

# The Russian Socio-Legal Tradition

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

The logo for the Foundation for Law, Justice and Society (FLJS) is displayed in a large, white, sans-serif font. The letters 'F', 'L', 'J', and 'S' are stacked vertically, with the 'L' and 'J' overlapping. The background of the logo is a dark red, semi-transparent image of a cityscape with a prominent dome and spires, likely representing a historical or academic setting.

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# Contents

Introduction .....	2
<b>Neglected Traits in Russian Customary Law</b>	
Marina Kurkchyan, <i>Centre for Socio-Legal Studies, University of Oxford</i> .....	5
<b>Legality as a Part of Authority in Imperial Russia: The Digest of Laws of the Russian Empire</b>	
Tatiana Borisova, <i>National Research University Higher School of Economics, St Petersburg, Russia</i> .....	8
<b>Law as Regulation</b>	
Jane Henderson, <i>King's College London, Dickson Poon School of Law</i> .....	10
<b>The Role and Effectiveness of Law in Regulating the Soviet Command Economy</b>	
Christopher Davis, <i>Department of Economics, University of Oxford</i> .....	13
<b>Constitutionalism in Russian: Presentation and Reality</b>	
Alexander Blankenagel, <i>Humboldt University, Berlin</i> .....	15
<b>The Relevance of Soviet Legal Culture Today</b>	
Peter H. Solomon, Jr., <i>University of Toronto</i> .....	17
<b>Reflections on Legal Nihilism in Russia</b>	
Kathryn Hendley, <i>University of Wisconsin-Madison</i> .....	21
<b>Case Studies from History on the Use of Law in Russia</b>	
Cathy A. Frierson, <i>University of New Hampshire</i> .....	23
<b>Participants</b> .....	28

# Introduction

In the first workshop in September 2011 we discussed some of the features of law, especially what it means and how it is used in contemporary Russia. That discussion left us with the realization that we need to reach a better understanding of the inherited context within which contemporary development in the role of law is taking place. For that reason the second workshop focused on the Russian socio-legal tradition, in order to address some of the following questions:

- **How much continuity, and how much change, can we see in the evolution of legal culture in Russia?**
- **What are the dominant historical forces that shaped the legal culture in Russia?**
- **Which tendencies, identifiable in Soviet times, are gaining strength in contemporary Russia, which are fading away, and which remain unaffected by the transitional reforms?**

Addressing these questions, Marina Kurkchian argued that, to understand Russian legal culture, one has to examine it in its entirety as an evolving combination of customary law with all the influences that have occurred throughout history. We can see that a number of principles of Roman Law have been transplanted into this culture but that imported laws and institutions have never adapted well to their new situation. Therefore, uncritical association of the Russian legal tradition with the Continental Roman Law tradition is misleading and counterproductive. She further suggested that if we take a closer look at the pattern of Russian borrowing of the Continental tradition, we can see how the prominent characteristics of Russian legal consciousness were established, resulting in an interpretation of law that is formalistic, restricted to the instrumental function, and separated from the notion of justice. Finally Kurkchian argued that the scale and character of informal practices and networking in contemporary

Russian society can be understood only in the context of the Russian model of autocracy and social order based on the principle of 'servitude'.

Tatiana Borisova briefly outlined her research on the assembling and maintenance of *The Digest of Laws of the Russian Empire*, and argued that it constitutes a persuasive example of how a formalistic approach to dealing with legal texts weakens the very legitimacy of the laws and makes them unsuitable for practical use. She noted that the existence of different texts of the same law necessarily causes confusion, despite which, the judiciary has no capacity to interpret a law independently. Borisova went on to suggest that this situation is both an expression and a reinforcement of the Russian tendency to establish hierarchical relationships. The effect of the persistent legal contradictions is to necessitate the exercise of top-down control because the judges cannot avoid the need to consult a higher institutional level for clarification and instruction on a regular basis.

The tendency of a hierarchical, controlling model of social order to replace law by a multiplicity of regulatory instructions and 'sublaws', observed by Borisova in her scrutiny of imperial Russia, was further elaborated by Jane Henderson in her discussion of the late Soviet period, including perestroika and beyond.

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She explained and illustrated the way in which a given set of regulations can be elaborate, detailed, and convoluted while still allowing numerous exceptions, but may nevertheless be introduced officially without being publicized or circulated to its target audience. In some instances an additional set of regulations will be introduced at a later date, preceded by an order to disregard the previous set and to comply with the new instructions. The overall effect of this practice is to create an arena so heavily dominated by regulation that the law itself is given peripheral importance within it.

In Soviet socio-economic life, it was not only instructions, sub-laws, and different forms of regulation that marginalized the role of the law. In his comments, Chris Davis pointed to a series of practices that were specific to the Soviet command economy, whereby economic plans and budgets, repeatedly revised by bureaucrats and implemented by means of pressure informally imposed by Party officials, had enormous regulatory power and had to be treated as if they were law. In describing the way in which the Soviet economy was run, he contrasted two politico-ideological models: on one hand the official image of an orderly process governed by the Constitution and law, and on the other hand an academic account of the realities of a 'shortage economy' in which the formal economy could be kept on track only by political control and bureaucratic coordination, law was almost non-existent, and the informal/illegal economy was continuously expanding. The lasting effects of those distortions (lack of legal incentives for participation in the economy, barter as tax avoidance, violations of the rights of minority share-holders, etc.) are still in play in contemporary Russia even after two decades of experience of a market-type economy.

Of course the existence of a mismatch between form and content, image and substance, is neither an unknown phenomenon nor specifically a Russian one. Nevertheless, Alexander Blankenagel argued, the Soviet regime, with its openly double standards, seemed to intensify the mismatch to an extreme degree, a fact that remains true of contemporary Russia as much as the Soviet past. In his account of the dissonance between the array of principles set out in the Russian Constitution and the reality of how things are happening in practice, Blankenagel demonstrated that Russia is still far away from the proper

constitutionalism that can be understood as a working democracy characterized by the rule of law.

Peter Solomon also discussed the Soviet period of Russian history and focused on the legal practices that prevailed. He identified the same three qualities of Russian legal culture that had been outlined at the first workshop and further elaborated during the second by Kurkchiyan: formalism, instrumentalism, and the overpowering role of informal practices. He also mentioned the Russian tendency to build rigid hierarchies in order to impose vertical control, as underlined by Kurkchiyan, Borisova, and Henderson. After outlining and developing several quite different aspects of the Soviet legal tradition, he characterized it as anti-business in its orientation, that it encouraged popular participation in the administration of justice, and that it assigned a paternalistic role to the Soviet judiciary in helping to educate and assist members of the public. Examining how those qualities had changed since the Soviet era, Solomon suggested that the aspects of Soviet legal culture that are socially orientated, such as popular participation and the supportive role of judges, are now in decline. On the other hand, the Soviet proclivity for strengthening hierarchy in social institutions has become more prominent, as also has (somewhat counter-intuitively) the characteristic Soviet instinct to oppose the role of business firms. He observed that legal nihilism is increasing in contemporary Russia and that popular attitudes towards legality and law in general have become more negative than they were in Soviet times.

Taking up the idea of Russian legal nihilism, Kathryn Hendley adopted an empirical approach to test just how deeply rooted legal nihilism is in the Russian legal consciousness. She argued that we need to consider a more detailed and explicit understanding of the social distribution of the dismissive attitudes towards law typically found in Russia. Her own statistical analyses of survey data suggest that, contrary to the usual expectations of outside observers, the majority of people in Russia actually do believe that law must be obeyed, even if it is unjust. Taking the question of whether or not to obey the law as an indicator, Hendley found that nihilism is stronger among less educated and more authoritarian-minded people. Men are more nihilistic than women, and wealthier people are more nihilistic than poorer people. Significantly, the most nihilistic attitude was expressed

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neither by young people nor by the older generation, but by the middle-aged respondents who probably suffered worst in the transitional turmoil of the 1990s.

Cathy Frierson joined the voices urging a far more cautious and balanced assessment of the role of law in Russia. She provided two thoroughly researched examples, one taken from late imperial history and one from the 1990s, to show that Russians do actively use their legal institutions and that they are legally knowledgeable and skilful at negotiating the law. She demonstrated that there are strong indications of an

expanding legal consciousness and that the rule of law is gaining ground in Russia. In conclusion, she sought to shed light on the stage of Russia's legal development by drawing comparisons to the West, where, she argued, many of the shortcomings that are apparent in Russia today were an accepted feature of Western life not so long ago. Given that it took centuries for democracy to evolve in the West and for the roots of legality to grow deep, it is misleading to judge Russia outside the appropriate historical and comparative context. ■

# Neglected Traits in Russian Customary Law

Marina Kurkchiyan, Centre for Socio-Legal Studies, University of Oxford

The Russian legal tradition is considerably under-researched, and the socio-legal tradition even more so. The established approach is to refer to it as belonging to the Continental or Romano-Germanic tradition. But it is also usual to add some vague conditionality. For example, Harold Berman called it an 'illegitimate child of Roman law'<sup>1</sup> while Patrick Glenn referred to it as Roman law with a strong input of customary law, without any further elaboration.<sup>2</sup>

Continental law is a misleading and unhelpful comparator. Typically, such a presentation takes the Western model as a point of reference, from which vantage Russia is classified as a case of failure, thereby substituting useful analysis of *how* Russia works with unhelpful assessments of why it does not work. Furthermore, whilst terminology and concepts are applied to phenomena, which, in the Russian context, often carry different meanings, the substantive questions continue to be neglected. In what way can the Russian tradition be treated as Western? What are the characteristics of Russian customary law and how is it manifested in contemporary Russia? And how do the legal, political, and social traditions blend together to form the legal culture of contemporary Russia?

First, some comments about the Russian legal tradition. Bringing in linguistic analyses may be a revealing way to start. After all, it is through language that people convey the meaning of social phenomena, and explain what they think they are doing.

As a matter of interest, the *Oxford Dictionary of English* tells us that it is now commonly accepted that the origin of the word 'law' is not the Latin *lex*, but the old Germanic 'lay', meaning 'something laid down or fixed'. The word 'justice' can be traced back to the later period, the early Middle Ages, when it entered into English from Latin, via French, and simply meant 'the administration of the law'. It therefore should come as no surprise that those two concepts are always linked in the English-speaking world.

Russian etymology does not have that consistency and it tells us a different story. The old Russian word '*pravda*' (which in contemporary language means

'truth') takes its origin in old Slavic and refers mostly to customary law. Words associated with it include *prava* (rights); *spravedlivost'* (justice); *pravilo* (rules); and *viprabit'* (to correct).

For law, in the contemporary Russian language, the word that is used is '*zakon*'. It has a different source. Its original meaning is expressed by its main part, '*kon*' which meant to start, to finish, a limit, or completed round of a game. Many scholars argue that originally the *zakon* appears to be predominantly associated with foreign, Byzantine laws that entered Russia with Christianity. That usage established a contrast between everyday language and Church language. Zhivov argues that this linguistic duality is an expression of the wider legal duality prevailing in the Muscovite Rus'. He suggests that the native codes belonged to the sphere of *byt* (everyday life) in which customs served as the basis for secular law, while the *zakoni*, translated from Byzantine written codes, were restricted to the Church and to the educated higher society.<sup>3</sup> Most scholars agree that in Muscovite Russia the dominance was strongly on the side of customary law, up until the eighteenth century.

Of course the reality was messier than this tidy picture, with its sharp social distinction between the usage of customary law and Western *zakoni*, and Russia was just like anywhere else, in that the formation of a unified concept of law was a process of shifting balance between competing sets of rules. Imported legal ideas were tossed into the cultural melting pot. The first national codes, the *Sudebniki* of the late fifteenth and mid-sixteenth centuries, mostly drew upon customary law and practices, but

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they also gave hints that Byzantine texts had been consulted. More comprehensive legal code of the mid-seventeenth century *Ulozhenie* consolidated the laws that were practised locally while also bringing in elements drawn both from Byzantine law and from the Polish-Lithuanian Code. Slowly, the Russian tradition was evolving.

However, the organic process of legal development in Russia was interrupted by the reforms initiated by Peter the Great in the early eighteenth century. His strategy to modernize Russia was to impose models transplanted directly from Sweden and Germany without much effort to domesticate them. All the following reforms of the imperial period were in the same format, intended to transform society by imposing new legal codes that had been strongly influenced by Western examples and had little grounding in local social practices of dispute resolution. The repeated attempts at massive legal borrowing driven by the small educated elite achieved neither their intended task of ‘westernization’ of administrative and legal practices, nor the smooth incorporation of customs into the format of codified law.<sup>4</sup> Historians generally agree that it was as late as the eighteenth century onward when *zakon* began to take priority over custom as a source of law.

But ‘zakon’ in this context was not a career of the Continental tradition as such, with its internal logic and set of values, but merely a set of mostly transplanted legislation. This, in many ways, explains why Russia developed a formalistic interpretation of law, a feature of Russian legal culture that we discussed at the previous workshop. And I would argue that Russian formalism should not be interpreted simply as an extreme expression of the Continental tradition; rather, it has different sources and qualities.

Historical linguistic analyses could again be helpful to demonstrate that the connection between Russian and the Continental tradition is a superficial one at best. ‘*Jurisr*’, meaning a professional lawyer, entered Russian vocabulary in the eighteenth century, and the profession of jurist as an identifiable educated group did not emerge until the mid-nineteenth century, only to be de-professionalized by the Bolsheviks a few decades

later. Until then, what we would call a system of justice (mindful of the aforementioned reservations about using Western terminology because the act of labelling a phenomenon can blur its true meaning), was an exclusively administrative, bureaucratic activity.

Another word: ‘*Urisprudentsia*’ (jurisprudence). In the West, the jurisprudential tradition grew up with the spread of the ideas behind Roman Law. Philosophical debate about law in general has always been a distinct and important part of the tradition. In contrast, Roman Law was installed in Russia without that intellectual baggage. The Western concept of law as learning, in written form and according to rigorous requirements of reasoning, was and remains alien to Russian tradition. Russian legal theory has never considered law as a subject in its own right. Even when the discipline took shape in the nineteenth century, it concerned the legislative activity of the state, not the jurisprudence as it is known in the Continental tradition.

One could go into great detail in order to demonstrate the huge gap between the Russian tradition and that of Continental law. We could examine the differences in legal reasoning; in the role that judges play, which is neither adversarial nor inquisitorial; in the meanings and importance attributed to the procedure, and so forth.

However, I would rather pose a different question. Why was Russia so slow in taking the Western tradition on board, despite not only having been exposed to it for a long period of time but also having made enormous efforts to westernize itself? Or, to rephrase the question, could law have worked in the same way in Russia as it does in the West? In all likelihood, the answer is that it could not, because social order in Russia is based on different principles and the society works differently.

In any society, social order is dependent on the established mode of interaction between the people, supported by the factors that are responsible for generating conformity and securing compliance. In the Russian case it is the power of hierarchy, not law, that keeps society together and enables it to function.

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A society organized by hierarchy of status does not favour the growth of formal institutions managed by impersonal bureaucracies, such as those at the heart of the Western tradition. The levels of the hierarchy are linked by reciprocal obligation of support from the higher level and loyalty of the lower. The higher the status of the person giving the instructions, the more efficient the system becomes.

On this point I would like to reference Valerie Kivelson's argument, according to which the combined pressure of internal demands and external necessities caused Russian rulers to legitimize their power by developing a structure that Max Weber labelled a 'service state', a society in which all the members are fitted into a hierarchy of servitude.<sup>5</sup> Yet the Russian version of autocracy did not promote an image of unlimited power of the tsar; rather, it gave him the responsibility of national fatherhood and guardianship. In effect, it became a kind of social contract: servitude in exchange for the assurance of protection that only a really strong ruler could provide. Whenever the Russian people

felt that the contract had been broken because the tsar and his officials had failed in their duties of merciful action and protection, they did not hesitate to say so, filing complaints and petitions or openly protesting. It seems that this sociopolitical pattern of relationship is still in place in Russia, as exemplified by the relationship between Putin and the people.

To summarize, this model of social order undoubtedly has implications for the meaning of law and the role it can play in Russian society. For instance, it is not the impersonal law that is important, but the instructions, issued by the higher levels of the hierarchy in the form of regulatory decisions, which are more effective instead. As a consequence, the more productive line of analysis for research is to examine how Russia is regulated by different forms of instruction rather than how law and legal institutions work.

The following sections assess the socio-legal traditions in Russia and how modern-day Russia is changing in the light of its imperial past. ■

# Legality as a Part of Authority in Imperial Russia: The Digest of Laws of the Russian Empire

**Tatiana Borisova**, *National Research University Higher School of Economics, St Petersburg, Russia*

My aim is to focus attention on the material embodiment of the official understanding of ‘legality’ in the Russian Empire — The Digest of Laws of the Russian Empire — an embodiment of the operative legal system in late imperial Russia.<sup>6</sup> It was the Digest that contained the law in force from 1835 until the Bolshevik revolution in 1917. Notwithstanding the fact that it is a crucial source of Russian (legal) history, its meaning has been often overlooked, for a number of complex reasons.

The Digest originated in a desire shared by all of Europe’s absolute monarchs: to collect all laws regulating the life of a country in a single edition. To provide detailed regulation covering all legal relationships in such an edition meant nothing less than to create a universal instruction for all and everyone. The original ‘Russian’ idea of the Digest was to maintain the exhaustive compendium of the whole country’s legislation and keep it up-to-date by including every new piece of legislation in the existing system of the Digest. The result of the necessary editing procedures when a new piece of legislation was included in the Digest was the remarkable difference between the original texts of laws adopted by the legislator, and their published form in the Digest.

This strange feature of legal procedure, in which two different versions of a particular law — the original one and the one codified in the Digest — both remained in force, should be considered a part of official autocratic legality in late imperial Russia. Even though it may seem inefficient and irrational, the practice of obligatory codification of laws in the Digest existed for a rather long time — from 1835 until 1917. My research aims to find possible explanations for the Digest’s prolonged existence in the context of political and legal culture of late imperial Russia.

Nicholas I expected the Digest of Laws to be the official and final collection of law in force and so to reduce abuse among officials, which was considered

to be based on deficient or fragmented knowledge of legislation. Within this compendium, an administrator or a judge would find a solution relevant to any particular situation and in case of uncertainty he would be obliged to address himself to the higher authorities.

The law on the Digest described in detail how the Digest was to be implemented by appropriate personnel. In order to solve a case, first of all, a chancellery of an institution, such as a court chancellery, had to prepare a list of the Digest’s articles that were relevant for the case. The format of references to the Digest was also defined (volume, name of a law, number of an article). Next, a secretary had to check the articles and bind the list. Amid the discussion of the case, the listed articles ‘had to be read out during the meeting from the Digest’s volumes’. Finally, the statement was required to ‘include in definition’ word-by-word those articles that would found the decision. In the case of an ambiguity in a law from the Digest one had to address a higher institution for clarification.

Analysis of the codification process in the Digest and the assigned procedure of its use demonstrates the paternalistic administrative approach that the state had towards law. The compulsory publication of new legislation for public awareness obviously was not of the highest priority. Another aspect of legislative practice was even more important: the codification department would add a new law to the Supplements of the Digest or new editions of its

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particular parts. While the new legislation was undergoing codification work, the information about it was sent by affiliation to the specifically assigned organs and authorities that had to know about the changes.

Regardless of the changes from the original text (and sometimes meaning) of a legal act that were caused by adding new legislation in the Digest and the Supplements, the advantage was given to the codified law: the citizens and institutions had to refer to the codified version. The respective rule was confirmed in the Statute of the Governing Senate and stayed in force until the Bolshevik October Revolution of 1917.<sup>7</sup> One can trace here a paternalistic attitude of the legislator. State officials and judges — as well as citizens and their advocates — were denied any opportunity to independently interpret the new legislation in relation to existing law.

The other remarkable feature of the Digest phenomenon was legal traditionalism. Law-drafting techniques used in the Digest were essential: old laws were transformed into new laws. The issue of coordinating between the power of the original legislation and its codified version in the Digest was inevitable. During the discussion on 'the power of the Digest' its chief editor Mikhail Speranskii insisted on the application of the original law in cases of doubt. However, the attendees of this discussion saw clearly that many parts of the Digest, for example, The Fundamental Laws of the Russian Empire, originated during the codification process, that is, were compiled from a body of detached legislative materials. This explains why Nicholas I did not support Mikhail Speranskii and the Digest was put into force as a positive law that cancelled all legislation prior to it.<sup>8</sup>

It was considered inappropriate for addressees of the law to consult with the original legislation if they wanted to clarify, for example, the Fundamental Laws of the Russian Empire that were placed in the first volume of the Digest. Finally, the Digest was prepared with the monarch's direct participation by the organ that was extremely close to him (The Second Section of His Majesty's Own Chancellery), so its legitimacy could not be questioned in the 1830s. The situation with the legitimacy of the Digest's new editions and Supplements changed radically with the development of the legal profession in Russia since

the 1860s. In view of the growing bureaucratization of the codification process the necessity of the Digest has been questioned by legal specialists.

*This way of codifying laws reinforced the very ethos of Russian autocracy, in which contradictions in laws to some extent supported the supreme power of the monarch.*

How could this phenomenon be explained? From what we know about autocratic power in the Russian Empire, it seems that this way of codifying laws reinforced the very ethos of Russian autocracy, in which contradictions in laws to some extent supported the supreme power of the monarch.<sup>9</sup> Uncertainty about the law in force always left a gap for arbitrariness that preserved an advantageous position for the monarch 'above the law'; it was only he who could restrain the vices of state agents. One of the main static features of autocratic understanding of legality was distrust in formal institutions and popularizing the 'above the law' power of monarch, which could be used as a means of 'strengthening legality'. This is shown not only by the crown's adherence to the old system of obligatory codification and thus to incomplete transparency in the matter of current law. To give an example, we can take a project designed in 1898 by Dmitrii Sipyagin, who soon afterwards was appointed to the position of Minister of Interior. With the purpose of strengthening legality he suggested reforming the Chancellery of Petitions for His Majesty into an official body standing above all the central and higher authorities. For that purpose the Chancellery was to be entitled to review these institutions' resolutions 'on the basis of anyone's petition'.<sup>10</sup> Thus, almost a century after Karamzin's memoir, in the top echelons of power an autocratic legal order was still based not upon law and legal procedures but upon the favourable will of the monarch.

The experience of assembling and maintaining the Digest clearly demonstrates the practical weakness of formal institutions — the legislation itself — which is perceived as something less important than actual performance. To borrow Karamzin's advice to reformer Alexander I: 'the most important are people, not laws' (*ne zakony, a liudi vazhny*).<sup>11</sup> ■

# Law as Regulation

Jane Henderson, *King's College London, Dickson Poon School of Law*

It is apparent that despite quite dramatic changes in the political environment in Russia, from the Empire through the Soviet period to the different regimes in independent Russia, there are resonances in legal culture which seem to endure. Four striking themes emerge: firstly, the apparent dissonance between image and reality, that is, between what people say about their legal system and how they actually behave in relation to it; secondly, the tension between formal and informal/customary law and practice; thirdly, the love–hate relationship between Russian legal culture and the ‘Significant Other’ of the West; and fourthly, the fact of regional variety.

The following is an impressionistic account of the impact of an approach to law which primarily characterizes it as a set of restrictive rules, rather than being a facilitative framework within which autonomous actors can organize their affairs. Clearly the focus in this account is therefore on civil and administrative law (in the sense of administrative rules), rather than criminal law or the law of administrative violations. This approach to ‘law as regulation’ was an important part of Soviet legal culture, arguably in one form or another throughout the whole Soviet period. Even in the early Soviet period:

The rhetorical nature of Soviet legislation was reflected, above all, in the major legislative acts, where they were presented as a product of the revolutionary will. *In the first months of the Soviet Union, laws of this type were already weighed down by the massive number of sub-legislative administrative regulations.*<sup>12</sup> [Emphasis added]

In the writer’s view this attitude still resonates within the Russian legal system. (Whether a similar characterization might apply in other, particularly codified, legal systems is beyond the scope of this account.)

## **The power of sublaw**

In day-to-day living during the Soviet period, and in particular the Brezhnev era with which the writer is most familiar, it was the many varieties of sublaw (*podzakony*), rather than primary legislation (*zakony*), which had an important impact on people’s lives. There were many sources of sublaw in the Soviet

Union: ministers, ministries, departments, Soviets at different levels, executive and other committees of the Soviets, collective farm rules, and so forth. In his 1978 lecture on ‘Techniques of Law Reform in the Soviet Union’ William E. Butler noted that there were over forty different words in Russian for the various types of sublaw; he ran out of terms in English in his attempt to maintain consistent one-for-one equivalence.<sup>13</sup>

In a centrally state-planned economy, functioning without a market mechanism, regulation of output quality was through detailed regulation; there was a state standard for everything.

It was common for primary legislation to be overlaid by a myriad of regulations, often unpublished. An important reform in 1970 aimed to improve the situation to some extent. A joint Party-Government decree ‘On improving legal work in the national economy’ called for the publication of departmental and ministerial ‘normative acts’ in a regular Bulletin. This was implemented, and many such regulations did appear in print in the Bulletin. However, not all relevant sublaw was published. (The landmark opinion of the USSR Constitutional Supervision Committee [CSC] on the necessity of publication of legislation affecting the rights and legal interests of citizens grew out of a recognition by the CSC of this issue.)<sup>14</sup>

One side-effect of the proliferation of regulations was that it gave power to petty bureaucrats, with the attendant risk of inconsistency and little accountability. This encouraged people to try to work around the law, rather than with it.

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This issue has not gone away, and arguably it has negatively impacted the move to a market economy. Gene Huskey has written about the continuing negative impact of government rule-making, for example in 'Government Rulemaking as a Brake on Perestroika'<sup>15</sup> and 'Lowering the Barriers for Entry for Russian Small Business: Will the 2001 Law on the Registration of Juridical Persons Make a Difference?'<sup>16</sup>

#### **Other limitations**

The impact of this morass of 'sublaw' was enhanced by the fact that before the late 1980s, the overriding principle was 'Everything not allowed is forbidden'.

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'Rights' were not necessarily right. Until the development of constitutional oversight as part of the *perestroika* reforms, the Constitution, although called the Basic Law, was not an enforceable legal document. Neither the 1977 USSR Constitution nor the 1978 RSFSR Constitution was directly applicable in court. Political rights enumerated in the constitutions were qualified (e.g., 1977 USSR Constitution: Article 50. *In accordance with the interests of the working people and with a view to strengthening the socialist system*, citizens of the USSR shall be guaranteed the freedom of: speech, press, assembly, meetings, street processions, and demonstrations. [Emphasis added])

Primary legislation was also not immune to inbuilt limitations. There could be deliberate lack of clarity, because of 'exceptions'. For example, in civil law, in the law on compensation for infliction of harm (delict/tort), general liability was based on fault, except if the cause of harm was a source of increased danger such as an industrial enterprise, when there was strict liability; except if the person causing harm was employed by the same employer as the victim, in which case there was a fault requirement.

Olympiad S. Ioffe, in *Soviet Law and Soviet Reality*, asserts that Soviet law was made deliberately complicated because of the urge to centralize and prevent any independence.

... the complexity of Soviet laws is also due to a system of legal regulations, which, in the case of rights given to citizens, ensures the complete invulnerability of state interests. Therefore general rules are usually accompanied by exceptions; exceptions, in their turn, are subject to sub-exceptions, and, under certain conditions, sub-exceptions annihilate exceptions and restore general rules, etc. ... [As a result] everyone can be confused, and, as judicial practice proves, the judges are also not immune from such a danger.<sup>17</sup>

#### **The role of a lawyer where law is regulation**

In a system where 'Everything not allowed is forbidden', the role of lawyers is circumscribed. Arbitrarily, whether they wish to or not, lawyers become part of the state's control mechanisms; the 'school rules' approach to law puts them in the position of being the 'school monitors'.

We see an example of this in the introduction into Soviet enterprises in 1970 of greater numbers of jurisconsults, in order to keep in check enterprise directors following a slight increase in director autonomy. Jurisconsults were put under a duty that they had to 'visa' any legal documents issued by the director, to ensure adherence to legality. Both jurisconsults and advocates were encouraged to educate workers about their labour law rights, as a mechanism for ensuring management did not overstep its powers. Like the 'culture of complaints', the motivation was not to enhance workers' lives, but to maintain a limit on management activity.<sup>18</sup>

#### **The perestroika reforms and beyond**

In 1988, the 19th CPSU Conference Resolution on Legal Reform articulated an aspiration to a changed approach to law. The first resolution talked about '...beginning extensive work involving the formation of a socialist rule of law state (*sotsialisticheskoe pravovoe gosudarstvo*)'.

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Resolution 2 began:

The improvement of the legislative activity of the supreme bodies of power of the USSR and the Union and autonomous republics aimed at strengthening the constitutional regime in the country, resolutely enhancing the role of Soviet laws regulating the most important fields of social relations, and *consistently implementing the principle that everything not prohibited by law is allowed* is gaining great importance. [Emphasis added]

The role of the advocate was also expanded. Resolution 8: 'The conference attaches great importance to enhancing the role of the Bar (*Advokatura*) as a self-governing association for providing legal assistance to citizens, state enterprises and co-operatives and representing their

interests in the courts *and other state agencies and in public organisations*.' [Emphasis added] However, cultivation of this new mindset would require more than a Party resolution, and decades of struggling through, or around, restrictive regulations has left a cultural imprint which is still felt in today's Russia. As Bill Butler states in his 2011 book on *The Russian Legal Practitioner*:

Whether the legal system is the reflection or a cause I cannot be certain, but there are elements of formality and bureaucratic procedure endemic to centuries of Russian legal behaviour that do separate them in degree from other legal cultures. Whatever their scepticism of the law and legal system, they feel 'undressed' without an exceptionally large morass of subordinate legal acts to tell them what to do and how to do it.<sup>19</sup> ■

# The Role and Effectiveness of Law in Regulating the Soviet Command Economy

**Christopher Davis**, *Department of Economics, University of Oxford*

The features and performance of the economy in the USSR were important both in supporting the emergence of that country as the world's second superpower and in contributing to its long-term decline ('stagnation') and eventual collapse. Given the importance of the state-owned and centrally planned Soviet economy, it is important to understand the role played by law, for better or worse, in its regulation. However, such an understanding has been and still is made difficult by the alternative politico-ideological models used to interpret reality in that country, the scale of informal activities in the economy (e.g., the black market), and hidden processes in the functioning of the state.

Over the years the functioning of the economy and the legal system in the USSR has been interpreted in differing ways by government and academic analysts using numerous models: Marxist (Official Soviet, Degenerate Workers' State, State Capitalist, Maoist, Economy of Waste, Eurocommunism) and Non-Marxist (Totalitarian, Bureaucratic Society, Industrial Society, Interest Groups, Economy of Shortage).<sup>20</sup> For the purpose of this report it is worth recalling two of them.

The Official (Marxist-Leninist) Soviet model claimed an important role for law in economic regulation: the Constitution provided the general legal framework; by law the Communist Party of the Soviet Union played the leading role in the political system, society, and the economy; the Supreme Soviet (parliament) was responsible for passing laws and adopting Five Year Plans and unified state budgets that guided the economy as legal documents. According to this interpretation, all operations of the state and most activities in the economy were regulated by the Constitution and laws adopted by the leading legislative body. It was recognized, however, that there were deviations from socialist legality (speculation, embezzlement, corruption) that arose due to weaknesses of individuals and were controlled by appropriate state agencies.

An alternative vision is provided by Kornai's shortage economy model.<sup>21</sup> According to him, the socialist countries had an economic system that was fundamentally different from Western market economies. Kornai ascribes little importance to law in the main operations of the traditional command economy (e.g., the USSR pre-perestroika). The system was dominated by quantity signals (shortages), behavioural patterns (quantity drive, investment hunger), and methods of control (planning using quantity indicators). However, law became more important in reforming economies (Hungary during the New Economic Mechanism, the USSR during perestroika), especially in the operations of the private sector.

Although Kornai was concerned with shortage-related phenomena, he devoted relatively little attention to the second economy, which can be defined as activities involving direct pursuit of private gain and/or significantly violating the laws and regulations in the socialist economy.

The causes of the second economy included: price controls (leading to speculation/resale); chronic shortages (leading to private farming); state ownership (leading to theft of state assets); excessive regulation (leading to fixers [*tolkach*] arranging informal supplies for firms); and

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prohibition of desired private activity (leading to illegal private provision of construction services by seasonal migrant workers [*shabashniki*] and of medical services by doctors). Empirical studies have shown that informal/illegal private activities were carried out continuously, but with varying degrees of intensity, in all command economies.

The second economy played a significant role and influenced individual and institutional behaviour, as well as important quantity- and monetized-economic processes. The second economy was motivated to supply desired goods and services by substantial rewards in cash and kind despite laws prohibiting these activities and enforcement of them by police and prosecutors. It was able to produce and distribute commodities because of slack social control, corruption, and widespread theft of materials, capital equipment, and labour time. This siphoning of resources by the second economy in turn aggravated shortages in official retail and producer goods markets.

The interconnections between individuals, firms, and state regulatory agencies in the socialist economy are described and discussed by Davis, who provides a systems analysis of the second economy.<sup>22</sup> The paper offers an evaluation in theoretical terms of the quantity and financial flows between transactors in the second economy, including those in state regulatory bodies, and relates to these phenomena findings from empirical studies. With respect to the state regulatory bodies, lower level participants in the black market pay bribes to them in order to escape official detection and prosecution. This results in significant corruption in the state apparatus.

Detailed empirical studies of economic planning in the USSR reveal other characteristics of the relationship between regulation and the role of law. Zaleski accepts that according to the official Soviet model, 'The USSR Supreme Soviet is the only body that can pass laws, change the Constitution. ... It is responsible for ... voting on the USSR budget and plan. Economic plans are developed by Gosplan and the Council of Ministers and then sent to the SS for approval. After that it is transmitted to the executors of the plan'. He points out, however, that in reality all processes are controlled by the Communist Party and that it enforces a 'Priority of Management over Planning' in the plan implementation period:

The principal summary documents of the plan are passed by the Supreme Soviet, and one frequently comes across affirmations that the plan must be treated as law. In practice, the process is so complex that the plan has to be repeatedly revised ... This situation leads, inevitably, to a breakdown in respect for the law. Soviet managers know that if they are going to satisfy some targets/laws they will have to infringe on others.<sup>23</sup>

Rutland supports this argument that there are disguised processes in economic regulation that do not conform to the Constitution or laws. He points out that throughout Soviet history there were secret sections (defence, security) of plans and budgets that were not included in documents passed by the Supreme Soviet but exerted great influences on economic developments; continual and pervasive informal interventions by Party officials during plan implementation; many secret instructions by central state bodies and ministries; and tolerance by state officials of informal operations of enterprises (e.g. *tolkachi* and inter-enterprise barter) that were not for private gain. Rutland provides quotations from Soviet managers to the effect that they are forced by higher state authorities to break laws by engaging in informal processes in order to achieve plan targets and make their superiors look better.<sup>24</sup>

Many features of the economic transition process in Russia contributed to the survival of some existing informal processes and the development of others. These include the reduced risk of detection caused by the weakening of the state; bribes demanded by an intrusive state; high or inconsistent taxation; lack of legal incentives for participants in the economy; growth of inter-enterprise debt; barter as tax avoidance; tunnelling (asset stripping of enterprises) and looting (embezzlement of loans); violating the rights of minority share-holders; and the 'loans-for-shares' deal and the rise of the oligarchs. Kim and others have estimated that the informal economy in Russia in the 1990s accounted for 25 to 40 per cent of total GDP.<sup>25</sup> As in the Soviet period, these disguised and illegal activities could not occur on such a substantial scale without the widespread participation of economic regulators in the state apparatus. ■

# Constitutionalism in Russian: Presentation and Reality

Alexander Blankenagel, *Humboldt University, Berlin*

How far has Russia got with its 1993 Constitution? When the Constitution was made, Russia was in the middle of the process of transformation and the idea was not only to pass a new constitution, but to implement constitutionalism in Russia. Constitutionalism is understood as a situation in which the Constitution has been implemented to effect a working democracy, rule of law, and a real and substantial volume of basic rights enjoyed by citizens and other individuals.

The thesis of this short paper is that Russia is still a long way from achieving an effective constitutionalism and that one of the reasons for this deficit can be described as an orientation to the surface or outward appearance of things. For constitutionalism, this implies the creation of the symbols of constitutionalism with a simultaneous non-creation or erosion of substantial constitutionalism. The paper links this to the phenomenon of 'pokazucha'. Pokazucha is a phenomenon from the Soviet socialist past of Russia: the everyday term describes the phenomenon that, to demonstrate the achievements of socialism, the realization of the plan or of some other normative idea, some item (institution, product, achievement, or other) would be created and presented in accordance with these normative ideas or expectations, whereas the substance of the item would not meet these normative ideas or expectations, but would be the usual grey socialist reality.

Looking at the Constitution and its realization from the point of view that it is all symbols and little substance, one will find symbolic norms already in the Constitution itself, in the legislation concretizing the Constitution, and in the constitutional adjudication of the Russian Constitutional Court. A look at some empirical data will not only demonstrate that Russian citizens perceive their Constitution as a beautiful surface with no substance beneath it, but also, that they have little conception of how the substance of the Constitution should be adapted to attain constitutionalism.

Let us look at some pokazucha provisions in the Constitution. Art. 29 par. 5 ConstRF guarantees

freedom of the mass media without making clear that they must be neither state-owned nor state-controlled: the result is state-owned and state-controlled television (print media, owing to their relatively minor influence, are actually quite pluralistic). Freedom of assembly has not been granted as free from registration and permission; the 'Federal Law on the Freedom of Assembly' regulates a rather suffocating registration procedure and its application has turned this registration into a permission procedure. Other examples one can find in the chapter on federalism. Art. 72 ConstRF lists a long catalogue of subject matters of joint jurisdiction. The idea of joint jurisdiction in the distribution of powers between federation and states implies, as witnessed by the term 'joint', that both partners have their rights: in consequence this means that there should be some conditions under which the federation can make use of joint jurisdiction. There are no such conditions, either in art. 72 ConstRF or in art. 76 ConstRF, which regulate the legislation on the federal and the state level. As a result, matters of joint jurisdiction are matters of federal jurisdiction in the sense that the federation may choose either to use or not to use its powers, or to delegate them to the states according to its liking. Another example is art. 77 par. 2 ConstRF, which regulates that the federal and the state executive bodies form an integrated hierarchy of organs of the executive power. The whole idea of federalism is to have two layers of statehood and thus two separate hierarchies — federal and state — of organs of the executive power.

Turning to the implementation of legislation, the impression of a constitutionalist surface and a non-

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*The exercise of a number of basic rights is subject to bureaucratic registration or permission procedures which give the state full control over the realization of such rights by individuals.*

constitutionalist substance becomes even stronger. The exercise of a number of basic rights — freedom of assembly, freedom of association, freedom of religion, freedom of the press — is subject to bureaucratic registration or permission procedures which give the state full control over the realization of such rights by individuals. In these registration procedures the individual has to submit all sorts of relevant and in many cases irrelevant information; failure to give information, false information, or a contradiction of other legislation of the RF will be a justification for the authorities to decline the registration, in other words, to forbid the realization of the basic right. The state practically allows the realization of basic rights where it should, if anything, simply acknowledge the fact that an individual makes use of his or her basic rights and support him or her in this matter. Thus, we see that, in Russia, the laws do not have to be in conformity with the Constitution; rather, the Constitution is made to conform to the existing laws.

Similar things happen in the concretization of the federal system in the federal law No. 184. The constitutional regulation of distribution of competencies in legislation in matters of joint jurisdiction has been substantially changed by the law FZ No. 184 in a very indirect and hidden way. In regulating the financing of matters of joint jurisdiction the legislator has composed a catalogue of subject matters of joint jurisdiction which is in many of its parts in clear contradiction with the catalogue of subject matters of joint jurisdiction in art. 72 ConstRF. Again, FZ No. 184 had, after the terrorist attack in Beslan, abolished the direct elections of the governors of the states of the Russian Federation. Instead, they were elected by the state parliaments on the basis of a non-declinable proposal by the federal president, non-declinable, because the federal president had the right to dissolve the state parliament after three unsuccessful proposals. Apart from that, the federal president had the right to dismiss the president's respective governors of the states at any time, on the grounds of a loss of trust in them. (This law has

recently been revoked, as a response to the mass protests after the Duma elections in December 2011, to allow direct elections with some influence of the federal centre and to reduce the possibility of dismissal.) In consequence the already weak and mainly symbolic federalism of the Russian Constitution was reduced to a federal surface with a centralistic substance by the concretizing legislation.

One finds the same picture when one turns to the judicial practice of the Russian Constitutional Court. In its judicial practice concerning basic rights, the Court very often abstains from deciding the case in substance. Instead of stating whether an infringement of a basic right is proportional or not and therefore unconstitutional, the Court very often instead raises the uncertainty of the relevant statute, sending it back to the legislator for correction and thereby avoiding the question of the constitutionality of the infringement, which remains unanswered. Another example: instead of deciding a case on its merits, the Court very often rejects the complaints as inadmissible. In the reasoning of these rejections the Court will tend to express its position on the merits of the complaint in a so-called 'legal position' which will, unlike a decision on the merits of the complaint, have no legal effect. The Court considers these legal positions to be binding; the other courts and the executive power will often not observe them. Again, the constitutionalist surface concealing an absent constitutionalist substance is revealed.

Empirical data on the views of Russian citizens on their Constitution confirm this finding of a symbolic constitutionalism, lacking in substance. Surveys show that Russian citizens like and support the democratic principles and rule of law enshrined in the Constitution, but when asked who should decide and control such things, respondents were found to ignore the principle of separation of powers, instead favouring decision-making power and control by the executive. Despite this, they will commonly describe state (executive) power as arbitrary, unjust, and corrupt.

Constitutionalism is a matter of substance: the forms may vary if the substance is constitutionalist. The Russian approach seems to have a fatal and culturally based predilection to reverse this logic: the substance may vary if only the form is constitutionalist. ■

# The Relevance of Soviet Legal Culture Today

Peter H. Solomon, Jr., *University of Toronto*

What was Soviet legal culture and to what extent does it persist and shape the nature and place of law in Russia today? Legal culture can refer broadly to major features of the role of law in society and the way legal institutions function or narrowly to the attitudes of the public or elites toward law and its role. Understanding the term in either sense, one might expect both continuity and change in different features of the legal culture of Soviet times. It is useful and revealing to inquire into the reasons for continuities as well as changes (not to take inertia for granted) and ask whether and why some aspects of Soviet legal culture may have become more intense.

I have identified eight characteristics of the role of law in the USSR, including the three that were singled out at the first workshop (extremes of legal formalism, an instrumental approach to law, and the prominence of informal practices).<sup>26</sup> None of these characteristics is unique to the USSR (or tsarist Russia) and some derive from Continental legal tradition, but their extreme forms and combination in the Soviet Union were unusual, as were some of their consequences. It is important to start by recognizing as a first characteristic of Soviet legal culture a narrow construction of the role of law and legal institutions, manifested in their small part in the handling of disputes of political or economic significance. Thus, constitutional matters and challenges to the actions of government agencies and officials (administrative justice) were largely outside the purview of the courts for most of Soviet history, as was the resolution of important economic disputes (typically in the purview of executive branch tribunals [state *arbitrazh*]). Consequently, the law lacked the prestige associated with these functions.

The formalistic approach to law took an extreme form in the USSR and the communist world, such that law (*pravo, jus, droit, recht*) meant only the laws (*zakony, leges, lois, gesetzen*), and there was little need for carefully reasoned court decisions, let alone judicial creativity; this reality left its mark on legal education. According to Zdenek Kuhn and Michal Bobek, the kind of legal formalism found in the USSR and the socialist world mimicked that of Western Europe in the late nineteenth century and no longer

present in the second half of the twentieth.<sup>27</sup> This limited understanding of law also discouraged members of the public from developing a rights consciousness and its translation into action.

As I have argued earlier, in the Soviet Union an instrumental approach to law won out over a nihilistic, Marxism inspired one by the mid 1930s.<sup>28</sup> But the needs of the Communist Party leadership did stay above the law, and its members had the right to define, bend, and avoid laws, not to mention intervene in their application. This approach trickled down to political and bureaucratic authorities everywhere, leading to the habit of producing framework laws and defining their operational meaning through instructions, another practice taken to extremes in the USSR. Criminal prosecutions were also used as a tool in political and economic disputes, a harbinger of worse problems to come.

*Criminal prosecutions were also used as a tool in political and economic disputes, a harbinger of worse problems to come.*

The prominence of informal practices, including those outside or against the law, reflected the weakness of formal institutions in the Soviet order. It may also have produced within the Soviet public a tolerance of mild forms of deviance and a realistic view about what courts and other formal institutions could deliver. A 1971 survey in Moscow, Orel and Kemerovo found that most people believed

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that it was inappropriate to use criminal punishments against petty thieves and bribe givers. At the same time, persons bringing complaints against illegal actions of officials went not only to the procuracy or courts (with their narrow jurisdiction) but more often to executive officials (starting with party leaders) at all levels of the political hierarchy.<sup>29</sup>

Four other characteristics of Soviet legal (and political) culture were the value placed on hierarchy and control; an anti-business strain; and, on a more positive note, the emphasis on popular participation in the administration of justice and the responsibility of judges for helping members of the public. The bureaucratic judiciary of the post-Stalin period reflected the stress on hierarchy and control and became almost as confining to judges as that of Japan. Among other things it limited the independence of individual judges (barely visible even as a value today); encouraged the close relationship of judges to law enforcement officials; and justified the issuing of instructions or directives to judges. The anti-business strain was reflected in the criminal law and its enforcement, and it grew worse with the rise of the second economy. Popular participation in justice included the use at trials of lay assessors sitting in mixed panels with judges and the prominent place of lay courts (both rural ones and the comrades' courts). Judges' contributions to public understanding of the courts included accessibility in their offices, informal trial proceedings, and participation in community events.

The eight characteristics of Soviet legal culture that I have identified have had different fates — some have declined, others have become more pronounced, and yet others have remained the same. Of course, the law and courts are now involved in highly salient matters, including constitutional, administrative, and business disputes. (Administrative justice is one of the success stories of post-Soviet Russian legal reform.)<sup>30</sup> When you combine this with the instrumental approach, you are bound to get an increase in attempted interventions in the administration of justice. The problem of vague framework laws and the corresponding role of instructions has not gone away; if anything, the quality of laws overall has deteriorated, with many new laws reflecting special interests and not coordinated with other ones.<sup>31</sup>

Two features of Soviet legal culture that have declined are ones that had a socialist flavour — the value placed on popular participation and the responsibility of judges to the public. Judges never liked lay courts or peoples' assessors, and both were in decline in the late Soviet period. Likewise, judges' holding office hours for members of the public declined because of its potential for *ex parte* communications, and the whole concept of a duty to inform the public disappeared. However, the new justice of the peace courts have succeeded in improving accessibility for the public.

Two elements of Soviet legal culture that have become more pronounced are hierarchy and control as dominant values in the organization of the courts, and police and the anti-business strain in criminal law and its enforcement. The relatively autonomous judicial branch became even more hierarchical and bureaucratic than before, marked by strong chairs of courts, the dependency of individual judges on their chairs and the higher courts, and a system of evaluation of judges that discouraged individual initiatives by trial court judges. For its part the police have become more centralized than ever. The prejudice against business was a Bolshevik tradition, revived by Khrushchev, contested under Gorbachev, again revived in the 1990s, and by now a dominant force in criminal policy. The regulation of business in the RF overuses the criminal law, and in practice serves the corrupt interests of police.<sup>32</sup>

The three features of Soviet legal culture identified by the earlier workshop — an instrumental approach to law and legal institutions, the prominence of informal practices (often deviating from formal ones), and formalistic thinking by jurists — remain vital parts of the post-Soviet legal scene. This is so because of their strong connection to Russia's authoritarian politics and hierarchical relations in social institutions. In fact, without changes in the political and social orders, it would be hard to imagine a curtailing of the instrumental approach to law or a willingness of leaders in the RF to accept subordination to the law.

It is also possible to explore the relationship between the public and the law in Soviet and post-Soviet times, although to do this thoroughly would require close analysis of sociological data from

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different periods. Long ago Harold Berman recognized that the Russian and Soviet publics cared more about morality and justice than law in a formal sense, and that they understood that the laws were not always legal or just.<sup>33</sup> In fact, the gap was often so blatant that it would be unreasonable to expect the public to be prepared to obey laws simply because obeying the law was important. However, sociological studies of legal consciousness from the 1970s indicate a more settled and comfortable relationship of the broad public to laws than might have been anticipated. There was a strong group of legal sociologists at work in these years, based mainly at two of the large institutes (IGPAN and the Procuracy Institute), and their most detailed findings were often classified, so that definitive study would now require archival work.

The studies in this period emphasized knowledge of laws, obedience to laws, and respect for law; only in the 1980s did scholars investigate consciousness of rights and the willingness of citizens to pursue them. As one might expect, only about half the population had reasonable knowledge of laws, despite efforts at legal propaganda and socialization. A report on the motives for obeying laws from 1979 revealed that more than half of the respondents (fairly constant across social groups and location) chose 'because the laws reflect social and personal interests'. Less than half of that share cited 'habit' or 'fear of consequences of non compliance'. In other words, there was a sense that for the most part the laws that affected ordinary persons (family law, law of housing, inheritance, and criminal law) were reasonable.<sup>34</sup> While there was not a lot of study of trust in legal institutions, one survey from 1976 found that 60 per cent of the population thought that the sentences of judges were fair (most of the dissenters thought that they were too lenient).<sup>35</sup> While it is hard to compare findings of different surveys with different questions across time, I have not encountered in the Soviet period studies the deep cynicism and lack of trust that characterized surveys of popular attitudes toward courts in the 1990s (when 15 per cent approval rates were the norm). Even now, the most reliable studies find approval ratings no higher than the low thirties (still much better than in countries of Southern Europe). I know of no studies of perceptions of corruption in the courts in the Soviet period.

My sense is that the attitudes of Russians toward their laws and legal institutions today are more troubled and conflicted than those of their parents and grandparents toward Soviet ones. This development may reflect changes in expectations as well as reality. Two decades of talk about rights and democracy and increased exposure to the experience of the West should have raised expectations, at least among the young and educated, so that even Soviet era practices would be less satisfactory than before. At the same time, along with some improvements in the administration of justice (e.g. its efficiency and openness), there have also been important areas of deterioration (corruption), which, when measured against higher expectations, lead to cynicism. Nonetheless, citizens use the courts more than ever before and those who do so tend to see the courts in a better light.

Perhaps the most dramatic source of cynicism toward law in Russia today is the practice of law enforcement at all levels, from traffic police to senior officials raiding business for their own enrichment.<sup>36</sup> Without fundamental change in the conduct of policing, I would not anticipate improved public attitudes toward law and legal institutions. It is possible that the police reform legislation of 2010 will reduce petty corruption among rank-and-file officers but it is not likely to affect high-level corruption or conflicts of interest. Until government officials are separated from business activity and profit, the role of the police in business will not decline.

A final question is the extent to which demand for 'law' (laws that are clear and fair and administered by impartial judges) is present and even growing among the population or relevant elites. Surveys indicate that small business people (entrepreneurs) 'dream' of operating in a normal legal context.<sup>37</sup> Perhaps, well-educated young persons have similar desires, although Hendley's study of legal nihilism presented here suggests that, like their grandparents, young adults will bypass laws as need be. A hopeful sign for the future is a recent widening of public criticism of legal institutions and the emergence of new sources of policy ideas — from NGOs to think tanks to public bodies and the media — all communicating through the

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Internet. There are new possibilities for building an agenda of change in the legal realm, but just which persons or groups will come to support it is unclear.

On a larger plane, the legal culture of post-Soviet Russia, marked as it is by contradictions, is

congruent with political and social institutions, the authoritarian state, and hierarchical social institutions. Law, legal institutions, and public attitudes toward them can change only in limited ways as long as their political and social bases remain. ■

# Reflections on Legal Nihilism in Russia

**Kathryn Hendley**, *University of Wisconsin-Madison*

Legal nihilism is presumed to be epidemic in Russia. Policymakers and ordinary citizens alike believe that Russians do not respect law and generally ignore the law whenever it proves inconvenient. When running for president in 2008, Dmitry Medvedev famously commented that the level of legal nihilism among Russians is the highest in Europe. Legal scholars as well as commentators in the mass media have echoed this sentiment. There is general agreement that this disdain for law is nothing new, and that it was not a phenomenon born during or out of the Soviet period. Instead, it is seen as an integral element of the Russian legal tradition that dates back to the tsarist era.

Despite this dogma, there has been little effort to investigate the attitudes of Russians toward law empirically. Doing so is not easy. Pinpointing the level of legal nihilism in Russian society is almost impossible. Attitudes about law are complicated and inherently messy. It is possible to be nihilistic with regard to some issues, but to be deeply compliant in other areas. Notwithstanding these difficulties, I have been engaged in an effort to analyse the level of legal nihilism among Russians and to investigate what sorts of characteristics are most likely to be found among nihilists.<sup>38</sup> My goal is not to present the definitive causal model, but to begin a discussion grounded in empirical data. My hope is that others will contribute to the discussion.

To this end, I analysed data collected as part of the Russian Longitudinal Monitoring Survey of the Higher School of Economics (RLMS-HSE).<sup>39</sup> Questions about attitudes toward law were included in the 2004 and 2006 rounds of the RLMS-HSE. Included was a question that I used as a rough proxy for legal nihilism. Respondents were asked to indicate their level of agreement or disagreement with the following proposition: 'if a person believes that a law is unjust, he has the right to go around it'. Somewhat surprisingly, given the rhetoric, a solid majority of respondents took issue with this statement. In 2006, only 6 per cent expressed strong agreement. An additional 18 per cent were in general agreement. But the remainder were either ambivalent (34 per cent) or opposed (26 per cent) to the sentiment expressed. When compared to the results for 2004, a gradual decrease in the

level of legal nihilism can be observed. The percentage of respondents who agreed with the statement decreased from 29 per cent in 2004 to 24.5 per cent in 2006. Moreover, when compared to other countries, Russia's level of legal nihilism appears to be typical. Thus, Medvedev's boast of Russia's supremacy in this regard seems to be overstated.

Looking past the basic levels of legal nihilism to what characteristics tend to be associated with nihilism in Russia, I found that the data provided support for some aspects of the prevailing common wisdom while revealing a few surprises. As is true elsewhere, education is negatively correlated with nihilism. Likewise, Russian men — much like men elsewhere — tend to be more nihilistic than women. Logic suggests that Russians who are committed to democratic principles would be less likely to embrace nihilistic attitudes, and this was born out by the regression analysis. After all, nihilism is grounded in an assumption that the law can and should be manipulated to serve the interests of the individual. This sort of particularistic approach to law is at odds with the principle that law should be the same for all, regardless of power or wealth, which stands at the heart of the democratic ideal. Along similar lines, those who exhibited low levels of trust for key state institutions were significantly more likely to be nihilists. Those who are firmly in Putin's camp, as judged by their support for his signature policies of centralized appointments of regional governors and term limits for legislators, tend to be more nihilistic.

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Logic also suggests that those at the extremes of the economic spectrum would be more nihilistic, and the data support this. Those who have suffered economic reversals may blame the vicissitudes of the law for their ill fortune, and wish they had the opportunity to bend the law to their will. The results for all these analyses remained consistent in regression analysis.

The role of age was more surprising. Its impact came into clear focus when I divided the respondents into several generational cohorts. Social scientists have explored the role of generational change as to many aspects of the Russian reform process. They have uniformly found that older Russians tend to be more resistant to democratic processes than their children. To date, however, attitudes among different generations toward legal reform had not been studied systematically. A few Russian pollsters have asked questions about willingness to engage the legal system, and have analysed the results in terms of age. These studies support the findings of the literature on generational impact. In other words, older Russians are more reluctant to use the legal system. Thus, I had expected that older generations of those surveyed as part of the RLMS-HSE would exhibit greater cynicism toward law. After all, they had lived through the worst of the crudely instrumental use of law by Communist Party officials. Some had survived the successive purges of the Stalin years, during which the courts served as a conveyor belt to the camps. Yet the analysis reveals this oldest generation to be the least nihilistic. Instead, legal nihilism is highest among those who are now middle-aged, who were most affected by the dislocation of the 1990s, both positively and negatively. Many were laid off from jobs that they had thought were secure for their lifetime, and were forced to scramble to provide for their families. Some never found their place in post-Soviet Russia. A smaller group were able to see the opportunities presented by the disorder of the 1990s. Both groups are significantly more likely to adopt attitudes of legal nihilism.

*Communist Party members and others who were well connected were able to sidestep the law regularly in ways that benefitted them personally.*

What explains the low levels of legal nihilism among the oldest cohort is not entirely clear. It may be that the socialization of the Soviet era in which citizens were exhorted to obey the law held sway among these older respondents. The idea of going around the law may have triggered their dislike of chaos and their desire for discipline within society. This explanation is somewhat problematic in that it assumes that this group was unaware of the gap between the rhetoric and reality of law during the Soviet period. This gap was not only reflected in the cooptation of the courts during the height of the purges, but also in day-to-day reality. Communist Party members and others who were well connected were able to sidestep the law regularly in ways that benefitted them personally<sup>40</sup> and also in ways that conformed to the benefit of society.<sup>41</sup> In any event, the data indicate that any hope that attitudes toward law are growing less nihilistic with the younger generations is misplaced.

This preliminary analysis serves to remind us that legal nihilism is a nagging reality within the Russian legal tradition. At the same time, it provides a reality check. Legal nihilism is not inevitable among Russians, nor is it embraced by the majority of Russians. Rather, it tends to be more popular among those who are looking for some excuse to explain their lack of success. In a society where the 'haves' and 'have-nots' are increasingly far apart, it is not entirely surprising that cynicism about the ability of law to provide an even playing field has emerged among those at both ends of this spectrum to explain their fate.

In many ways, this study raises more questions than it answers. One obvious limitation of the analysis is the use of a question that focuses on attitudes rather than behaviour as the dependent variable. Future work might incorporate focus groups and/or surveys that are aimed specifically at uncovering behaviour vis-à-vis law. Looking at how Russians actually behave when confronted with a series of stark choices of either obeying a law that they find annoying or going around it would tell us more. My goal is to open a dialogue and to encourage others to take the analysis further. Much more work needs to be done in terms of identifying who the legal nihilists are in Russia and exploring the implications of legal nihilism. ■

# Case Studies from History on the Use of Law in Russia

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Marina Kurkchiyan opened our symposium by calling on scholars to research Russia's socio-legal culture from within, on its own terms, in order to discern its distinctive, enduring features, rather than apply models developed through the study or practice of other cultures. A key aspect of such a methodology is to view Russia as a socio-legal culture with a long history. Rather than apply ahistorical social science models to Russia, she recommended examining Russia's legal history to identify continuities which might open the way to understanding Russia's current condition.

Even as we focused on historicizing Russia's legal culture within its own borders, we frequently strayed into comparisons with other cultures to situate the phenomena we identified on a broad spectrum of socio-legal cultures around the world. I discussed two case studies to explore Russia's history in developing a rule of law and legal consciousness broadly in the population: the fifty-year history of the volost' court, the lowest judicial institution in the late imperial Russian judicial system, established in the legislation emancipating serfs in the Russian Empire in 1861 to deal exclusively with disputes among peasants; and the twenty-year history of the late Soviet law — the law 'On Rehabilitation of Victims of Political Repression' issued in October 1991, which is still in force in the Russian Federation. The continuity I see here is the willingness of Russian subjects and citizens to make use of the laws and courts offered them to pursue their interests and rights. And a comparison seems apt in this case. The experience of African-Americans in the US from emancipation through the Civil Rights era, and affirmative action as a legal effort at restorative justice, reveal some of the fallacies in viewing Russia, especially post-Soviet Russia, as an exceptional case of a 'failed rule-of-law' state a mere twenty years after the collapse of the Soviet Union.

My two research projects on the volost' court and the 1991 law 'On Rehabilitation' have led me to doubt the old chestnut that Russia has never had a rule of law or its correlate, legal consciousness, among broad sectors of the population. In both case studies, I discovered that impressive numbers of the

population had made use of these legal institutions — a court and a law — to pursue their interests. Not only did imperial subjects and post-Soviet Russian citizens use the institutions; they did so knowledgeably and displayed tenacity in pursuing their interests through appeals if they were disappointed in what the court or the law initially delivered. In both of these cases, the persons making use of the legal institutions available to them were among the least powerful, the least privileged, indeed, among the groups of the population one would expect to be least confident and adept in pursuing their interests through the courts or the law: recently emancipated serfs in the case of the volost' court, and stigmatized pariahs victimized by the Soviet state in the case of the 1991 law 'On Rehabilitation'. Hundreds of thousands of peasants brought their civil disputes to the volost' court before World War I; almost four million persons have received official status as 'victims of political repression' through the 1991 law. If Russia has never had either a rule of law or broad legal consciousness and has neither now, what do we make of these numbers? And if Russian subjects and citizens have been so quick to use the courts and laws available to them, why do Russians and outside observers alike continue to insist that no other culture has as severe a case of 'legal nihilism' as does Russia?

The compressed time frame applied to Russia's development and the fiction that a rule of law has existed somewhere in full and universally for all citizens in any culture set the bar inappropriately high for Russia. They also obscure how legal

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institutions have actually functioned, according to the historical record, in two major phases of the Russian state's attempt to elevate the previously unfree or victimized members of its population: 1861-1917 for emancipated peasants, and 1991-2011 for the Soviet Union's political prisoners and their spouses and children.

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The United States offers an example of a country where it has taken far longer than twenty years to establish and secure the rule of law. As a native of the Deep South in the United States who grew up at the end of the Jim Crow era and the beginning of the Civil Rights era, I observed the absence of the rule of law in the region. The continuing struggles of African Americans to make real the promises of the US Constitution of the late eighteenth century, to say nothing of the promises of emancipation from the 1860s, underscored the distance between the rule of law as an ideal in the US and a reality for this stigmatized and disenfranchised sector of the population.<sup>42</sup> As an eyewitness to the absence of the rule of law in an entire region of the US in the middle of the twentieth century, I recognized the hazard of examining Russia's legal history as an aberration from a model of the rule of law in mature democracies. Rather, I have been interested in how imperial subjects and post-Soviet Russian citizens have made use of the reformed legal institutions available to them.

The volost' or cantonal/parish court embodied the desire of reform legislators in 1861 to remove former serf owners from the process of deciding civil disputes among peasants and to offer emancipated peasants a venue for learning legal procedure and formal laws in their new status as liberated subjects of the Russian Empire. Fostering legal consciousness was an explicit goal in the design of this transitional judicial institution. Legal consciousness was to be a stepping stone toward the development of a rule of law in nation-building which, the reformers understood, required closing the divide in concepts of law and justice between the previously unfree serfs/peasants and their masters. Reformers also

envisioned the volost' court — a peasant court staffed by peasant judges deciding cases according to custom and the civil code of law — as a temporary solution to the shortage of legal professionals available in the empire to manage the petty civil disputes of peasants, who comprised more than 80 per cent of the population.

The volost' court was so successful an institution of transitional justice, school for legal consciousness, and instrument for peasants to pursue their interests through civil law that the autocracy extended its jurisdiction in 1889, and the elected, representative Duma of the constitutional period (1906-1917) reformed, rather than replaced it in 1912. Extensive archival research in the records of the courts has amply proven that pre-revolutionary Russia had found an institution that promoted the development of legal consciousness and the rule of civil law among 80 per cent of the population.<sup>43</sup> As Peter Solomon pointed out at our symposium, the Soviet state replicated the volost' court by introducing comrades' courts when it confronted its own shortage of legal professionals to deal with petty civil disputes.

In the post-Soviet era, the October 1991 law 'On Rehabilitation of Victims of Political Repression' is the key artifact of transitional justice in the Russian Federation, reinforced by the 1993 Constitution of the Russian Federation. Its framers intended it to serve both as restorative justice for the survivors of Soviet abuses and to defuse the political tensions that led to the Soviet Union's collapse two months later in December 1991. The law defined 'victim of political repression' broadly, embracing the multiple categories of Soviet citizens whom the state had subjected to disenfranchisement, imprisonment, forced resettlement, exile, and execution from the founding of the Bolshevik regime in October 1917 through its entire history. The law prescribed the procedures for applying for victim status and promised welfare benefits to those who were granted that status. The Russian Federation government invested significant institutional and financial resources to the law's implementation from 1992 to 2005, including a Presidential Commission for the Rehabilitation of Victims of Political Repression and local branches of the commission to facilitate survivors' applications. The record of the

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law soured, however, in 2005, with the federal monetization of the welfare benefits, transfer of the prerogative of setting the benefits' monetary value to local officials, and shift of funding to local budgets. A firestorm ensued, including many court cases initiated by survivors and survivors' advocacy groups.

Almost four million persons have applied for status through the 1991 law and received a decision.<sup>44</sup> The law has been amended several times. I argue that the firestorm following monetization in 2005 and the survivors' active use of the court system to press their complaints and claims from 2005 through 2011 indicate that the 1991 law had gone some distance in its first fifteen years toward convincing survivors of their rights and in encouraging them to view the law and the Constitution as instruments they could use to pursue their interests. The many cases which have risen to the Constitutional Court suggest that survivors and their advocates have taken to heart the human rights granted to them through the Constitution, as well as the constitutional guarantee that citizens will receive restitution for harm done to them by the government. Plaintiffs' frustration over the fact that there are no mechanisms to force implementation of Constitutional Court rulings does not negate the fact that they have enough expectation that the constitutional system *should* be enforced to undertake their suits in the first place. Furthermore, plaintiffs' very use of the court system and reference to the Constitution, previous court rulings, and the law itself indicate that they have some degree of legal consciousness.

If we take these two examples of legal reform in Russian socio-legal culture, one from the late imperial period, the other a junction between the late Soviet and the post-Soviet period, we must make a judgment about their significance. Should we consider subjects' and citizens' active use of legal institutions offered by the state an indicator of the expansion of legal consciousness and the rule of law? Do these millions of individual decisions to pursue interests, claims, and rights through the courts and through the law demonstrate that even the most historically disenfranchised Russians have in the distant and recent past displayed a capacity to embrace the rule of law? Do we grant the possibility that the century and a half of Russian legal history and civil law extending from the emancipation of the serfs in 1861 has a trajectory similar to the century and a half of US legal history in civil rights since the Emancipation Proclamation of 1863? Does it matter that Russian citizens have seized the law as *their* instrument to use and have mastered legal procedures to make *their* demands in the stubbornly instrumentalist, formalistic, and statist Russian socio-legal culture? I acknowledge that statism and state instrumentalism predominate in Russian socio-legal culture and legal history, but I argue equally that we must not ignore or dismiss major episodes in Russia's past and present which support an alternative interpretation. We should also examine why the more catastrophic or exclusively negative appraisals of Russia's socio-legal culture over the last 100 years have prevailed. Whose interests or claims about Russia's past and present and consequent policy moves, both domestic and international, do they vindicate? ■

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## Notes

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2. Glenn, Patrick (2004) *Legal Traditions of the World*. Oxford: Oxford University Press, p. 135.
3. Quoted from Franklin, Simon (2007) 'On Meanings, Functions and Paradigms of law in Early Rus', *Russian History/histoire Russe* 34, Nos 1-4: 63-81.
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6. For a detailed discussion see Tatiana Borisova (2008) 'Russian National Legal Tradition: Svod versus Ulozhenie in Nineteenth-century Russia', *Review of Central and East European Law* 33.3: 295-341; and 'The Digest of Laws of the Russian Empire: The Phenomenon of Autocratic Legality', forthcoming in *Law and History Review*.
7. Uchrezhdenie Pravitelstvuishego Senata, izdaniia 1915 goda, i ego izmenenie zakonom 16 dekabria 1916, in *Sobranie uzakonenii i rasporiazhenii pravitelstva*, No.11, 1917, Item. 68.
8. The legislation on the army and on some provinces, such as Finland and Poland, was placed separately and was not included in the Digest of Laws.
9. This observation, made by Richard Wortman (1976) in his *The Development of a Russian Legal Consciousness* (Chicago: University of Chicago Press), has been further elaborated by other scholars. See the survey by Richard Wortman (2005) 'Russian Monarchy and the Rule of Law: New Considerations on the Court Reform of 1864', *Kritika: Explorations in Russian and Eurasian History* 6.1: 150-51.
10. Quoted in: Anatolii Remnev (1989) 'Problema ob'edinennogo pravitelstva nakanune pervoi rossiiskoi revoliutsii', *Novoe o revoliutsii 1905-1907 gg. v Rossii*. Leningrad, p. 97.
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13. Butler, W. E. (1978) 'Techniques of Law Reform in the Soviet Union', *Current Legal Problems* 31: 209.
14. See Maggs, P. (1991) 'Enforcing the Bill of Rights in the Twilight of the Soviet Union', *University of Illinois Law Review*: 1049.
15. (1990) *Law & Social Inquiry* 15: 419.
16. In (2007) *Remaking the Role of Law: Commercial Law in Russia and the CIS*, ed. Kathryn Hendley. New York: Juris Publishing Inc., p. 149.
17. Ioffe, Olympiad S. (1985) *Soviet Law and Soviet Reality*. Dordrecht, The Netherlands: Martinus Nijhoff, p. 194, references omitted.
18. See Luryi, Iuri (1979) 'Jurisconsults in the Soviet economy', in *Soviet Law after Stalin: Soviet Institutions and the Administration of Law. Law in Eastern Europe* 20(III). The Netherlands: Sijthoff & Noordhoff, p. 168; Giddings, Jane (1975) 'The jurisconsult in the USSR', *Review of Socialist Law* 1.3: 171; Henderson, Jane (1992) 'The role of the jurisconsult in the Soviet state in the light of the economic reforms', in *The Emancipation of Soviet Law. Law in Eastern Europe* 44. Dordrecht, The Netherlands: Martinus Nijhoff, p. 143.
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38. For the full paper, see Kathryn Hendley, 'Who Are the Legal Nihilists in Russia', *Post-Soviet Affairs*, forthcoming.
39. The RLMS-HSE is a nationally representative household-based panel survey of Russians that uses a stratified cluster sample. Since 1992, it has been fielded on a regular basis through a collaboration between the Institute of Sociology of the Russian Academy of Sciences, the Carolina Population Center at the University of North Carolina, and the Higher School of Economics. Background on the RLMS-HSE is available at <[www.cpc.unc.edu/projects/rlms-hse](http://www.cpc.unc.edu/projects/rlms-hse)>
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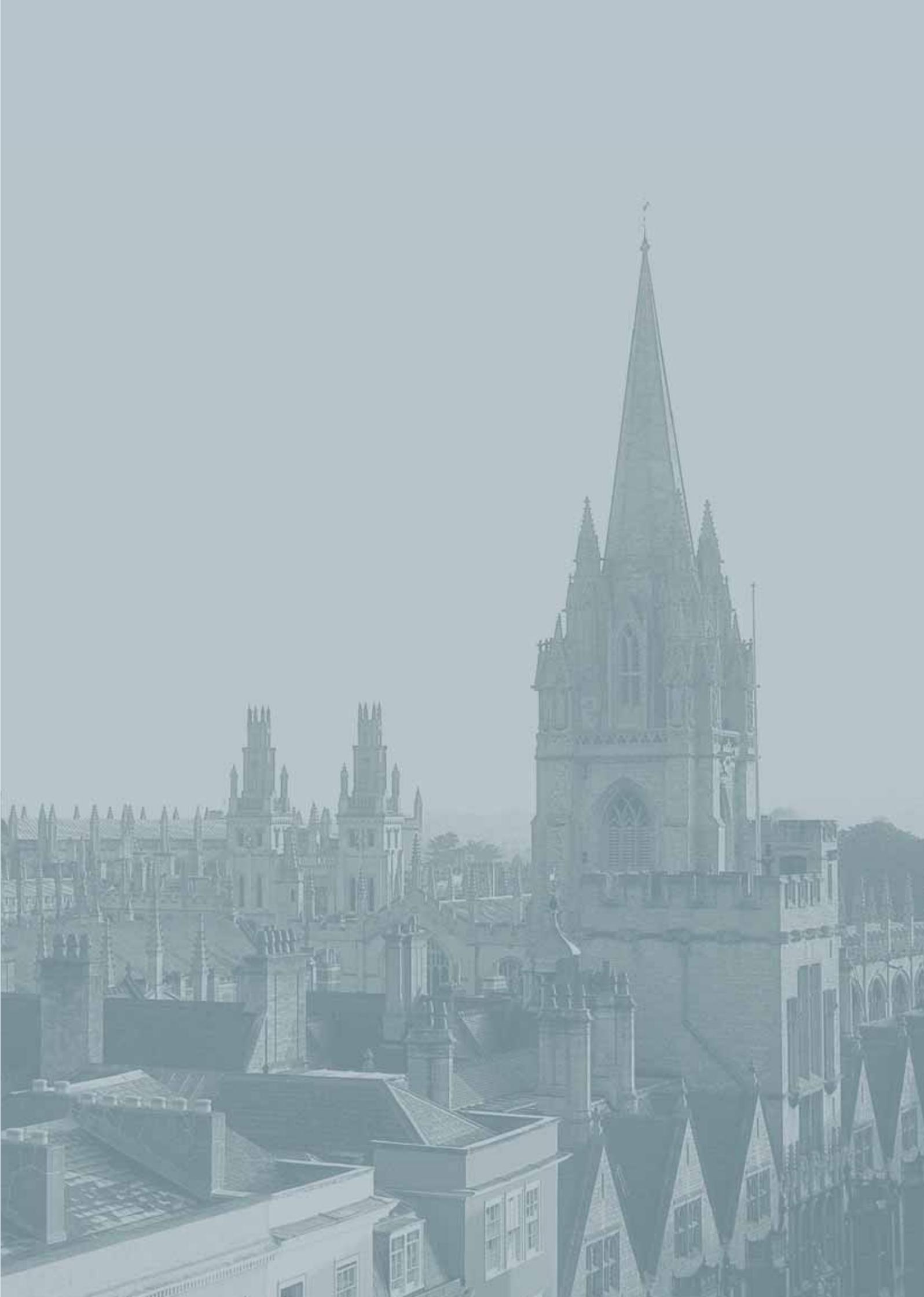
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