

The State of Russia



Introduction – Conclusion – Further Reading

I. INTRODUCTION

A. Russia's struggle for constitutionality

THE CURRENT RUSSIAN Constitution dates from 12 December 1993. It is the first Constitution adopted in a Russian State with universal adult franchise and multiple political parties. It is also the first Russian Constitution to be directly applicable and not subject to an overriding veto, either *de jure* by a pre-revolutionary autocrat or *de facto* by the one political party which ruled during the Soviet era, the Communist Party of the Soviet Union (CPSU), 'the Party'.¹

The Constitution makes the claim that Russia is a democratic federated rule-of-law State with a republican form of government. Its section on human rights compares favourably with international human rights law. However, both the Constitution and its application remain problematic. It was created during a time of troubles and is not a balanced document, being weighted heavily in favour of presidential authority. It does stipulate a separation of powers, but without an effective check-and-balance system. Its form of federalism also allows for substantial

¹ The Party went through a series of names: originally the Bolshevik wing of the Russian Social Democratic Labour Party, it took the name of Russian Communist Party (Bolsheviks) on 8 March 1918. On 31 December 1925 it became the All-Union Communist Party (Bolsheviks). On 13 October 1952 at the XIX Party Congress, Stalin declared that as there were no more Mensheviks, the name Bolshevik should be dropped so it was renamed the Communist Party of the Soviet Union.

asymmetry despite a claim of equality for the different entities which constitute Russia's federation. Nevertheless, the 1993 Constitution is a landmark document – the first in Russia to be taken seriously as a legal document – to which public figures try to conform.

This book will explore the background to the Constitution in chapters two and three, and important characteristics of the three branches of State power – executive, legislative and judicial – in chapters four, five and six, before a conclusionary chapter seven. The current chapter will give an overview of Russia and the place of law in her culture.

B. Russia's place in the world

Russia is the largest country in the world. In her current form she spreads nearly halfway round the globe, from longitude 20 degrees east to 169 degrees west, covering 17 million square kilometres (6.5 million square miles) and spanning nine time zones (reduced from 11 in 2010). She has two alternative official names: Russia and the Russian Federation. These were adopted on 25 December 1991, shortly before the dissolution by the end of that year of the Union of Soviet Socialist Republics (USSR, also known as the Soviet Union). Russia, in the form of the Russian Soviet Federated Socialist Republic (RSFSR, Soviet Russia), was the largest of the socialist republics, also known as Union Republics, which made up the USSR.²

Russia is a country of contrasts. She works on a different scale from practically all other States because of her physical extent and diverse population. Even her climate runs to extremes, of hot dry summers and very cold winters. She spans two continents, Europe and Asia. At different stages of her history for different reasons has she weathered isolation from neighbouring cultures.

² In its developed form from 1956, the USSR comprised 15 Socialist Republics: Armenian, Azerbaijan, Belorussian, Estonian, Georgian, Kazakh, Kirghiz, Latvian, Lithuanian, Moldavian, Russian Soviet Federated, Tajik, Turkmen, Ukrainian and Uzbek. Initially Russia was known as the Russian Socialist Federated Soviet Republic, but the order was changed to indicate the victory of socialism; see GP van den Berg, 'Power-sharing Compacts under Russian Constitutional Law' in R Sharlet and FJM Feldbrugge (eds), *Public Policy and Law in Russia: in Search of a Unified Legal and Political Space* (Leiden, Nijhoff, 2005) 43, fn 5.

In the second half of the 20th century, the Cold War created a legacy of alienation and mistrust between the USSR, including Soviet Russia, and Western States. The division of the world between socialist and capitalist during the Soviet period created an ideological rift. The USSR and Russia were presented by most western media and politicians as the enemy, irrespective of the fact that the USSR was one of the Allies successful against the Axis forces in World War II (known to Russians as the Great Patriotic War). Despite the passage of time since the dissolution of the USSR at the end of December 1991, this heritage of a polarised world still influences commentators, making it difficult for them to be balanced in their reportage. There is ready condemnation by Western analysts of Russian practices in relation to, for example, human rights or criminal procedure, when comparatively little adverse comment is made of other States with equally problematic practices.

C. The federal dimension

As noted, Russia is a federation. At time of writing she is composed of 83 federal subjects (*sub"ekty Rossiiskoi Federatsii*). There are 21 republics (*respubliki* – singular *respublika*), nine territories (*kraia* – singular *krai*), 46 regions (*oblasti* – singular *oblast'*, sometimes translated as 'province'), two cities of federal status, one autonomous region (*avtonnaia oblast'*), and four autonomous areas (*avtonnye okruga* – singular *avtonnyi okrug*, sometimes translated as 'district').³ Voluntary amalgamations reduced the number from the 89 listed in Article 54 in the 1993 Constitution.⁴

³ (In Cyrillic alphabetical order) *Republics*: Adygeia, Altai, Bashkortostan, Buriatiia, Dagestan, Ingushetia, Kabardino-Balkariia, Kalmykiia, Karachaevo-Cherkesskaia, Karelia, Komi, Marii El, Mordoviia, Sakha (Iakutiia), Northern Osetia-Alaniia, Tatarstan, Tyva, Udmurt, Khakasiia, Chechnia, Chuvashia; *Territories*: Altai, Zabaikal, Kamchat, Krasnodar, Krasnoiar, Perm, Maritime (Primorskii), Stavropol, Khabarov; *Regions*: Amur, Arkhangel, Astrakhan, Belgorod, Briansk, Vladimir, Volgograd, Vologda, Voronezh, Ivanovo, Irkutsk, Kaliningrad, Kaluga, Kemerovo, Kirov, Kostroma, Kurgan, Kursk, Leningrad, Lipetsk, Magadan, Moscow, Murmansk, Nizhegorod, Novgorod, Novosibirsk, Omsk, Orenburg, Orlovsk, Penza, Pskov, Rostov, Riazan, Samara, Saratov, Sakhalin, Sverdlovsk, Smolensk Region, Tambov, Tver, Tomsk, Tula, Tiumen, Ul'ianovsk, Cheliabinsk, Iaroslavl; *Cities of federal significance*: Moscow, St Petersburg; *Jewish Autonomous Region*; *Autonomous National Areas*: Nentsy, Khanty-Mansiisk-Iurga, Chukotsk, Iamal-Nenets.

⁴ H Oversloot, 'The Merger of Federal Subjects of the Russian Federation during Putin's Presidency and after' (2009) 34(2) *Review of Central and East European Law* 119.

Nevertheless, 83 is still an unwieldy number, and there have been frequent and ongoing calls for federal restructuring to achieve a smaller number of larger entities. To some extent this has been achieved through the division of Russia in 2000 into seven (since January 2010, eight) 'federal districts', each overseen by a presidential federal representative (*polpred*). Half of the federal districts contain between six and nine federal subjects, and the other half between 11 and 18. The introduction of presidential federal representatives is discussed in chapter four.

Soviet Russia (the RSFSR) was also federal, but there was a significant difference. As with the USSR itself, residual power lay at the centre. Under Article 73 of the current Russian Constitution, residual power resides with the federal subjects. However, this residue is vanishingly small. Article 71 lists matters exclusively in federal jurisdiction, while Article 72 lists those within the joint jurisdiction of the federation and the federal subjects. Very little escapes mention. The 1977 USSR Constitution made a show of declaring the constituent Union Republics to be sovereign with a right of secession, although somehow this was to be exercised without changing the USSR boundaries, as they were exclusively within USSR jurisdiction. By contrast, the 1993 Russian Constitution does not extend a right of secession to any of the federal subjects. There is further discussion of Russia's unique federation in chapter three.

D. Language

The official language in the Russian Federation is Russian, a Slavic language written in the Cyrillic alphabet, although more than 140 other languages and dialects are currently spoken in Russia, and the republics within Russia have the right to assign official status to other languages. In recent years the Russian language has been developing rapidly. A new vocabulary of 'loan words' and resurrected pre-Revolutionary expressions fill the need for terms appropriate to the market economy, introduced from 1990 after years of centralised State economic planning under the Soviet system. A fashion for using terms and expressions coined in the GULAG⁵ (the vast system of prison camps developed under Stalin) has broadened the vocabulary in everyday usage.

⁵ GULAG is the acronym for the Head Administration of Corrective Labour Camps and Colonies (*Glavnoe Upravlenie Ispravitel'no-Trudovykh Lagerei i kolonii*) made famous by A Solzhenitsyn's three-volume *Gulag Archipelago*.

Non Russian-speaking scholars of Russian law need to be wary of the unavoidable interpretation associated with translation of legal materials. There are hazards for a translator rendering a Russian legal text into English. For example, Russian laws are written in the present indicative tense, rather than the future imperative expected by English speakers: ‘Thou shalt not kill’. It is therefore impossible to tell from its grammar whether a particular Russian phrase is meant to be descriptive or normative. A translator may choose to make the text of a Russian law sound normative to English ears by the use of ‘shall’ rather than ‘is’, but that is a deliberate addition to the original. Thus the first article of the Russian Constitution has been translated as: ‘The Russian Federation – Russia is a democratic federated rule-of-law State with a republic form of government’⁶; equally as ‘The Russian Federation – Russia shall be a democratic federal rule-of-law State with the republican form of government.’⁷ In the first example, it sounds as though the federal rule-of-law situation has been achieved; in the second it may still be an aspiration, but that different nuance is a trick of the translation.

Another characteristic of Russian is that, as with many Continental European languages, there are two words for ‘law’, *pravo* and *zakon*.⁸ English does not have this duality of expression, although it may refer to both ‘jurists’ and ‘lawyers’. The word *pravo* is cognate to the Russian word *pravda*, meaning truth. The name *Pravda* may be familiar as that of the newspaper formerly issued by the CPSU.⁹ *Pravo* means law in the general sense, associated with rights, similar in meaning to the Latin *ius*, French *droit*, German *Recht*, etc. The alternative word for law is *zakon*. As with Latin *lex*, French *loi*, German *Gesetz*, this signifies enacted legislation. *Zakon* is not the only Russian word for types of legislation (normative

⁶ WE Butler, *Russian Public Law*, 2nd edn (London, Wildy, Simmonds & Hill, 2009) 4, and *Russian Law*, 3rd edn (Oxford, Oxford University Press, 2009) 811.

⁷ W Burnham and P Maggs, *Law and Legal System in the Russian Federation*, 4th edn (Huntington, NY, Juris Publishing Inc, 2009) 657.

⁸ There are two words for Russian as well. *Russkaia* means Russian in an ethnic sense, whereas *rossiskaia* means pertaining to the Russian State, so that an ethnic Tatar woman can be a Russian (*rossiskaia grazhdanina*) citizen but is not Russian (*russkaia*).

⁹ In the mid-1970s Professor Feldbrugge, Director of the then Documentation Centre for East European Law at the University of Leiden, commented to the author that Communist Parties in Europe name their newspapers after the principles they most abuse. The Soviet government newspaper was called *Izvestiia*, which means news, leading to the Soviet Russian joke that *Pravda* has no news and *Izvestiia* has no truth.

legal acts – in Russian *normativnye pravovye akty*) but is used for the highest form of enacted law, passed by the primary legislature either at federal level or in a subject of the federation. There are many other words for subsidiary legislation, eg *ukaz*, *postanovlenie* and *rasporazhenie*, usually translated as edict, decree and regulation respectively. In his attempt to translate using a one-for-one equivalence, Butler identified more than 40 different Russian types of legislation and ‘long since exhausted the repertoire of English-language equivalents’.¹⁰

There are also two Russian words for ‘truth’ – *pravda* and *istina*. *Pravda* truth would be that which is capable of proof – ‘a conformity with the known facts or events’¹¹ – whereas *istina* truth is something felt in the heart – ‘the truth beyond the known facts of the world’.¹² Alexander Yakovlev, in his *Striving for Law in a Lawless Land: Memoirs of a Russian Reformer*,¹³ contrasts these two concepts to conclude that ‘In the Russian people’s consciousness, the law has never been associated with moral truth.’¹⁴ In his view this dichotomy between law and conscience combined with the absolutism of the autocratic monarchy (*samoderzhavie*) and the Marxist denial of personal rights – ‘any personal rights may be sacrificed for the good of all’¹⁵ – are historical obstacles to be overcome in Russia ‘to make the change to a better life’.¹⁶ Yakovlev also contrasts two words for justice, *spravedlivost*, meaning fairness and justice, and *iusiustitia*, the Russian version of the Latin word:

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

¹⁰ WE Butler, ‘Techniques of Law Reform in the Soviet Union’ (1978) 31 *Current Legal Problems* 209.

¹¹ ‘Appendix 1: *pravda* versus *istina*’ in AV Ledeneva, *How Russia Really Works: The Informal Practices that Shaped Post-Soviet Politics and Business* (Ithaca, NY, Cornell University Press, 2006) 197.

¹² *Ibid.*

¹³ A Yakovlev, *Striving for Law in a Lawless Land: Memoirs of a Russian Reformer* (Armonk, NY, ME Sharpe, 1996).

¹⁴ *Ibid* at 10, although inexplicably Yakovlev characterises *pravda* as ‘moral, subjective and spiritual truth . . . *istina* amounts to factual truth’.

¹⁵ *Ibid* at 24.

¹⁶ *Ibid* at 25.

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.¹⁷

Sometimes it may be more appropriate to transliterate rather than translate. Thus, for instance, in the following chapters one of the Russian courts will be referred to as *arbitrazh* courts. Using this unusual term flags up their distinctiveness, and avoids the translational trap of calling them Arbitration Courts, which they are not. *Arbitrazh* courts grew out of the Soviet institution of *arbitrazh* tribunals, established to iron out inconsistencies in the nationwide economic plan. At that stage they did not aspire to be courts and focused on practical outcomes, not the balance of legal rights. Now they are fully-fledged courts, applying the same Civil Code as the other domestic courts, but with jurisdiction over entities working in the economic sphere; a relic of their original concern.

Even with straightforward translation, the reader should be careful not to assume the term in English has the same connotation as the original Russian expression. Phrases like ‘democratically elected’ or ‘political party’ may signify something rather different in Russia, with a meaning conditional on the historical context of its use.

Equally problematic, although for a different reason, is the expression ‘rule-of-law’. The Russian phrase *pravovoe gosudarstvo* is commonly translated as ‘rule-of-law State’, but this masks the distinction between law as *pravo* (the root of the adjective *pravovoe*) and as *zakon*. The Soviet system from the mid-1960s strove for legality (*zakonnost'*), but that was a long way from ‘rule of law’. There has been an analogous debate on meaning amongst Western scholars of the Chinese legal system, comparing concepts of ‘thick’ and ‘thin’ law in their approach to a possible rule of law:

A thin theory law stresses the formal or instrumental aspects of rule of law . . . thick or substantive concepts begin with the basic elements of a thin concept of rule of law but then incorporate elements of political morality.¹⁸

There is little doubt that Russia fulfils the ‘thin’ rule-of-law requirements; the extent to which she has developed a ‘thick’ concept of rule

¹⁷ *Ibid* at 10–11.

¹⁸ R Peerenboom, *China's Long March towards Rule of Law* (Cambridge, Cambridge University Press, 2002) 3.

of law is debatable, and that discussion forms the backdrop of this study of the Russian Constitution in context.

E. The impact of social culture

Russia has a diverse population, and it is foolish and patronising to dwell on stereotypes and caricatures. However, there are some general characteristics of Russian society which may inform her legal culture. There is, in general, respect for the aged and a chivalrous, some might say chauvinistic, approach to women. Loyalty tends to be to friends, group or patron, rather than to the State as an amorphous entity. The dividing line between reciprocal assistance and corruption is difficult to draw, as the long-held tradition of mutual exchange of favours still holds sway, and personal trust and other informal relations are given higher priority than formal arrangements. Attitudes to law and legal regulation may appear surprisingly lax to those brought up in North America and northern Europe. In Russia there can be a wide gulf between the 'law in the books' and 'law in action'. This must surely be true in all jurisdictions, but in Russia (pre-revolutionary, Soviet and post-Soviet) there persists an idea that law is made in Moscow, and for many that is a very long way away and local practices may take precedence.

In Russia, prior experience of constitutionalism was comparatively sparse. Compared with her Western European neighbours, Russia had some marked differences in her historical development:

There had been no feudalism, at least in the form of a balance of interests regulated by law; social classes were defined by service to the state; the Orthodox Church was an extension of government rather than a rival source of authority; and government itself accepted no legitimate limit to the scope of its decisions.¹⁹

In pre-revolutionary Russia, there were discussions about rights and whether there should be any limitations on the scope of the ruler's power, the interrelation between *pravo* (right) and *zakon* (enacted law), but these tended to be on an abstract, theoretical level, and rarely informed law-making and law application. In post-revolutionary Russia, law was given little respect as a result of the impact of Marxist ideology

¹⁹ S White, *Russia's New Politics: The Management of a Postcommunist Society* (Cambridge, Cambridge University Press, 2000) 291.

with its view that law was merely part of the superstructure of society overlaying the essential economic infrastructure at the particular stage of societal development (see chapter two). When the communist ideal was reached, law and State would have withered away. It is therefore not surprising that now, in post-Soviet Russia, there has been unparalleled development of an approach to legality and constitutionality.

F. Russian legal nihilism

Famously, in the mid-1800s, Alexander Herzen described the lack of any kind of legal order in Russia²⁰:

The legal insecurity that has hung over our people from time immemorial has been a kind of school for them. The scandalous injustice of one half of the law has taught them to hate the other half; they submit only to force. Complete inequality before the law has killed any respect they may have had for legality. Whatever his station, the Russian evades or violates the law wherever he can do so with impunity; the government does exactly the same thing.

This legal nihilism was highlighted by President Medvedev in his first annual address to the legislature in November 2008: '[Legal nihilism] did not appear in Russia yesterday. Its roots go deep into our past'.²¹ He has set himself to try to eradicate it, but in doing so he is attempting to sweep away a deeply-embedded and longstanding cultural tradition.

In her enlightening description of *How Russia Really Works: The Informal Practices that Shape Post-Soviet Politics and Business*,²² Alena Ledeneva also highlights the consequences of the cavalier approach to formal law that has been customary in Russia. She shows how legal rules may be manipulated to subvert their original purpose, and selective enforcement, or non-enforcement, may be used strategically. One example described how electoral campaigns can be affected.²³

²⁰ 'Du développement des idées révolutionnaires en Russie' in *Collected Works in Thirty Volumes* (Moscow, 1954–61) vol 7, 121, as cited in Yakovlev, above n 13, at 10.

²¹ D Medvedev, 'Russian president Medvedev's first annual address to parliament', *Rossiya TV* verbatim broadcast in Russian, 5 November 2008, translation by (2008) *BBC Monitoring Former Soviet Union*, 5 November, available via Westlaw.

²² Ledeneva, above n 11.

²³ *Ibid* at 48, 51.

Legal procedures are used to sabotage legality. Control of the media, use of negative campaigning (so-called 'black PR' – *chernyi piar*), collection of and trade in compromising information, and 'mutual support networks' all have a significant impact on the real distribution of power. As Ledeneva convincingly argues, these important informal practices 'are engaged in advancing but also undermining the workings of market and democracy'²⁴ and must be borne in mind, even though the extent of their impact is not open to measurement.

G. Families of legal systems?

In form, the Russian legal system has many of the hallmarks of a Continental European 'Romanist' system which takes its legal heritage from Roman Law. As with Continental European legal systems and their offspring, in Russia the main branches of law are codified. As a discipline, law is regarded as a science, so that the prestigious Institute of State and Law is part of the Russian Academy of Sciences. Legal academics are more respected than judges, who traditionally have been regarded as functionaries with little social standing, although this is changing.²⁵ There was academic debate over whether Soviet Russia had a Romanist legal system or led a separate family of Socialist legal systems. Now that debate considers whether post-Soviet Russia is back in the 'Romanist family' or in some separate post-socialist family. Whichever view, if any, prevails, there is at least one characteristic of the Russian legal system which may set it apart from its Continental cousins. There is a stark contrast between the rigorous Russian legal education, and its scientific approach to the study of law, and the traditional low level of regard for law in the general culture. This is a characteristic which Russia's current President Medvedev, a former lawyer, and the Chairmen of its three top courts have set themselves to transform. They see the Constitution as an important instrument in that process.

²⁴ *Ibid* at 27.

²⁵ The fact that many judges in Soviet Russia were women unfortunately said more about the perceived low status of the post than it did about real equality of the sexes.

II. CONCLUSION

Even for something as fundamental as the Constitution, there may be different views as to the role that it takes, and therefore the extent to which its terms are binding law or merely guidelines. Russian cultural and historical experiences have not created positive expectations for law in general, and the Constitution in particular. The next two chapters expand on the historical background to the current Constitution, before an examination of its substance in relation to the Executive, Legislature and Judiciary in chapters four, five and six. It may then be possible to assess the extent to which post-Soviet Russia is developing a new and effective constitutionalism.

FURTHER READING

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