerged from the discussions, as discussed below.

The legal tradition

The Russian legal tradition is commonly placed within the family of Roman law, if only in a peripheral position. However, the attribution of Russian characteristics to Roman origins may obscure more than it clarifies. It is clear that the difference between the Russian and the Roman legal cultures is immense, and the conclusion reached in our workshop was that the conventional proposition that they have common roots should be taken with caution. There are several reasons for this view. Roman law first entered Russia from Byzantium along with Christianity in the tenth century, in the form of canon law. However, canon

law did not dominate the system in practice. Right up to the seventeenth century, the whole of the secular law in Russia continued to be firmly rooted in the local customary law.

It was not until as late as the eighteenth century that the Russian emperors started to cast their gaze toward the West, and now and again initiated legal borrowings. But in real terms, the effect of those transplants of Western laws and legal institutions remains an open question, and there is no consensus to support the claim that Western concepts penetrated deeply into the Russian tradition. In Europe, Roman law was spread across the continent in the middle ages, slowly and thoroughly. The process began with education and then continued through the adaptation of local customs to systematic Roman legal principles. By contrast, the Russian policies of patchy borrowing were driven by a succession of imperial instructions issued pragmatically, to achieve specific goals of social engineering. The instructions dealt with the legal texts, but not with the underlying principles.

Legal education was introduced into Russian universities only in the nineteenth century, and it was not until after that measure had taken effect that an independent profession started to emerge. That evolution lasted only a few decades before it was brought to a halt by the Bolshevik revolution in the early years of the twentieth century. Law was, of course, a subject of study in the Soviet universities, but it was not taught as a science, nor a critical philosophy or jurisprudence. Instead it consisted of a training exercise that required students to learn the text of laws as they were written down in a statute book.

It is against this background that the current state of Russian legal culture should be assessed. Then it will not be surprising that, as several participants in our workshops pointed out, Russia has a well-developed legal code; it has many educated lawyers; and it even has newly established or recently reformed professional bodies — but it does not have the most important feature that distinguishes the Roman law tradition: a legal profession in the fullest sense. The professional bodies have failed to gain power and independence. The lawyers do know how to use the law aggressively and effectively so that they can make their living out of it, but as a corporate body of

practitioners they do not control it and certainly have not lifted it to the status of professional knowledge of principles. Meanwhile, jurisprudence, as a philosophy of law, is still non-existent. There is no appreciation of the need to build up a set of systematically collected data for analysis and argumentation of principles and exceptions to principles. The quality of legal education in most universities remains exceptionally poor by Western standards. Having made all those points, it must be stressed that the legal profession in Russia still has only a very short history and a prospective professionalism is beginning to emerge in recognizable form, which provides grounds for optimism in the long term.

The meaning of law and the role of law

The trajectory of evolution of the legal tradition in Russia helps to explain, at least partially, why the Russian interpretation of law is so rigidly formalistic and instrumental. This theme occurs repeatedly in accounts of Russian law, and it has been discussed at length in the earlier workshops. One reason for it is the longstanding Russian propensity to import legal codes from Continental legal systems, which resulted in a tendency to restrict the understanding of law to the literal meaning of the written text. To apply law, in this way of thinking, can only mean to apply 'the letter of the law'. In practice the application of the letter of the law often turns out to be unrealistic. The socio-legal consequences of routinely unrealistic expectations are considerable, and frequently unfortunate. Law becomes detached from common sense, from moral norms, and from the idea of justice. Any deviation from the letter of the law tends to be interpreted as manipulation or deliberate distortion of law, which in turn creates a strongly negative social climate. And perhaps most significantly, the prevailing culture of rigid adherence to the letter of the law has the effect that, whenever a judge is bold enough to exercise discretion, the action is met with suspicion and distrust.

Law and social order

Any attempt to understand the place of law in any society inevitably brings us to the much wider question of how social order is maintained in that society and the role of the law within it. In the Russian case it is the support of an underlying structure of hierarchical relationships that keeps society together. The dominant hierarchical pattern

is in the political domain, and it has duplicated itself in all the social, economic, and legal substructures. This vertical pattern has been in existence throughout Russian history, and it remains the skeleton holding together the Russian model of social order.

Within that model, law functions as a means of conflict resolution just as it does in other societies, but in addition it often becomes subordinated to the rules of politics and acts as an enforcement mechanism for the rulers. The case studies presented in all three workshops demonstrated that process clearly. The instrumental use of law in the social game of power can be somewhat indistinct, as most of the recent political cases have demonstrated, but at the same time it can be subtle and even invisible. The example given at the second workshop showed how the existence of different texts of the same law in late nineteenth century Russia became an effective way for those at the top of the hierarchy to keep control over the judiciary. The case study presented at the third workshop demonstrated how financial intelligence was collected in the admirable cause of fighting corruption and stamping out money laundering – and then turned into a weapon used in power struggles at every level of society, political as well as commercial. The subordination of law to the interests of the political elite and the maintenance of a hierarchical social relationship can also explain why numerous regulatory acts, by-laws, and many kinds of unpublished top-down instructions have acquired greater importance than the statutory law in the everyday conduct of affairs in Russian society.

Legal nihilism

The characteristic negativity of popular attitudes to the law in Russia, especially the universal supposition that nothing can be done to improve it, was another theme that repeatedly came up in the discussions. The prevalent legal nihilism in Russia has become not just a socially debilitating attitude, but also a cognitive barrier that can preclude both constructive analysis and critically balanced assessment of what is really happening on the ground in different sections of the legal system. The dismissiveness of the popular view not only obstructs efforts to identify positive trends, but obstructs efforts to encourage and actively promote them further. Recognizing this, the workshop discussants made at least the beginning of an attempt to go beyond the common acceptance of ‘the fact’ of universal Russian nihilism and instead to scrutinize how far and how deeply the negative attitude is distributed across demographic, economic, and social groups.

At the conclusion of the workshop series we were left with the question of whether things are changing now or not, and what we can expect in relation to the rule and role of law in future. We concluded that precisely for the sake of answering those questions, it is useful to put things in historical perspective. However, it was a shared view that at this stage in the development of the Russian legal culture, it is next to impossible to predict whether the culture will change in the direction of convergence towards or divergence from the Western tradition that considers itself to deserve *the* label of the rule of law model. ■

Notes

1. Kurkchiyan, M. (2012) ‘Constructing Legal Culture through Institutional Reforms: the Russian Experience’, FLJS Report. Oxford: Foundation for Law, Justice and Society, p. 4. Available at: www.fljs.org/Russian-Legal-Culture.
2. Foucault, M. (1977) *Discipline and Punish*. New York: Pantheon Books.
3. For a broader analysis, see Dubova, A. and L. Kosals (2012) ‘“Vkliuchennost” rossiiskikh politseiskikh v tenevuiu ekonomiku’, *Otechestvennye zapiski* 2.
4. See for instance websites such as <http://rus-sidyashaya.org/>
5. Hendley, K. (2012) ‘Dvadcatiletie stanovlenija sistemy arbitrazhnyh sudov: razmyshlenija amerikanskogo professora’, *Sud’ja* 1: 73-76.
6. Kurkchiyan, M. (2012) ‘Constructing Legal Culture through Institutional Reforms: the Russian Experience’, FLJS Report. Oxford: Foundation for Law, Justice and Society, p. 4. Available at: www.fljs.org/Russian-Legal-Culture.
7. Voronkov, K. (2012) *Aleksei Navalny: groza zhulikov i vorov*. Moscow: EKSMO, p. 84.
8. *Ibid.*, p. 107.
9. Rumiantsev, O. G. (2007-2010) ‘Iz istorii sozdaniia Konstitutsii Rossiiskoi Federatsii: Konstitutsionnaia komissii: stenogrammy, materialy, dokumenty, 1990-1993 gg’. In: *History of the Origins of the Constitution of the Russian Federation*. Moskva: Wolters Kluwer.

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