Constructing Legal Culture through Institutional Reforms: The Russian Experience

REPORT AND ANALYSIS OF A WORKSHOP HELD AT WOLFSON COLLEGE, OXFORD
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Introduction

The familiar stereotypes of Russia that we see not only in the popular media but even in some academic writing suggest that there is no effective law in Russia and that most significant decisions are made either as a consequence of corruption or of political intervention. The country is often discussed as if it were an isolated case and presented without any context for objective comparison. Simplistic perceptions of this kind do not help us to understand what is really happening there, in terms either of the flow of events as a whole or of what law means in the economic and social aspects of Russian life. In practice, the relationship between law and everyday life in Russia is complicated, and in spite of extensive commentary, the central question of precisely what contribution law makes in organizing Russian society remains unanswered. To explore this question, The Foundation for Law, Justice and Society, together with the Centre for Socio-Legal Studies, convened a workshop in September 2011 to bring together a group of experts on Russian law, politics, and economics in the hope of achieving a better understanding of Russian legal culture in its broadest sense.

The workshop’s aim was to consider whether an approach via ‘legal culture’ is helpful towards gaining an in-depth understanding of how law works in Russia. The workshop was designed to outline the distinctive characteristics of Russian legal culture and evaluate the effects of the country’s many institutional reforms since 1990 on the legal mentality and behaviour of the people. Can institutional transformations modify legal practices, alter popular attitudes and perceptions, and thereby change what people expect of the law? If any changes are indeed taking place, how substantial are they? Is it possible to identify a new pattern of conduct throughout the society, or are the changes merely localized or partial? And finally, if a better understanding of the Russian socio-legal profile can be achieved, what implications might there be for understanding how to use the technique of institutional reform as a social engineering device?

Can institutional transformations modify legal practices, alter popular attitudes and perceptions, and thereby change what people expect of the law?
The Distinctive Features of Russian Legal Culture

Although legal culture has now become established as an analytic framework in academic circles, there is still a considerable amount of dispute about it. There are as many interpretations of what it consists of as there are researchers who choose to use it. In the broadest definition, suggested by Laurence Friedman, legal culture is the ‘dominant pattern of ideas, attitudes, expectations and opinions about law held by people in some given society … that determines their way of doing and thinking … and bends social forces toward or away from the law and in particular ways’. This view provokes the question ‘does a pattern exists throughout the society?’ And that question in turn provokes an even harder one: ‘how can we know?’ Are we sufficiently well equipped methodologically to test such a generalization when it seems to be inevitable that our empirical observations must always be patchy at best?

However, I take my point of departure from the arguments of scholars who assert the importance of legal culture despite the challenge it poses to the methodology of social science. As Clifford Geertz has pointed out, even if we cannot see culture we can certainly make informed guesses about the state of mind that the term is intended to describe. Culturally, historical serendipities are likely to have amplified the differences between one society and another. Each society is distinctive to the extent that its local peculiarities have caused its law and legal institutions to have evolved into an appropriate pattern. It follows that one would expect law and legal institutions to convey different messages to the people in each country. In turn, the ordinary people, the users of legal institutions, define and re-define them through their distinctive beliefs, experiences, and practices. The particular configuration and performance of other institutions in the society (economic, social, and political) influence the role and interpretation of law, how and when it should be used, and its value in that particular social setting.

It should be borne in mind that the concept of legal culture does not suggest that there is a fixed pattern in a society, a ‘social genetic code’. Far from it; legal culture is not fixed. It consists of an account of the current state of affairs in a society, but that state necessarily evolves over time and is an adaptive response to changes of every kind, internally and externally.

A complete pattern of what could be defined as legal culture is too complex a phenomenon to be captured in full. To put it metaphorically, if legal culture is a mosaic the best that we can achieve is to put a few tiles in the right places within it. The aim is to be able to fit together enough pieces to form a significant section of the design, so that inferences can be drawn to give a meaningful impression of the whole picture, rather than attempt to provide a complete picture in every detail. The task becomes even more complex when the country under scrutiny has as vast, widely dispersed, multilayered, and multi-ethnic a population as Russia. In analysing Russia, qualifications are unavoidable. First, the cultural differences between some of Russia’s many regions are very great. It is necessary to make clear which ‘Russia’ we are talking about. In this report I collected the empirical data during visits made over several years to various urban centres in the European part of Russia. There are no reasons to assume that people in the Siberian towns or the Russian Muslim population do not share a common legal culture with their countrymen in the western part of Russia, but without empirical evidence that cannot be taken for granted. Second, the research covered a particular social group, consisting mostly of people with a background of secondary or higher education. These are the people who are traditionally seen as the most

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influential in shaping values and social practices, which mean that findings based on data about them are significant for legal culture.

In my work, the term ‘legal culture’ is understood as the foundation upon which a society constructs, informally, its ‘rules of the game’. To introduce my findings about Russian legal culture, I will outline what appear to be among the most prominent component tiles in the mosaic of Russian legal culture. They are: (a) an extreme formalism in the perception of what law is; (b) the reduction of law’s social value to that of a mere instrumental role; and (c) a conflict between the formal and informal rules of Russian social institutions that continually undermine institutional performance. Having discussed each of these in detail I will then proceed to consider whether there is any evidence that the legal reforms passed during the transition have produced, or are now producing, the large-scale transformation in the way in which Russians perceive and use law that was hoped for twenty years ago.

The ‘hard law’ approach

What was evident from my research experience was that the manner in which law is interpreted is formalistic in the extreme; most Russians think strictly in terms of the letter of the law. In other words, the characteristic Russian vision of law does not allow space for the concept of a ‘soft law’. Soft law thinking gives prominence not so much to what the law actually says as to what its makers intended to bring about, and how any given legal principle or stipulation should be adjusted to fit the circumstances. In the West, the ‘soft law’ approach has an accepted place in the legal sphere. The application of rational thinking or reasonable judgement to a case are not seen as illegal when they bring about the result that the law was intended to achieve, even if some requirements of that particular law are not explicitly followed. The benefits of having an actively dialectical relationship between the ‘soft’ and ‘hard’ versions of law are acknowledged in the West, both in the socio-legal literature and in the practical implementation of policy. The main issue that concerns theorists and policymakers alike is how to find the balance between ‘hard’ and ‘soft’ attitudes that will produce the best results. This search creates a broad legal space within which common sense, shared norms, and societal values each play a legitimate part.

In the Russian model of extreme formalism, the legal space of law is entirely restricted to the law as it is written down. It is assumed that if the law is a good law, it must be applicable to the circumstances just as it is; when the time comes to implement the law there can be no legitimate requirement for negotiation, flexibility, or adjustment. There is therefore no provision for a judge to exercise discretion to adapt the content of law to the specific circumstances of a particular situation.

In reality this formalistic stance simply does not work. Life is too complex to be regulated by rigid rules. Even in Russia those who must apply the law are faced with the need to negotiate a way to fit the law to the circumstances, and they do it. But by doing so, they immediately step into a space that they themselves define as being outside law. This act has significant implications for them. Stepping outside the law cannot be done legitimately, so it requires bribery of some kind. The choice is: either pay a bribe and get things done, or choose not to pay a bribe and get stuck in petty restrictions. In short, everyone who deals with the law in any way in Russia has to live with an ongoing paradox: an urge to comply with formality and therefore to act legally co-exists with an urge to solve the actual problem, which requires acting informally and therefore illegally.

Confusingly, some observers misinterpret this paradox, arguing that Russians simply do not recognize the binding force of law and that, for them, law is fluid, adjustable, and lacking in hard edges. However, those observers are not actually discussing the legal domain. The law remains the law; what they are describing is the mass of illegalities that result from the narrow way in which the law is defined in Russia.

The tension between an expectation of how things should be (life regulated by strict rules) and how it actually is (life in which law cannot work in practice because of the way in which it is formulated)
generates contradictory feelings, among ordinary people and legal professionals alike. On the one hand, there is a strong belief that things should be brought under control; on the other hand, there is a sensation of intense disappointment at the persistent and repeated failures of all the controlling agencies. Because of this contradiction there is an ongoing attempt in Russian society to gain control. People long to see the introduction of new ways to impose one control system upon another, but they do not actually trust anyone to implement them.

Yet, it should be recalled that there is a tendency towards formalism across Continental Europe in contrast to the common law tradition. The formalistic approach to law became most pronounced in Eastern Europe under the communist regimes, and the legacy of that is still present. However, it seems that Russia has developed an extreme degree of formalism in which discretions and a ‘soft law’ approach are perceived as illegitimate.

The instrumental approach

Law has many qualities and many social functions. The most immediately obvious one is its instrumental role: it is a means of resolving conflicts or implementing social engineering projects. In this capacity law manifests itself as a set of purpose-designed tools for serving specific goals. It is not as an ‘end in itself’. Governments tend to see law instrumentally, as a tool for shaping and implementing policies and for keeping control of deviant behaviour. Social movements treat law in a similar way, as an instrument enabling them to campaign for their desired social changes. And for parties in conflict, law is available to maximize their gains and minimize their losses. Goals achieved by legal means could be public or private; driven by idealism, partisanship, or private interests.

But in any society, law is potentially capable of achieving far more than mere instrumental satisfaction for whoever gains the power to bring a specific legislative act into force. It has another dimension, a capacity to be constitutive rather than instrumental. Law can become social value in itself, broadly accepted, capable of shaping public attitudes, and helping to frame the thoughts and actions of people in the society. Just by virtue of its existence law acquires the quality of being acknowledged as an unqualified social good regardless of the degree of compliance. This value judgement of law links the social demand for justice to the actual performance of law.

Different legal cultures exhibit variations in the particular qualities of law; in any given society some can be more prominently expressed than others. As a broad generalization, it seems that the instrumental aspect of law is universal, but law is not everywhere embedded into the social texture as a recognized value in itself. For example, in the British and American legal cultures the instrumental and constitutive functions are equally strong. There is a substantial literature showing how deeply law is rooted into the self-image of those societies, sometimes with a zeal that matches religious fervour. The term ‘judicial nationalism’ has been suggested to describe it.

Law is still viewed instrumentally: people regard it as a mechanism to achieve political or private objectives, and not as an unqualified social good.

In traditional Russian legal culture, it is the instrumental quality of law that is strongly expressed, while the concept of law as a social good is not developed. The roots of this pattern can be clearly traced back at least to the Soviet time, and arguably far back before that. Almost the entire history of Russia is known for its unbroken chain of authoritarian rule – the dominance of the political over the legal. Focusing on the legal culture of Russia today, I would argue that law is still viewed instrumentally: people regard it as a mechanism to achieve political or private objectives, and not as an unqualified social good.

What has changed since the Soviet form of legal system instrumentalism prevailed is its foundation: there has been a shift from an ideological justification for instrumentalism towards a pragmatic
instrumentalism serving private interests. Neither in Soviet times nor in post-Soviet times has the population as a whole expected justice to be achieved by legal means. For them, to be just or unjust is an intrinsic quality of a person, not a result that can be fought for and achieved in court. In the Russian legal culture, justice and law are separate issues.

The role of informal institutions
The longstanding reliance upon informal practices and networking is commonly assumed to be an exclusively Russian way of getting things done, which it is not. The typical Russian networking pattern is certainly well recorded, but it has not yet been well analysed, nor has it been scrutinized in sufficient detail. For that reason it is important to describe here some of its determining features, although it is not possible in this presentation to provide an in-depth analysis of the interplay between law and informal practices in Russia.

Most Russian networking practices can be attributed to two different sources. One is generated by legal formalism, which I have mentioned earlier. The other is deeply rooted in the social order in Russia, which is traditionally based on a hierarchical structure and relationships of power between the different levels. It is commonly expected that at each level the superior would provide protection in exchange for loyalty from his inferiors. Both ‘protection’ and ‘loyalty’ mean providing favours on request, using all available resources, including illegal ones. Within this model of social order, the politics of relationship—who you know—is stronger than any other social force, even the force of law. The structural frame provided by the social network determines not only the stability of the society, but also its capacity (or lack of capacity) for dynamism.

Nevertheless, the extensive use of informal practices and reliance on hierarchical relationships are not necessarily negative factors for the operation of social institutions. Saul Estrin and Martha Prevezer have compared different models of the interplay between formal and informal institutional layers in corporate governance, arguing that in China and some states of India ‘substantive’ informal practices are essential for positive outcomes because they usually take the place of ineffective and weak formal institutions. In contrast they see Russia as being characterized by a ‘competing’ interplay of those two layers: the informal mechanisms tend to undermine the effective functioning of formal institutions that are reasonably well set up. My research supports this observation, and, I would argue, the evidence it provides is typical for the rest of Russia’s institutional infrastructure.

Legal Culture in Transition

If we agree that these three factors are the dominant features of Russian legal culture (although the list is far from being exhaustive), the question remains: how far is it changing? What is the outcome of the vast social experiment that we hopefully called ‘the transition’? Have the reforms of the official institutions reconstructed the informal institutional layers? A consensus does now seem to be forming around the view that Russia has built a sufficiently strong set of formal institutions. A separation of powers is now in place to form a basic legal framework; law-making is more transparent than ever before; the remuneration and working conditions of the judiciary are now such that they ought (in any other country at least) to be able to act independently; market regulation closely resembles international legal rules; and access to the courts is not expensive, so arguably they are even more available to everyone than they are in the West. If that is so, then should we now assume that it is only a matter of time before we are able to see measurable convergence between the Russian and Western ways of dealing with law? Or in spite of its array of globally homogenized institutions, is Russia still capable of taking a different path towards the development of its own socio-legal environment? And if it is choosing a different path, how should we describe it?

The true answers may only reveal themselves if the newly established structure of formal institutions is more critically reviewed. Arguably, we need to examine not only the formal rules that have been put in place to form and regulate institutions, but also the political processes behind the making of those rules. It is possible that the legislative process, already captured by corruption and outside influence, may have predetermined that these institutions will be weak even if the formal rules adopted look good on paper. Against this reservation, it should be noted that interest-group lobbying of politicians and corporate manipulation of the law-making process are not specifically Russian phenomena. The extent may vary, but the processes themselves are part of the legislative process in any country.

However, transitional reforms certainly have taken place in Russia – and on a large scale. Their overall goals can be presented as (a) building institutions that support democracy, (b) encouraging a free market economy to develop, and (c) opening up Russian society, economy, and culture to the external world. Therefore it seems reasonable to assess the tendencies that have emerged from the various institutions that are now supposed to ensure transparent law-making, the independence of the judiciary, the play of free market forces in business, and a continuous flow of communication and exchange between Russian and foreign professionals in every field. I will now consider each of these goals in turn.

Building democratic institutions

If we observe the contemporary law-making process in Russia, we would agree that in terms of the highest level of the formal institutional structure, the legislature has undergone noticeable improvements in the way in which it conducts its business. A proposed law is published and debated beforehand, and the body of Russian law as a whole has become more consistent and stable.

In respect to the judiciary, the Status of Judges Act established the principle of life appointment. Judges can now be removed and promoted only by their own professional body, as is the case in the other developed democracies. There was also an attempt to ensure that they would be adequately paid from public funds so that they could function independently. It remains true that the salaries of judges in Russia are not high enough to make them wealthy, but the level is now undoubtedly sufficient to enable them to feel secure and thus able to preserve their integrity – if they choose to do so.
There has been a correspondingly impressive increase in the number of professionals offering legal services. Law firms are thriving, and institutions such as an Advocacy Bar are in place to regulate the profession. Formally, the advances are real.

However, when we scrutinize what is happening on the ground, the picture is less rosy. Overall, the institutional reforms appear to have had an uneven impact on the traditional pattern of informal practices with respect to legal matters. On the one hand, sophistication is visibly increasing throughout the legal institutions: the judiciary has evidently been freed from direct political pressure; the value placed upon professional expertise is increasing; and above all, the law cannot be easily dismissed today. On the other hand, there is no evidence that the judiciary is acting independently; the law has yet to be internalized as a common good by the professionals who serve it; the legal institution as a whole still lacks the autonomy that underlies its authority elsewhere; and there is no evidence that the generally more sophisticated way of dealing with law has resulted in a significant change in the role that law plays in determining relationships within the society.

The judiciary has been freed from direct political pressure, and above all, the law cannot be easily dismissed today.

The question, then, arises of why the external influences did not automatically disappear when the institutional formal infrastructure was transformed and adjusted to Western standards. For instance, why is it that the judiciary has yet to organize itself as an independent professional body? The explanation that I was most frequently offered was that the career prospects of Russian judges, and in some respects also their day-to-day working conditions, are strongly affected by a system of rewards that are distributed within the judicial hierarchy. A judge’s promotion is determined by a qualifications committee, with the result that everyone becomes acutely conscious of who the present and prospective members of that committee are. A qualifications committee can even dismiss a judge, though only for cause and under extreme circumstances. By law, a judge is officially entitled to the allocation of an apartment, but suitable apartments are scarce. A realistic chance of getting a good one, or even getting one at all, depends on the goodwill of the regional governor and the chairman of the particular court structure in which that particular judge works. Similarly, the distribution of cases between judges is a matter firmly within the jurisdiction of the chairman of that group of courts, and the outcomes of appeals against a judge’s decisions depend on people serving in the appropriate court of higher instance.

These factors alone, however, do not amount to a convincing explanation for the reluctance of the judiciary to assert itself. An appeal system and a hierarchical structure within the profession are both standard practice across the West, and neither is thought likely to diminish the independence of judgment of any particular court. In the Russian context, however, the emphasis was always on the ‘who’ and not the ‘how’. What mattered to the judges was the identity and disposition of the individuals who were responsible for determining the outcome of an appeal, not the facts of the case or the law or the procedure itself. It was taken for granted that if there is to be a favourable judgment, it must be earned.

Evidently, the dominant reason for the judges to be improperly influenced in their judgments was not direct political pressure on them from the state. But in spite of that, the problem is considerable. It seems to be mostly a matter of the traditional Russian pattern of social relationships whereby all major institutions including the law are run as relationships between patrons and protégés, with favours being exchanged upward and downward between them. Naturally, the higher the office a person holds, the more favours can be granted. More favours generate more influence, which means that the person granting them eventually moves up to a higher office. I found no significant evidence that the supposedly emancipated judiciary is making any effort to resist...
this practice. In other words, the persistence of strong informal rules undercut the formal rules brought in by the reforms.

To make sense of the bigger picture of corruption in the Russian courts I asked my informants, practising lawyers who were dealing with courts on a daily basis, to assess the proportion of cases in which their experience indicated to them that the outcome had been determined by non-legal means. The consensus was that around one-quarter of all cases were decided non-legally. That figure does of course indicate that three-quarters of court cases are being decided on proper legal criteria and are free of taint. But it also suggests that the question of how to proceed with a case in today’s legal environment presents those involved with an almost Shakespearean choice: to bribe, or not to bribe?

Everyone confronts this dilemma when they are engaged in a formal dispute. They are likely to have thought about bribery even if they do not resort to it, which might be because they lack the resources, or because they decide that the case is not worth it, or because in that particular instance it would probably not work with that particular judge. It was remarked to me that the nature of the evidence and the quality of the legal arguments are visibly becoming more important. Conversely, when a case is wholly one-sided and one party’s position is all but legally indefensible, bribery is not likely to have a decisive effect.

One must conclude, however, that the extent of the networks of personal contacts and their impact on decisions have had a severely detrimental effect not only on the judiciary but on the strength of all professional institutions in Russia. The influence of the networks has prevented the formation of a non-state civil structure that can be supported and trusted within the profession. The judiciary does need to have a self-regulatory professional association that can enforce and adjudicate codes of ethics, supervise internal monitoring and control, defend members against outside pressures, and provide services such as the training and testing of staff. These functions are crucial to any legal institution.

Having interviewed lawyers about their own reflections on what they do I come to the conclusion that although the legal institutions are indeed taking a more sophisticated shape than they have ever had before, the spirit of the law is not yet part of this structure. All the various legal institutions have certainly expanded, and the law plays a much more active (and in some ways aggressive) role than ever before in the social and economic life of the society. But even so, the law has not become a part of the professional identity of the lawyers who serve it. Despite their training, for them the law is an instrument that they must know in order to make it work for their own ends. There was no notion in their responses that once they are endowed with professional standing, they have also taken on social obligations to be seen to be serving higher social goods, such as justice, confidentiality, or human rights. It would of course be naïve to claim that all their Western counterparts are going about their job with a sense of social duty. East and West, lawyers tend to play the rules rather than to play the game. But Western lawyers and judges cannot safely ignore the established popular expectation that law must be just and fair, so it has become part of the game to be seen doing just that. In Russia there is no sign of either a popular demand that law must be just or a universal expectation that lawyers must be seen to be ethical and fair.

**A free market economy**

There is an argument in economic theory that any market contains a self-correcting mechanism that requires firms to act within the rules of law. The law increases market efficiency by reducing the risks of business transactions and by protecting deals from delays and from arbitrary interference at the hands of bureaucrats. It is therefore reasonable to expect that, once market relationships have been established, economic interests will prevail and the niche that was previously allocated to law will be enlarged automatically. Clearly, the self-interest of private agents may, on occasion, result in laws being broken or manipulated, but the argument is that market efficiency outweighs these individual transgressions: ultimately, the profit motive will keep illegal behaviour in check.
Indeed, there have been regular indications that Russia has already generated a capitalist class that is not only keen to protect its rights and interests, but strong enough to resort to law even against individuals and organizations in the political system. Statistical evidence suggests that suing the state has become common practice in contemporary Russia, and that the number of disputes initiated by private actors is increasing.

The capitalist class is not only keen to protect its rights and interests, but strong enough to resort to law even against individuals and organizations in the political system.

The turning point in the formation of the Russian market structure was the financial crisis of 1998, which burst the expanding economic bubble. Many of the entrepreneurs who had been applying a ‘short-term/big profit’ strategy were hit hard by the crisis, including those who were simply careless and had not ensured that their crucially important receipts, contracts, accounts, and other legal documents were all in order. Lessons have been learned. The business leaders who survived the Russian shock of 1998 were those who had begun to appreciate the need for commercial prudence, purposive lobbying, legitimate contracts, and accurate (or at least accurate looking) bookkeeping. Since 1998 the bulk of Russian business has become more civilized and more legal.

Even so, the approach to law in Russian economic culture remains very uneven. It is not surprising that big companies have introduced legal departments and that in-house lawyers have become more prominent in the outward image that the companies project. Broadly, the lawyers had three areas of responsibility: to keep track of legislation and to adapt the operation and reporting of the company so as to fit any new laws; to develop appropriate ‘tax minimization’ strategies for the company; and to draft contracts, although only after a deal has been struck between managers. It was evident that company lawyers in Russia are not often invited to share actively in the development of strategy, decision-making, or even negotiation.

Small and medium-sized businesses which do not employ lawyers as staff members in the company commonly consulted a lawyer, either in a law firm or more usually in a bank. And it is clear that large and some medium-sized businesses have reached the point at which they cannot afford to distrust lawyers. They routinely involve a legal professional in what they consider to be the appropriate stage of a negotiation, and they also bring law suits to determine disputes.

However, the growing legality of Russian firms in respect of use of legal methods to do business does not mean that business has become law-abiding generally. Although most firms in our research drew up contracts even for simple transactions and many of them recognized the value of a court as an arbiter in settling disputes, managers pointed out that they did not feel that they were protected by law. The impression is that the use of the law has become quite discriminating. For instance, if companies wish to win economic disputes in the courts, they tend first to secure a strong legal defence, whilst at the same time preparing to resort to non-legal means. As one of the company lawyers put it to me: ‘When the contract is good it is easier and less costly to bribe a judge than it is with a bad contract.’

In matters of taxation, the trend towards apparent legitimacy has not eliminated the traditional resort to informal deals with tax officers, even though companies have started to treat tax demands seriously in recent years. In most cases, companies found it easier to use routine ‘oiling’ to sort out their disagreements with tax officers informally rather than having to construct a defence of their accounting, even when, as they claim, there is no infringement to overlook. There was no evidence that companies are making any serious attempt to replace the customary informal practices with impersonal bureaucratic procedures.
The pattern in which problems are habitually solved by means of exchange of favour or direct corruption was commonplace in all the instances of the business-bureaucracy relationships that were examined. The broader finding was that the market not only fails to eliminate the culture of networking and the use of non-legal short cuts; it actually supports that culture and enables individual managers to profit from it.

The overall conclusion must be that the market has generated a corporate interest in enhancing the prominence of law in order to reinterpret the ‘rules of the game’. Two ways in which this is played out can be identified.

First, the free market significantly improves the legality of business operations, just as the theory predicts. Competition requires that costs be minimized, and companies respond to that imperative. They attempt both to cut down on payments to corrupt officials and to reduce their transaction risks by raising the quality of their documentation and management procedures. The effect is that they become significantly more law abiding.

Second, the evidence shows that, just like its monolithic Soviet predecessor, the free market uses, benefits from, and therefore strengthens the old and well-established practices of using non-legal means to take short cuts and solve problems informally. The market does not set up a barrier to the traditional network pattern of mutually beneficial relationships between businessmen and bureaucrats. Instead, business is adapting to the new culture and making it work for itself.

Western influences

The transition also meant opening up the society to the outside world. Government officials took advice from international consultants about shaping the institutional reforms; domestic companies went into business with overseas partners; trainees were sent abroad for technical instruction; and Russian students enrolled in universities around the world. Western academics became more prominent and international collaboration became more noticeable in every field. As a consequence, the ongoing presence of Western firms in Russia today is considerable.

Although some Western or jointly owned companies abandoned the country after the financial crisis of 1998, a substantial number remained. Others later returned, and in many cases employed an increased proportion of local staff. Western lawyers arrived together with Western companies, and in due course a clutch of specialist multinational law firms set up practices in Moscow. Most of the practising lawyers whom I spoke to had some sort of personal experience in the West, through training courses, placement in different legal establishments, or at least experience of work with Western partners.

This substantial exposure of the Russian business and legal community to Western culture poses a whole series of researchable questions. For example, what impact have these interactions made on local assumptions and ways of doing things — if any? Is there observable evidence that Russians have adopted a Western approach to law, wholly or in part?

I began to explore this topic by asking my interviewees to describe their opinion of Western legal practices. It was apparent that the image of the West among Russian lawyers and businesspeople was unflattering. They could see instrumental use of law there, but were not able to grasp the constitutive aspects of law that were unfamiliar to them. As a result, ideological nationalism was expressed through the repeated assertion that the West is no better than Russia in any way. In my interviews I was told repeatedly that the West is just as corrupt as Russia and that there is no difference between Western and Russian ways of dealing with law. Informants offered me numerous examples from their experience of time spent in the West, demonstrating that, in their judgement, there is no basis for the assumption that the ‘rule of law’ prevails in the West, but has failed in Russia. The issue here is not whether this Russian vision of the Western ‘rule of law’ culture is accurate or distorted; rather, the significance in the present
context is how Russian lawyers perceive the situation, in their own country and in the West.

Instead of the expected ‘Westernization’ of the Russian legal culture and a climate of appreciation of the local presence of Western legal firms, I found something close to the opposite. There were repeated expressions of overt hostility between Russian lawyers and the employees of the multinational law firms that operate in Russia. This can partly be explained by the intensified competition between Western and local lawyers as the economy has developed. But the tension was also a result of the clash between the two cultures.

In short, a cultural tension has developed between Western law firms and local legal professionals. Western firms are not popular among the local lawyers, and they have no potential to affect the local legal culture. It is clear that the interaction between the Western and Russian cultures of law and business has not led to their convergence. Russian lawyers and businesspeople firmly reject the idea that the West can offer them something new and valuable in terms of legal practices or business practice. Although it is true that interactions and contact each have a substantial value in themselves, and that what has once been learned cannot easily be unlearned, there is evidence that the legal norms transmitted through these globalizing processes have not been internalized.

**Conclusion**

It remains to sum up. After examining the effects of the different social forces generated by the transition on the way in which Russian society is organized and how the legal system functions, I would argue that despite all the intentionally far-reaching reforms of Russian legal institutions, law is not transcending the merely instrumental role that it previously occupied in the society, and its value as a principle upon which to organize society is not increasing. As far as my data allow me to suggest, there is no tendency for a new type of legitimate ‘impersonal’ informality to emerge, one that for the sake of common purpose would marginalize the old habit of resorting to self-interested informal practices. Today more than ever, informal rules continue to undermine the formal institutional structure.

This is not to say that the legal culture is not changing; it is changing, visibly and significantly. The use of law has become more intensive, more professional, more self-conscious, more prestigious, and much more aggressive. The number of firms that practise law is increasing, as is the number of lawyers working within other business firms. But I would argue that Russia is not on the way towards a rule of law culture. Something wholly new and quite different is being formed there. The legal culture that is emerging seems likely to be one that possesses both the outward trappings of Western law and a more cynical and conniving inward looking profile.
**Commentary**

**Formalism, expectations, and trust in Russian legal culture**

Jane Henderson, *King’s College London*

This was an extremely worthwhile workshop discussing the elusive but nonetheless important topic of Russian legal culture. The cross-disciplinary input from the different experts was very valuable, even though (or perhaps because) there were some differences in opinion about the possibility of defining the concept of legal culture.

I came to the table as a legal academic who has been studying the Soviet, and now the Russian, legal system for decades. Personally, I am convinced that there is value in trying to elucidate the qualities of Russian legal culture and how it compares with legal culture in other jurisdictions. As Dr Kurkchiyan has noted, the stereotypical opinion about Russia is that there is no law and legal culture; all is politics. This is clearly wrong. Law is, and, even through the worst of the Soviet era, was, an important element in national life. However, there is a traditionally dim view of legal culture in Russia. Public discourse admits to a large degree of legal nihilism, as, for example, in President Dmitry Medvedev’s first annual address to the legislature in 2008, broadcast on Rossiya TV on 5 November 2008, when he commented that legal nihilism ‘did not appear in Russia yesterday. Its roots go deep into our past’. The extent to which Russia has moved away from that self-image towards a rule-of-law state was at the heart of our roundtable exchange.

Here I note some thoughts inspired by Dr Kurkchiyan’s paper and the subsequent discussion.

**The issue of expectation**

Dr Kurkchiyan has noted that, under the Russian approach, law tends to be generally regarded as formalistic, instrumental, and separated from the widespread use of informal means. Alongside this, there is an unreal expectation about what law can achieve. The perception that ‘good law’ should not require adjustment means that any exercise of discretion is seen to imply improper manipulation. Such an approach draws attention to the issue of expectation as to what law is and what it can actually achieve.

The perception that ‘good law’ should not require adjustment means that any exercise of judicial discretion is seen to imply improper manipulation.

Professor Butler noted in his comments that the contrasts which were being highlighted at the roundtable could be characterized as the difference between pravo – a general sense of law as right, and zakon – enacted legislation. Our discussions focussed on the realm of zakon, enacted law, but Professor Butler pointed out that if more discretion were allowed in the application of legislation, then a greater concept of pravo would be required.

There is another contrast which might also be usefully recalled: the contrast within the historical English legal system between common law and equity. The system of equitable rules developed in England specifically to ‘temper the rigor’ of the common law. It was therefore very early recognized that the common law (and particularly the rigid common law procedural rules) could never be universally perfect; that individual circumstances could subvert even the best legal rules to give a perverse result. It was therefore regarded expedient to have another system with appropriate
procedures which, applied in certain circumstances, could allow particular states of affairs to be taken into account. This would avoid what would otherwise be clear miscarriages of justice. Plato and Aristotle were cited to justify this approach, that for any general law, there would always be a need for individual exceptions. The view thus became inherent to the English legal system that no law can be perfect.

The description of the Russian approach to law as discussed at the workshop evidenced a very different stance; that law can be perfect. A good law ought to be able to work in all situations, and discretion should play no part. Application of the law is a fixed process and the only way an exception can be made to avoid manifest injustice is through the exercise of arbitrary discretion by a powerful executive; clemency from the Tsar or equivalent, unreliably capricious and untrammelled in application by any clear principles.

The expectation that a good law needs no modification in the process of interpretation is unrealistic, and shows a wrongly idealistic understanding of how law works. It expects an impossible clarity in the application of any law, to exclude the exercise of any discretion. It also feeds mistrust about the role of a judge, discussed in more detail below.

Alexander Yakovlev, in his *Striving for Law in a Lawless Land: Memoirs of a Russian Reformer*, also picks up the issue of legal culture and expectation of law and its role in state behaviour. He asserts (at page 10) that ‘in the Russian people’s consciousness, the law has never been associated with moral truth.’ Yakovlev considers the effect of different terminology and its associations. In one example, he contrasts two words in Russian for justice, spravedlivost, meaning fairness and justice, and iustitsiia, the Russian version of the Latin word for justice, which are used in different contexts.

Of course, everyone in Russia understands that the system of justice ought to be fair, impartial, and lawful, that it ought to provide justice to people with essentially the same meaning that the word conveys in English. But this terminological duplicity reflects a specific cultural trait. The idea of justice as an objectively existing web of social relations in real-life situations (spravedlivost) exists in public consciousness parallel to (and in a different context from) the notion of justice as a set of political, state-bound institutions. Historically, the law was not considered to be a real ingredient of normal life but something imposed from above, more often than not a burden, if not actually a yoke.

Yakovlev also compares the two meanings of the English word authority, with its Russian equivalents. He says in English ‘an “authority” on a matter [is defined] as “someone whose utterances about it are reliable, not someone whose utterances demand compliance.”’ The Russian word in this context would be avtoritet. ‘But in Russian the same word is not used to designate political, state power. To translate “political authority” into Russian one must use the word vlast (power), not avtoritet (authority).’ Unfortunately the word vlast connotes compulsion, and obedience out of fear: ‘Given both meanings of “authority” in English, therefore, the state can be not only feared but respected. Without a single term to designate “authority”, [in Russian] the distinction between the power of the state and that of bands of robbers may be harder to make. This linguistic, terminological peculiarity clearly reflects certain historical and cultural realities.’

If Yakovlev’s analysis is correct, the Russian approach to legal cultural has been constrained by the Russian language towards a negative attitude with alienation from normal social values of right and wrong. However, this impact of vocabulary is not immutable. All languages change, and in recent times the Russian language has been developing at an

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6. Ibid., p. 12.
impressive rate to acquire (or remember) the concepts and words necessary for a market economy. New understandings and connotations can develop. On the context of criminal procedure law, the expression *presumtsia nevinovnosti* has undergone a transformation. Harold Berman could write in the early 1970s that the expression:

> is far stronger in Russian ears than the literal equivalent — ‘he is presumed innocent’ — is in English or American, ears. Or to put it otherwise, the technical meaning of the Latin word ‘presumed’ has penetrated more deeply into our consciousness than into the Soviet. Soviet citizens and even Soviet lawyers are apt very quickly to translate ‘presumed’ as ‘considered,’ and to say on schitaetsia nevinovnym — ‘he is considered innocent.’

Yet to say that the accused ‘is considered’ innocent is clearly inaccurate, for the prosecutor, at least, ‘considers’ him guilty, and so does the preliminary session of the court that confirms the indictment, while the trial court has — as yet — no opinion at all in the matter.\(^7\)

Now article 49(1) of the Constitution, and for example article 340 of the 2001 Code of Criminal Procedure on ‘Final Instructions by the Presiding Judge’ include reference to the principle of presumption of innocence with no fear of misunderstanding. In Russia, despite the prevalence of informal institutions, it appears that such a development over time of transactional trust between contractual parties has not (yet) occurred. There appears to be very little transactional trust at all, even between parties who deal with each other on a regular basis. Neither, apparently, is there trust in judges to exercise discretion rightly in the application of law. It becomes problematic if it is accepted that the application of law necessitates the exercise of some discretion (see above), and if, as discussed at the workshop, the exercise of any discretion is seen as tantamount to evidence of corruption. This points up the importance of the judicial role, and even more crucial, the issue of who becomes a judge and by whom (and on what basis) judges are judged.

Judges in Russia are required to have a higher legal education than in the USSR before reforms in late 1989 and some experience of legal work prior to appointment. However, as was noted at the workshop, many judges in Russia formerly worked as court administrators, or as members of the procuracy, so that they are likely to have developed a mindset tuned to hierarchy, not to taking individual responsibility. This may be compared with the English position where, historically, appointment to the judicial bench invariably followed a successful career as a barrister, that is, as a self-employed advocate used to being in individual charge of the conduct of each case. Entry to the judiciary is no longer as restricted, but it is suggested that the practice of judges having formerly been successful independent practitioners has been a factor supporting the culture in the modern era in England of an independent judiciary.

In Russia, there has recently been open admission of administrative pressure on the judiciary. A report for the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, prepared in 2009 by former German Minister of Justice Mrs Sabine Leutheusser-Schnarrenberger, contained a number of examples of judges being pressured by their court chair or by members of the procuracy.

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case was Judge Olga Kudeshkina, who successfully sought redress from the European Court of Human Rights for her wrongful dismissal. She received damages of 10,000 euros, although she was not subsequently reinstated into her former post.

In Judge Kudeshkina’s opinion, there needs to be a wider pool from which Russian judges are drawn, to get ‘new blood’ and a corresponding cultural change in the standard judicial mindset.

The Russian Supreme Court has recently chastised, in regard to another matter (the illegal extension of pre-trial custody of Khodorkovsky and Lebedev), the Moscow Court Chair, Olga Yegorova, who had been instrumental in engineering Judge Kudeshkina’s wrongful dismissal. This is being seen as a positive sign that the Supreme Court is trying to ‘clean up’ the lower judiciary, enforcing the correct application of law and (perhaps ironically) reducing the impact of ‘orders from above’. If it succeeds, then it may be easier to inculcate trust by the general population in the proper exercise of judicial discretion.

The Yukos case and the image of Khodorkovsky and Lebedev in the courtroom cage is probably what comes to mind for most people when they think of the Russian judicial system. This case, which was widely acknowledged as having been manipulated by the Kremlin, would seem to suggest that the courts are weak and malleable to political pressure. My answer to that would be ‘yes, but…’. There is no question that, when their interests are at stake, the political and economic elite of Russia are capable of obtaining their desired outcomes in trials. They typically do so in a blatant fashion that leaves no doubt as to their involvement. The written law, in terms of both substance and procedure, is left in the dust. This is lamentable, but is it the whole story? As someone who has spent years studying the Russian courts, I would argue that it is a very small part of the story. Though these show trials have come to represent the Russian legal system, they are, in reality, not representative of the system.

While not denying the reality of such cases, I would argue that we ought to keep in mind the fact that the vast majority of cases proceed through the courts in a normal fashion. By that, I mean that they are heard in accordance with the procedural laws on the books and decided in accordance with the relevant substantive law on the books. Indeed, the number of such cases is rising steadily, belying the common wisdom that Russians are unwilling to use the courts. On a practical level, the problem of dealing with this deluge of cases is more serious than the manipulation of outcomes in politically sensitive cases. My observations of court proceedings suggest that, rather than the courts being a malleable institution, they are an overly formalistic institution. Russian judges’ rigid adherence to the strict letter of the law sometimes acts to undermine the goal of achieving justice. Let me provide a few examples, in the realm of both procedural and substantive law.

In the procedural arena, the single most important rule governing the courts is the fixed deadline by which cases must be decided. The deadlines vary depending on the type of case, but are always difficult to meet. The challenge is particularly acute for the courts of general jurisdiction because they have not yet embraced electronic filing to the extent that the arbitrazh (commercial) courts have, leaving them reliant on the Russian postal service, which is notoriously poor. Judges care desperately about maintaining a good track record because this affects their prospects for promotion and salary increases. At first glance, the deadlines would seem to be a good idea. We all know the old maxim, justice delayed is justice denied. But all too often cases are rushed simply to serve the deadline. At a deeper level, I wonder whether these rigid deadlines reflect a fundamental lack of societal trust in judges. They put a straightjacket on the judge and force her to march in lockstep irrespective of the specifics of the case at hand. They are symptomatic of a system in which judicial discretion is not encouraged.

The unwavering commitment to the law on the books and the distaste for judicial discretion has had a perverse effect in business litigation. As written, Russian contract law is generally hostile to extra-contractual arrangements. Though the law recognizes oral contracts, it is not open to allowing oral agreements to modify written contracts. This is, of course, a muddy area of the law in the US and elsewhere. The US generally does not allow oral agreements that occur before the contract is signed to come into evidence (with a few notable exceptions). On the other hand, there is an openness to the modification of contracts through oral agreements and the behaviour by the contractual partners that occurs after the contract is signed. It is believed that behaviour serves better evidence of the intent of the parties than the contract. Russian law, by contrast, does not recognize any non-written modification to a contract. In a business environment that is a tangled web of informal connections, this means that the real terms of business transactions often cannot be brought into evidence. Once again, we see the downside of the lack of judicial discretion.

The very idea of introducing greater discretion for Russian judges is highly controversial. The general assumption is that any discretion would devolve into corruption. This, of course, illustrates my larger point about the general lack of trust in judges in Russia. The result is a vicious circle, motivated by the false assumption that the written law can account for every possible circumstance. Whether Russian policymakers are prepared to give judges more breathing room is unclear. It is certainly not likely in the short term.

The unwavering commitment to the law on the books and the distaste for judicial discretion has had a perverse effect in business litigation.
Many of those who write in the West today about the contemporary Russian law do so in the same manner as twenty years ago in so-called ‘good-old Soviet times’. What they see in modern Russia is the reincarnation of the USSR in a slightly weakened form. It seems to them that in Russia there still exists a dichotomy between the ‘authoritarian (totalitarian) regime’ and a growing civil society agitating for the rule of law.

In fact, the last few years of the USSR were a fairly good time for lawyers. At the time the most radical features of the communist legal nihilism were already eliminated. The doctrine of revolutionary terror was gradually replaced by the phenomenon of ‘Soviet legalism’. Moreover, public opinion demanded the rule of law, both as an idea and as a practice. This need for the practical interpretation of an existing theoretical concept was a real driving force for a number of the institutional reforms and a change in legal culture within Russia.

Today’s reality seems to be different. Russia has recently undergone one of the most vital revolutions in its history, and this revolution is far from finished even today. As a result, Russia is currently spoiled by the new post-communist ‘revolutionary’ legal nihilism. This legal nihilism is equally strong in the powerful elites and in the masses. From both sides of the barricades nobody wants to build the rule of law. The majority of the Russian post-communist elites do not care about Russian legal institutions. They live in equanimity with them precisely because, in general, they have little need for instruments of legal control. The current legal system well suits the contemporary legal culture and political system, in the sense that it serves the governing regime perfectly well. Today, there isn’t a serious political force in Russia seeking any sort of legal reform.

This situation created a new problem: the emergence of a type of legal nihilism entirely different from the nihilism of Soviet times. Post-communist legal nihilism is an extremely aggressive legal culture. It grows like cancer and can destroy any institution it touches. Legal institutions existing in Russia nowadays are irrevocably changed by this ‘virus’ that spread quickly and unrecognized by the public.

I have serious doubts that institutional development today can do anything to change this negative legal culture. I do believe that institutions themselves depend upon it more than the culture depends on institutions. Before we can expect any positive effect from the work of legal institutions in Russia we need to remove the ‘cancer cells’ of the currently dominant legal culture. It looks like the time for mild therapy treatment is over: Russian legal culture requires surgery to get back on track.

It seems to be much easier to start reforms in a legal desert than in the legal jungle. Why? Jungles harbour hordes of angry animals who will protect their home at all cost. However, cleaning those jungles is a condition sine qua non for any attempt to build the rule of law in modern Russia. Rule of law won’t appear in the country simply as a result of the evolution of existing culture. This type of culture is fully hostile to the idea and practice of rule of law and has to be removed for any significant progress to be made.

Legal reform and the strengthening of institutions is a question for a distant future. For now, we can only prepare the background for these reforms and wait until the main paradigm of Russian legal culture is changed from negative to positive.
The legal profession in Russia

W. E. Butler, Pennsylvania State University (Emeritus Professor of University College London)

‘Culture’ is among the useful prisms through which a legal system may be profitably perceived. Construing for these purposes the ‘legal profession’ narrowly to encompass the ‘advokat’ and the ‘jurisconsult’ (excluding the judiciary, procuracy, academic world, etc.), elements of Continental European and Anglo-American impact are certainly to be seen, some introduced by foreign practitioners and some adapted by Russian architects of the legal framework for the practice of law.

The ‘advokat’ is not a lawyer, an attorney, a barrister, or a solicitor, although he shares some common traits, nor is the ‘Advokatura’ a Bar. The ‘advokat’ is a distinctively Russian practitioner whose institutional foundations are deeply indebted to the Russian and Soviet past. His pattern of ‘doing legal business’ is product (rather than time) orientated. He works within a rudimentary code of ethics (which exhibits some elements of modern foreign standards) and devotes a considerable amount of time to criminal defendants. He is not trained in the skills of transaction strategy and problem-resolution.

The ‘jurisconsult’, by far the most numerous component of the Russian legal profession (ca. 500,000 upwards?), has never had any semblance of professional identity or cohesion. There is no licensing organization for jurisconsults other than the possession of a higher legal education. They operate as ‘in-house’ counsel, as a rule. Foreign lawyers in Russia are classified as jurisconsults unless they aspire to become an advokat. Jurisconsults are not bound by any professional ethical codes or conduct, other than Russian legislation itself. Jurisconsults often have more commercial-transaction experience than do advokats, although this can vary from one individual to another; they are less likely to have litigation experience.

Russian advokats have been wise enough to avoid ‘reciprocity’ in their relations with foreign professional legal organizations – an instrument which, if employed, would be used against them. Russian jurists have begun to open law offices within other CIS (Commonwealth of Independent States) countries and in Western Europe and the US, or to form alliances of cooperation with foreign law firms. This is at an embryonic stage but may be expected to increase exponentially during the next decade. A few Russian law firms have taken on foreign partners, and a number of Western law firms have Russian partners. Although there may be in some quarters a certain ‘contempt’ expressed in Russia for Russian lawyers who have acquired foreign law degrees, the number of foreign LLM and even SJD or PhD degrees earned by Russians is increasing year by year.

There are no standards by which one may measure whether a legal system is moving towards becoming a ‘rule of law’ system or culture. Insofar as this engages the concept of ‘legal consciousness’, the works of I. A. Il’in are deservedly attracting attention in Russia. The Russians impress this observer as being uncomfortable with the principle ‘all is permitted that is not expressly prohibited’. There continues to be massive ‘over-legislating’ in Russia, rather than excessive legal formality. It remains to be seen the extent to which the Russian legal system can accommodate elements of ‘discretion’, whether judicial or administrative; balance a literal interpretation of the law with the considerations of justice; emphasize ‘predictability’ of legal outcome against ‘abuse’ of right; encourage ‘autonomy’ over ‘independence’; achieve a proper adjustment of ‘checks and balances’; and pursue something other than a mechanical perception of the interface between public and private law, rights, and interests.
In discussing any country’s ‘legal culture’, it is important not to imply that a legal culture is necessarily holistic and coherent. Any law-governed country will be characterized by a mix of respect and disdain for particular laws. Drive on a high-speed motorway in the US or UK, for instance, and one will note that while all the drivers are obeying the law governing the direction of travel, a great number of them are exceeding laws on speed limits. Even when attitudes to ‘law as a whole’ are discernible, these may evaporate when specific cases are concerned. For instance, to suggest that a whole legal culture views the rule of law as an end in itself, rather than instrumentally as a means to other ends will obscure a great number of controversies, and indeed much of the business of legislating. Much of the business of lawyering anywhere involves turning laws to purposes their drafters had not envisaged; one notorious example familiar in the US is the use of procedural safeguards such as discovery not to uncover pertinent facts but to delay and impose costs on one’s legal adversary. Even when discussing the most general desiderata of the rule of law, Lon Fuller famously argued, it is best to talk of a ‘morality of aspiration’: complete correspondence to these desiderata can be striven for but, given their inherent difficulty and tensions between them, not consistently achieved.

If these considerations are correct, postulating a consistent and holistic legal culture makes it difficult to assess the empirical impact of law. Law can shape some significant social relations without shaping others. Even the finding that suborning judges is difficult or impossible when it involves asking them to manifestly contradict black-letter law demonstrates this point. Moreover, focusing on what happens in court, whatever the extent to which corruption plays a role there, can obscure the importance of ‘the shadow of the law’ — the ways in which the prospect of a legal collision affects behaviour even when no such collision occurs. In particular, the discovery that some businesses prefer informal, reputational mechanisms to secure exchanges does not necessarily imply that legality is irrelevant, insofar as law’s shadow may extend to these mechanisms as well.

In sum, assessing change in legal culture and legal practice requires an approach that facilitates the perception of partial and local changes, rather than dismissing their significance in light of broader trends. This argument, I submit, is particularly significant for students of Russia. The growth of the legal profession and the apparently universal desire of Russian businesspeople to acquire legally grounded property rights signal an enormous change in the place of law compared to the Soviet era. Even the persistence of massive failures in progress toward rule-of-law aspirations does not indicate an absence of meaningful change. Such progress is likely to be piecemeal rather than wholesale, and will most productively be studied as such. A final implication is that one should not dismiss the importance of law-making; piecemeal progress will be built on successfully fitting individual laws to the circumstances they seek to regulate, not from a general change in attitude to law’s legitimacy.
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