

ARTICLES

WHICH WAY IS THE RUSSIAN DOUBLE-HEADED EAGLE LOOKING?

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The article examines the historical reasons for the unique relationship between the state and the law in Russia, which has a system-forming impact on all aspects of life in modern Russia. The authors analyze the duality of the Russian political and legal world – ‘Athens’ vs ‘Jerusalem’ – ‘East vs West’ – ‘legal state vs state of obligation’ – and reveal the philosophical and ethical maxims through which it became possible to talk about Russia’s peculiar historical path and the modern image of Russia. In the latter case, the authors focus particular attention on the phenomenon of ‘sobornost’ [‘the spiritual community of many people living in the same space’] establishing that, in the philosophy of the Slavophiles, this category played the role of both a religious and a national proto-symbol, which can be understood as a source of spiritual unity of the people, connecting them from the outset during the sacrament of communal prayer and then being transferred to everyday life, organizing and directing all social practices of the Orthodox society in a special way. It is pointed out that the philosophical reflection on Russia’s peculiar historical path has found a certain continuation in the idea of the ‘Slavic legal family’ proposed by Professor V.N. Sinyukov.

The authors do not overlook the problems of legal nihilism as an attribute of the Russian political and legal practice. The instinctive distrust of complexity and inclination towards the utmost simplicity in solving social problems is named as one of the reasons for the legal nihilism of the Russian people.

In the final section, the authors address the issue of borrowing the political and legal experience from foreign sources. The ‘pole points’ of the analysis are the Eastern experience of the Chinese state and the Western experience of French law. Expansion

of the Anglo-American law is defined by the authors as the 'other kind of milk' for the 'Russian coffee' – which generally corresponds to the global trend in this sphere.

Keywords: law; state; east; west; Russia.

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1. Introduction

Russia has always been a conglomerate of differently vectored values, ideas, origins and images, where the light is easily combined with the dark, the irrational¹ with the rational, the European with the Asian, the evolutionary with the revolutionary. The mosaicism of the Russian social life is articulated well by V.V. Rozanov. 'There are' – he wrote – 'two Russias: one is a Russia of appearances, a huge bulk of external forms with regular defined contours – the 'Empire' the history of which was 'depicted' by Karamzin and 'developed' by Solovyov, the laws of which were codified by Speransky. And there is another one – the 'Holy Russia', the 'Mother Russia', the laws of which are not known to anybody, having obscure forms, vague contours with an unpredictable end and an unclear beginning: a Russia of the essentialities, the living blood, the abundant faith, where each fact holds on due to the power of its own existence inherent in it rather than due to an artificial link to another one.'²

So what are the origins of the statehood of this polyphonic country? Let us try to answer this question while identifying the key vectors of its objective manifestations and value-related origins.

¹ N.A. Berdyaev described the irrational grain of the Russian soul as the 'dark wine' which 'upsets all the theories of political rationalism ... turning our history into fiction, into an improbable novel.'

*Бердяев Н.А. Философия свободы [Berdyaev N.A. *Filosofiya svobody* [N.A. Berdyaev, *Philosophy of Freedom*]] 313 (Folio, AST, Moscow 2004).*

² *Розанов В.В. Религия, философия, культура [Rozanov V.V. *Religiya, filosofiya, kultura* [V.V. Rozanov, *Religion, Philosophy, Culture*]] 33 (Respublica, Moscow 1992).*

2. 'Athens' vs 'Jerusalem'

The 'Athens or Jerusalem' worldview alternative was first formulated by St. Paul the Apostle, who used the names of the two cities to denote the radical difference between two kinds of truth: the truth of reason and the truth of revelation.

'For the Jews require a sign, and the Greeks seek after wisdom; But we preach Christ crucified, to the Jews a stumbling block, and to the Greeks foolishness.' The first principle, associated with the capital of Ancient Greek philosophy, focuses on the mind, reason, logic. It found its embodiment both in classical philosophy and in the building of Western political and legal institutions.

The second principle was formulated in the course of the debate of the early Christians with the Hellenistic culture. 'Jerusalem' denies the cult of reason, maintaining belief in a transcendent origin, in the power of faith and the truth of revelation. 'Jerusalem' is opposed to 'Athens' as an alternative theory of God, the world, the human being, the cognition. 'Beware (brothers) lest any man spoil you through philosophy and vain deceit, after the tradition of men, after the rudiments of the world, and not after Christ.' This is the warning of St. Paul the Apostle, picked up on by the early Christian theologian Tertullian who put forward the famous formula 'I believe because it is absurd.' Tertullian expressed the uselessness of the mind in cognition of God with the following words: 'Seek God in simplicity of heart.'

The ideas of St. Paul the Apostle and Tertullian were spelled out with more precision, developed and, to some extent, 'modernized' by S. Kierkegaard and L. Shestov. This was achieved through contrasting the essence and the existence which found its justification first in the philosophy of life and then in existentialism. According to this intellectual tradition, the mind comprehends only the universal whereas the life is always unique. The mind can grasp only the essence whereas the cognition of the truth is the cognition of existence. Lev Shestov, in discoursing about why the truth of the mind is not the real truth, expresses his regret about the fact that the new European philosophers divided the truth and the morality, saying that there is no truth in the Bible, but only morality. Therefore, it is necessary to make a choice in favor of philosophy and leave the Bible for the sake of intellectual honesty – he writes: 'But what if one should try for once to conclude otherwise and say: 'consequently', we must send intellectual honesty to the devil, in order to rid ourselves of Kant's postulates and learn to speak with God as our ancestors spoke with Him.'³ All this leads the Russian thinker to a paradoxical conclusion: 'Intellectual honesty consists in submitting to reason not externally, through fear, but willingly, with all of one's heart. It is a virtue when the power of reason is legitimate. But what if reason has seized power illegally?'⁴

³ Lev Shestov, *Athens and Jerusalem* 386 (Ohio University Press ed., Athens 1966).

⁴ Lev Shestov, *Id.*

The conflict between Athens and Jerusalem is a conflict between two ideas of truth and between two doctrines of morality. The way in which they are woven into the social practice, into everyday life, is a special issue. Daily life is always richer and more diverse than principles and ideal types. However, following certain examples, acceptance or rejection of values is the organizing foundation both for reasoning and for action. On the other hand, historical and cultural experience has a very radical impact on the choice of principles and their subsequent revision. A vivid example of the change in principles and ideals is the transition of the Mediterranean from the stage of independent cities to the stage of empires, first Hellenistic and later Roman.

As noted by S.S. Averintsev, the birth of the Mediterranean empires produced two psychologies: the Caesarist and the Christian. Along with the empire, a new system of relations between the government and people entered into the life of society. This system seemed unusual only for the Greeks and the Romans, while in the Middle Eastern despotisms it had been long and thoroughly tried and tested. 'An Athenian sage knows full well that he can be killed but cannot be humiliated with severe physical violence, that his measured speech in court will last as long as it is guaranteed for him by the rights of the accused party and no one will make him shut up by hitting his face or his eloquent mouth (as happens in the New Testament story of Jesus and Paul the Apostle).'⁵ The moral philosophy goes 'hand in hand' with the philosophy of law, since both the former and the latter are organic manifestations of social evolution, when a new kind of thinking and acting comes to replace the traditional society.

'An eastern scribe, a sage or a prophet, an eastern noble and even an eastern king (if we remember the put out eyes of Zedekiah, whose fate was the prototype of so many fates in the Byzantine ages!) – all of them were well aware that their bodies were not immune from such abuse, which just did not leave space for Socratic equanimity.'⁶ This type of social relation inevitably leads to a situation where the moral experience is acquired outside of the legal one. The moral norm turns out to be the only kind of social norm and, within certain limits, it has to carry out not only its own functions, but also the functions of law.

Byzantium became the East at the same time remaining the West. Much of what was preserved in the social experience of the heirs of the Ancient Rome already existed as a form or a rite. But even if only the form is kept the trace is still there, since the form cannot be completely cleared of the content. The same is true for Russia, the history of which can be depicted as a series of westernizations and orientalizations or as a history of modernizations and archaizations. Curiously enough, each successive round of historical development did not lead either to

⁵ *Аверинцев С.С. Поэтика ранневизантийской литературы* [Averintsev S.S. *Poetika rannevizantiyskoy literatury* [S.S. Averintsev, *Poetics of the Early Byzantine literature*]] 62 (Coda, Moscow 1997).

⁶ *Аверинцев С.С. Id.*, at 63.

rapprochement with the West or to estrangement from it. Russian society has always lived a life of its own, following a logic of its own. This logic is clear enough: every time everything starts with realization of its own backwardness and inefficiency leading to the desire to transform all the structures and institutions in line with the Western model. This is followed by the phase of realizing the impossibility of successful westernization resulting in the next step along the so-called '*peculiar path*' which means strengthening the role of the state and transforming the institutional and value system, but now using the army as a model instead of the social systems actually existing abroad. These were exactly the actions of those who later would be placed in the cohort of the great reformers, not to mention the no less great 'counter-reformers' such as Ivan IV and Paul I, Peter I and Nicholas I, Lenin and Stalin, to say nothing of the twists and turns of the past decades.

Not so long ago, the motto 'Go, Russia!' literally burst into the Russian political and semantic space. But where exactly to go? Of course, towards the modern, i.e., towards modernization – where else? It can't be backwards, can it? Will it be successful? Why not? The way to modernization should be open to anyone who wants it. Just do it – modernize as much as you want. At least the direction is clear. However, with all this obviousness, there is a lingering sensation that, somehow, it is not happening the way it should and whatever is happening does not look very much like modernization. After becoming a part of the global market and getting an opportunity to import goods and services from different parts of the planet we really joined the world of modern technologies: computers and GPS navigation devices, mobile phones and social networks, exotic holiday resorts and innovative forms of leisure. But is this the modernization the Russian people are dreaming of while actually experiencing the country's de-industrialization and the loss of its once leading positions in the field of technology, science and education? Isn't the hope for a successful 'upgrade' to some extent mixed with a feeling that the alternative to such modernization is not stagnation or going round in circles? Isn't there a feeling that changes are going on, but in a different direction and rather quickly? Maybe it's time to talk about whether modernization – even rather successful modernization – can be a comprehensive process, i.e., the essence of all social changes. This must be done at least due to the fact that, despite all the going from one extreme to the other in the nineties, despite all the 'stability-seeking' caution of the noughties, a very different process is slowly but steadily going on in modern Russian society – the process of social archaization. It seems invisible against the background of the administrative and bureaucratic as well as political and legal stability, but its consequences can have a truly fateful effect. The argument in favor of the above statement may be the assumption that much (if not all) of what has been happening in society over the past two decades can be explained in terms of the yet non-existent archaization theory.

It is worth noting that the dilemma of Athens versus Jerusalem in this context means that the Russian national identity is defined in terms of a dichotomy of rational versus irrational. And it looks like the choice in favor of the irrational is motivated

both from the point of view of values and existentially. This idea has always haunted the minds of both the 'carriers' of such an identity consistently insisting on conscious irrationality and the Western intellectuals trying to solve the 'Russian enigma'. For example, the American sociologist T. McDaniel strongly emphasizes the inability, incapability and unwillingness of the Russian people to use the institutions of law, albeit not as developed as in the West, but still allowing one to defend one's rights legally and peacefully. And this fact is observed by him in different periods of Russian history. Assessing the actions of rebel workers, he points out that, on a subconscious level, their protest was based on an irrational, spontaneous and unformulated feeling of resentment. 'Action, particularity political action, was not necessary, for it was divisive and irrational; the government, representing truth, would determine the justice of the competing claims. Such a view of social groups and social action completely undercuts any idea of rights inherent in the subject; the subject is even deprived of the legitimacy of his or her own interests. Interest, after all, may be at the basis of society, but truth and justice are the roots of community.'⁷

However, it is not only the reaction of the society or certain groups within it to the actions of the authorities that seems deeply irrational to T. McDaniel, the Russian idea itself is interpreted by him not as a set of values, but as their irrational rejection and denial. Moreover, according to T. McDaniel, the reactive nature of the Russian idea is caused by Western institutions and values which are either periodically imposed by the authorities or permanently exist in the public consciousness as the reverse side of the prosperous West.

3. East vs West

Yes, exactly: the East and the West are the eternal suns of the Russian land. The Russian double-headed eagle alternately turned its gaze to the West and to the East. Let us remember the judicial reform of 1864, the attempts to create a pre-revolutionary Duma, the State Council and many other transformations in the sphere of state-building were dictated by the influence of the West on Russia. These transformations were difficult and, as a rule, did not last very long. The institutions and values did not manage to take root in the Russian soil and, after a while, found themselves decisively rejected. 'It is difficult to say whether the introduction of the jury system in Russia in 1864 reflected a national crisis comparable the enormity of serfdom, but almost all educated Russians of 1860s were aware of the glaring of disparity between justice and the law in the pre-reform system. Most would have argued that the critical disjunction between law and ethics in terms of the judicial system was far greater before 1864 than it was after the reforms, when Dostoevsky worked on *The Brothers Karamazov*. Dostoevsky, however, situated the great legal

⁷ McDaniel Tim, *The Agony of the Russian Idea* 72 (Princeton University Press 1996).

crisis, the absolute bifurcation of morality and law after 1864.⁸ Of course, the minds burning with ideas and heated debates about the law, justice and morality arise immediately when a 'pre-revolutionary' situation forms within a society, irrespective of whether the revolution is controlled and guided from the top or is only initiated by the authorities but later goes on to destroy of the old order. And every time everything starts with an attempt to copy the experience of Western Europe or North America. Therefore, after the radical rethinking of the Soviet version of the state in the 1990s, we came to the conclusion that we once again actually need to follow the state-building theory found and practiced in the West. However, later on the reverse processes have invariably taken place and these processes have almost always been perceived as a movement towards the East, as the restoration of the institutions and values which are either brought from the East or (more often) are only associated with the East as a cultural and historical type.

When assessing the existence of two social and cultural archetypes at once in Russia, it should be pointed out that such a situation is not unique. Many empires united heterogeneous elements, but none of them connected them so deeply and organically, maybe with the exception of Byzantium. The impressive similarity of Russia and Byzantium is easily explained, for it was Constantinople that, through the spreading of its religion, had a formative influence on the Ancient Russian culture, political institutions and law enforcement practices.

However, Ancient Russia was a likeness of Byzantium neither in terms of scale, nor in terms of its historical role. The young society, the young state and the young culture of Kiev in the X or XI centuries was different from the 'Second Rome' that existed for about a thousand years just like from its historical predecessor. Therefore, Russia may have more grounds for claiming the status of a subsidiary civilization in relation to Byzantium. However, in the days of Ivan IV, Muscovy began to call itself the 'Third Rome'.

No matter how questionable the multiple historical parallels, no matter how big the number of speculations around Byzantism, which is understood sometimes as a type of mentality and sometimes as a kind of social order, there are some grounds for them. In order to determine the peculiarities of Byzantism, we need to refer to the classical 'East – West' model. This model is intended to highlight the sense of the civilization-based comparison, which equally explains the differences in economy and religion, science and art, state-building and the organization of private life.

These oppositions must not be seen as clear and unambiguous characteristics of social and cultural reality inevitably inherent in Western or Eastern countries during all periods of their history. Here we can speak only about the ideal types materialized in reality with greater or lesser degree of completeness. Moreover, large-scale mutual influences took place from time to time resulting in westernization of the countries and regions traditionally included in the orbit of the East.

⁸ Rozhenshield Gary, *Western Law, Russian Justice. Dostoevsky, the Jury Trial and the Law* 7–8 (University Wisconsin Press, Madison 2005).

An example such westernization is the Hellenization of Syria and Egypt. This Hellenization was not just a short-term episode in the history of the Middle East. There are claims that 'the rise of Islam was a manifestation of the reaction of the East to invasion by an alien Western culture starting with the campaigns of Alexander of Macedon in the IV century BC. The previous attempts to break free 'from the Hellenic nightmare' manifested in the emergence of Judaism, Zoroastrianism and Christianity (in its various forms) were not successful, as the first two religions were of local significance and Christianity was 'kidnapped' by the West and became its property after being linked with Greek philosophy.'⁹

Equally obvious are the episodes of orientalization of the Western world in the course of expansion of Christianity. The West remains Christian, but the consequences of orientalization were overcome, though not immediately. The Renaissance, the Reformation and the Counter-Reformation are the most notable stages in this process. Eastern Christianity still remained a part of the Eastern world. But its Western roots will never be forgotten.

Even in the context of cultural interactions between the East and the West, the Russian experience is extraordinary. The interpenetration of two heterogeneous systems seems too organic. By no coincidence, this issue has become the central theme of Russian philosophy – and not just philosophy. Today, Russian political and journalistic thought continues raising questions which are directly related to the dispute that began in the XIX century. 'By and large, the most important ideas of Russian culture arose from an antagonistic dialogue between the radical intelligentsia and the great writers, with literary critics belonging to each group. On the one hand, we have the highly self-conscious tradition of intelligency (members of the intelligentsia), whose patron saint was Chernyshevsky and which came to include Lavrov, Mikhailovsky, Nechaev, Lenin, Stalin and Trotsky. On the other, we have the counter-tradition of Tolstoy, Dostoevsky and Chekhov. Or again: Bakunin, Dobroliubov, Pisarev and Tkachev are answered by Solovev, Bakhtin...'¹⁰

4. Legal State vs State of Obligation

A peculiar 'middle-of-the-road' option of finding one's own statehood in the tangles of time was the movement of Eurasianism.¹¹ This social trend reached its

⁹ Сравнительное изучение цивилизаций: Хрестоматия: Учебное пособие для студентов вузов [Sравnitel'noye izucheniyе tsivilizatsiy: Khrestomatiya: Uchebnoye posobiye dlya studentov vuzov [Comparative Study of Civilizations: Chrestomathy: Textbook for university students]] 494 (Aspect Press, Moscow 1997).

¹⁰ *A History of Russian Thought 95–96* (Ed. by William Leatherbarrow and Derek Offord, Cambridge University Press 2010).

¹¹ For more detailed information about this social movement, please see: Bassin, M.A., Glebov, S.B., Laruelle, M. *Between Europe and Asia: The origins, theories, and legacies of Russian eurasianism* (University of Pittsburgh Press 2015).

intellectual peak in Russia twice – at the beginning and at the end of the twentieth century. Both the first and the second case took place in the period when Russia passed the state-related break points and was urgently looking for its identity.

N.N. Alekseev, P.N. Savitsky, N.S. Trubetskoy and G.V. Florovsky stood at the origins of Eurasianism.

The following declaration of the Eurasianists became widespread: 'The Russian people and the people of the 'Russian world' nations are neither Europeans nor Asians. Merging with the native environment of culture around us, we are not ashamed to avow ourselves Eurasians.'¹²

It is the Eurasianists that introduce the idea of the state of obligation which will seem alien to the people of the Western world.

The Eurasianist philosophy is based on the opposition between the organicist, holistic approach to society and history characteristic of the East and the mechanistic, 'atomic', 'individualistic', 'contract' approach characteristic of the West.

With some sarcasm, N.N. Alekseyev points to the fact that the Western jurists understand the 'General Theory of Law' as the 'general theory of Western law', leaving outside the scope of consideration all the alternative legal models which, however, are still common among the nations which make up the greater part of humankind, and, in addition, which existed in the West itself in other historical epochs.

But what is opposed to the concept of law in alternative social models? The concept of duty (obligation). Alekseyev looks at it in detail. Citing the example of the social history of Russia, he very precisely uses the old term 'servitude state', i.e., a state based on the principle of domination of duties.

In its purest form, the 'servitude system' does not know and does not recognize any rights at all, but asserts only duties everywhere. This follows from the philosophical precept of a traditional society that treats an individual as a part of a whole, as a non-self-maintained and non-self-sufficient projection on a single unit of the universal. The individual is treated only as a part of the integral whole – the church, the state, the people, the nation, the community. This is the community principle, the principle of precedence of the general in the formation of the whole.

In fact, two possible legal theories emerge. One deals with individuals as a private and contractual community, as a product of connections of the private. The interrelation between them as well as interrelations between individuals constitute the subject matter of law as understood by the West. The extreme manifestation of this structure is the theory of 'a state governed by the rule of law' and 'human rights' (the latter does not imply any state at all – in this case it can be replaced by some other form of association, which leads to the modern theories of 'mondialism', 'World Government', etc.).

¹² Евразийская хроника. Вып. VII [Evrasiyskaya khronika. Vol. VII [7 Eurasian Chronicle]] 43 (Paris 1926–1928).

The second theory of law deals not with individuals (the 'indivisible'), but with persons, personalities, as the term 'person' in Greek means 'mask' and is used to characterize the participants of a tragedy. The Russian term for 'personality' ['lichnost'] is an etymological calque (loan translation) from Greek and means a 'function' and a 'role,' a 'mask' rather than a self-maintained and independent, autonomous unit. These personalities/masks are discrete forms of the manifestation of the whole – the community, the nation, the state. They perform the 'burden-carrying' function, serve as a driving force while working through the daily grind of social existence, which is so difficult precisely because it is all about operating with the universal, the integral, the single. The public field of each individual in the 'servitude state' is inevitably linked to the entirety of substantial ontology. Here everybody serves everything, performing the role determined by the whole and having as a reward a constant ontological prospect of full co-participation in this whole, a possibility of unlimited drawing of existential forces and peace of mind from this whole.

There are no exceptions to this rule in the 'servitude state,' not even for the sovereign himself, the basileus, who is the bearer of the priority right [right by priority] in the Western concept long before the Enlightenment and liberalism. The Eurasian tsar, the tsar of the organistic society, is the same person, the same mask, the same servitude (draft) figure as all the others. He is a servant of the general (public) being and, therefore, he is the first to feel the whole burden of ontological service. The tsar has more obligation than all his subjects. He is personally responsible for the smooth and uninterrupted functioning of all the other persons. He is not a collector of the servitude impost, but an overseer, a 'bishop' of the general (public) existence entity, which is entrusted to him by something higher than himself in relation to which he is just a mask and a role, a function and a servant.¹³

If we follow the logic of the Eurasianists, the authors of the 1993 Constitution of the Russian Federation are liars going against the historical past of their own country. They should have established the following declaration in Article 1 of the Constitution of the Russian Federation: 'Russia is a democratic federal state of obligation with a republican form of government.'

But is this possible practically and justified historically? Very unlikely. Although the Russian have survived innumerable hardships so severe that they might be unbearable to other peoples and nations.

5. A Peculiar Path

The supporters of the 'peculiar path' believe that caution should be exercised with regard to the calls for transformation of legal institutions into a universal means of resolving political and social problems. Among those who promote the position

¹³ Алексеев Н.Н. Русский народ и государство [Alekseyev N.N. *Russkiy narod i gosudarstvo* [N.N. Alekseyev, *The Russian People and the State*]] 293–295 (Agraf, Moscow 1998).

of uniqueness and exclusivity, there are adherents of a peculiar Russian philosophy of law, which may lead to the conclusion about the special nature of law in the life of the Russian society. As V.V. Lapayeva points out, the understanding of law in Europe has always been based on social practices which were characterized by individualism. 'Whereas the Russian legal thought', she writes, 'developed largely under the influence of the inherently system-centered Byzantine spiritual tradition which interpreted law as some kind of form of spiritual unity of people standing above an individual and controlling an individual based on truth and justice, divine grace, Christian ethics, etc. The Western (Greco-Roman) approach to law as a way of regulating [bringing order to] social life based on individual freedom was intrinsically alien to the Russian mentality. All this gives grounds for speaking not just about the philosophy of law in Russia but specifically about the Russian philosophy of law as distinguished from the tradition of Western legal philosophy.'¹⁴

A special role in understanding the specifics of the Russian political and legal system is played by the concept of *sobornost* [the spiritual community of many people living in the same space]. After the introduction of *sobornost* by Russian philosopher and Slavophile, A.S. Khomyakov, the philosophical discourse immediately went beyond the boundaries of Cartesianism. This concept can be neither explicated nor operationalized by means of modern philosophy – it will remain forever tied to the religious understanding of the world.

The concept of *sobornost* is often translated into the language of modern philosophy and political science as collectivism, although this translation can only lead to confusion and prevent understanding. In fact, the Greek word καθολικότητα is translated into Latin as catholicity, while in English it should be translated as universality. Despite the fact that the birth of this concept was associated with social and political reasons, its further comprehension took place in the intellectual and mystical genre very characteristic of the late Byzantine spiritual life. And although the principle of *sobornost* in Justinian's times allowed quite effective regulation of the administrative and legal issues in the field of relations between the state and confessions as well as intraconfessional relations, its administrative and legal use in the West was rather limited and its interpretation was speculative and scholastic. However, A.S. Khomyakov made it a keystone of his own doctrine of a social ideal which was further developed in the works of almost all the major representatives of Russian religious philosophy.¹⁵

¹⁴ Лапайева В.В. Российская философия права в контексте западной философско-правовой традиции // Вопросы философии. 2010. № 5. С. 3–14 [Lapayeva V.V. *Rossiyskaya filosofiya prava v kontekste zapadnoy filosofsko-pravovoy traditsii* // Voprosy filosofii. 2010. No 5. S. 3–14 [V.V. Lapayeva, *Russian Philosophy of Law in the Context of the Western Legal Philosophy Tradition*, 2010(5) Russian Studies in Philosophy 3–14]].

¹⁵ For more detailed information about this Russian philosophy, please see: Evert Van Der Zweerde, *La place de la philosophie russe dans l'histoire philosophique mondiale*, 3(223)

The concept of *sobornost* is closely linked to other concepts of the Eastern Christian theology and, first of all, to *symphony* (συμφωνία – consonance) and *synergy* (συνεργία – cooperation, support, assistance, partnership, complicity). 20th century critics of Soviet totalitarianism came up with another meaning which had a distinctly negative connotation – ‘like-mindedness’. All the attempts to translate the word *sobornost* into European languages have not led to the possibility of conveying the semantics of the term satisfactorily. N.A. Berdyaev even pointed out the similarity of this concept with the European concept of communism creating a new concept of ‘*kommunotarnost*’ [‘*communitariness*’] (from the French *commune* [association, community]) for philosophical translation.

In the doctrine of A.S. Khomyakov, *sobornost* played the role of both a religious and national proto-symbol, which can be understood as a source of spiritual unity of the people, connecting them from the outset during the sacrament of communal prayer and then being transferred to everyday life, organizing and directing all the social practices of the Orthodox society in a special way. Another prominent philosopher and Slavophile, K.S. Aksakov, used this word as a synonym for choral beginning: people who can sing together can also live together; they lose selfishness, but keep the aspiration towards creativity. An individual aspiration to creativity merges with other aspirations – like voices in a symphonic and synergetic chorus.¹⁶ The founder of the Russian cosmism, N. Fedorov, tied the concept of *sobornost* with the idea of the common cause which, in his opinion, included transformation not only of the whole society, but also of the whole nature and the whole cosmos based on his own doctrine. The students of N.F. Fedorov would later become the people coming up with the concept of the bio- and noosphere of the Earth, calculating the first and second cosmic speed [velocity], creating the theory of cosmonautics. The process of searching for an alternative to Western Cartesian rationalism was interrupted by the Bolshevik revolution and resumed by the new government in a completely different direction (and the very nature of the search was absolutely different).

The role of the concept of *sobornost* is striking in its assertion of consistent legal nihilism and justifying the revolution. ‘But both Tolstoi and Dostoyevsky rebelled against the injustices of human laws; they expressed the Russian spirit of antinomianism; they were both enemies of the bourgeois world and its standards. Both of them, though in different ways, seek true Christianity as against the distortions of historical Christianity, and Tolstoi and Dostoyevsky were possible only in a society which was moving towards revolution, in which explosive materials were

Diogène (2008). DOI: 10.3917/dio.223.0115 <<http://www.cairn.info/revue-diogene-2008-3-page-115.htm>>.

Piama P. Gaidenko, *Philosophie russe et pensée européenne: le cas de Vladimir S. Soloviev*, 2(222) Diogène (2008). DOI: 10.3917/dio.222.0032 <<http://www.cairn.info/revue-diogene-2008-2-page-32.htm>>.

¹⁶ Florovsky Georges, *Sobornost: the Catholicity of the Church*, The Church of God. An Anglo-Russian Symposium by Members of the Fellowship of St Alban and St Sergius 55 (ed. E.L. Mascall, London 1934).

accumulating. Dostoyevsky preached a spiritual communism, the responsibility of all for each that was how he understood Russian sobornost'.¹⁷

In addition to the idea of *sobornost*, the pillars, on which the philosophy of the uniqueness of the Russian political and legal experience rests, also include the maxims of reviving the idea of a genuine 'Russian truth' as a philosophical foundation of the national legal existence and the structure of legal nihilism. Criticizing the Marxist view on the essence of the ontological basis of the national legal order, N.N. Alekseev pointed out the following: 'If we look at the old, religious, Orthodox Russia, we will see that only the most general principles of the political and social system had religious and moral justification and became the subject of religious and moral theoretical reflections at that time. The tasks of the state and society building, of course, were also understood as a religious duty and an act of valor (Alexander Nevsky, Metropolitans Peter and Alexis, Patriarch Hermogenes), but they were not placed in the center of attention of the general public other than in the most general terms. The religious and moral ideal was understood mainly as belonging to the sphere of personal morality, as a personal valiant deed.... In terms of absence of purely political ideals, a typical member of the Russian intelligentsia of the last century (represented, for example, by many Russian populists [*narodniki*] as well as many revolutionaries and anarchists) was very much like a member of the Moscow intelligentsia of ancient Russia, promoting the ideals of Orthodox asceticism and not having any definite political program.... Coming back to the recognition of the old Moscow 'truth', a Russian person cannot help but get rid of the lies of the moral doctrine inculcated by Marxism.... Original political theories have never emerged in Russia the way they did in France and in England. The views of English philosopher Locke as well as the French philosophers Montesquieu and Rousseau left a mark on all the latest Western constitutional history. The modern Western states of the European and American cultures represent, in essence, practical applications of the theoretical reasoning of the aforementioned political writers. In Russia, the role of political ideas was not that significant and our state was built spontaneously, in a semi-conscious, 'organic' rush. Now is the time for free creativity in the sphere of Russian political ideas which certainly do not need to imitate the West by all means.'¹⁸

As for the legal nihilism as an attribute of the political and legal system of the Russian society, both in the past and at present¹⁹, it should be recognized as a common issue the question about the causes of which remains open. Perhaps the origins of legal nihilism should be searched for in the religious, philosophical

¹⁷ Berdyaev Nikolai, *The Origin of Russian Communism* 87 (Robert MacLehose and Company Ltd, The University Press, London 1948).

¹⁸ *Алексеев Н.Н. Id.*, at 301.

¹⁹ For further information on this issue, see, for example: Hendley, K. *Who are the legal nihilists in Russia?* 28(2) *Post-Soviet Affairs* 149–186 (2012) <<http://www.tandfonline.com/doi/abs/10.2747/1060-586X.28.2.149>>.

and cultural experience of Russian society. This point of view was at different times expressed by E.V. Solovyev, V.V. Bibikhin and many others. But there exists another supposition: the legal nihilism of the Russian people reflects their instinctive distrust of complexity and inclination towards utmost simplicity in solving social problems. The same tendency can be observed with the modern physicists for whom theoretical simplicity is the same as mathematically interpreted beauty, who are dreaming of building a unified theory of physical interaction, a unified field theory, superstring theory and other variants of the theory of everything. In contrast, the humanitarian scholars are able to enjoy the contemplation of complexity – they are attracted not so much by the universal as by the unique.

The philosophical reflection on Russia's peculiar path was to some extent continued by Professor V.N. Sinyukov,²⁰ who introduced the idea of existence of a 'Slavic legal family'.²¹ In his monograph, he poses the following questions to himself as well as to the reader: Are there any elements in Russia's existing legal system which would allow one to speak of its cultural and historical regulatory originality? Is there some kind of unique, peculiar, logic in Russia's legal path? Does Russia need a typologically independent legal system? Professor Sinyukov gives unequivocally positive answers to all these questions. The unique character of Russian law was also stated in the research by R.S. Bayniyazov. In his opinion, the legal 'self' of the society is determined primarily by its own kind of legal consciousness and experience, by a special way of thinking and creative activity of the mind. Legal thinking incorporates a most complex psychological process of understanding, interpretation and mental modeling of the legal life of the society.²² The legal mentality of Russian society has been characterized by a careless, negative attitude to law, by extreme politicization as well as by organically inherent etatism, as evidenced by the whole of Russian history.

²⁰ СИНЮКОВ В.Н. Российская правовая система. Введение в общую теорию [Sinyukov V.N. *Rossiyskaya pravovaya sistema. Vvedeniye v obshchuyu teoriyu* [V.N. Sinyukov, *The Russian Legal System. Introduction to General Theory*]] (Norma, Moscow 2010).

²¹ The term 'Slavic Law' may also be encountered in much earlier works. Fyodor Fyodorovich Siegel (1845–1921) wrote that the 'Slavic Law' is the law of the rural population and, since the Slavic people lived in accordance with their ancient customs which were maintained through tradition, it is closer to the English and American law than to the law of the Continental Europe. From this point of view, the norms of Slavic law are more independent from Roman and canon law than the continental ones. The Slavs developed their legal norms on their own. Unconditional and significant influence of foreign ideas was reduced to ideas only and did not affect the rules themselves. See: Siegel Fyodor, *Lectures on Slavonic Law* (London 1902).

²² Байниязов Р.С. Правосознание и российский правовой менталитет // Правоведение. 2000. № 2. С. 31–40 [Bayniyazov R.S. *Pravosoznaniye i rossiyskiy pravovoy mentalitet* // *Pravovedenie*. 2000. No 2. S. 31–40 [R.S. Bayniyazov, *Legal Consciousness and the Russian Legal Mentality*, 2 *Pravovedenie* 31–40 (2000)]]].

6. The Chinese trace, the French Track and Other 'Milk' for the 'Russian Coffee'

The Russian and, later, the Soviet historians argued for a long time that the impact of the Mongols on Russian society was destructive and absolutely negative, leading to its archaism and causing retardation as compared to Europe. Russian historians assessed the impact of the Mongols on the state structure which formed later differently, but it was very difficult to deny the fact of such impact. As noted by G.V. Vernadsky, 'when the Russians 'got acquainted with Mongolian criminal law and Mongolian courts, they turned out to be ready to accept some models of Mongolian jurisprudence. Even Vladimirsky-Budanov, who tends to minimize the Mongol influence on the Rus (Ancient Russia), admits that the death penalty (unknown to *Russkaya Pravda* ('Rus Truth [Law]') – the Russian code of laws of the Kievan period) and corporal punishment (in the Kievan period applied to slaves only) entered the law of Muscovy under the Mongol influence.'²³

The course towards westernization of the Russian society from Peter the Great to Catherine and later Slavophile ideas characteristic of the Soviet period formed an ideology through the prism of which it was difficult to notice at least some significant traces of the influence of the nomadic tribes on the culture of the Rus or the Russian mentality. Works showing the influence of the Turkic-speaking peoples on modern Russian culture appeared only in the late Soviet period. First of all, these are the works by the philologist O. Suleymenov and 'non-academic' historian L.N. Gumilev who, during his life, was reckoned to be a part of the department of geography and after his death came to be associated with the branch of knowledge newly arisen in Russia – cultural studies (culturology). But they were also far from searching for the traces of the quickly 'disappeared' Mongols, insisting on the proximity of the Ancient Rus and the Great Steppe represented by Turkic-speaking ethnic groups.

At the same time, nobody has disputed the fact that the Mongols actually captured the Chinese state, making only very insignificant changes to the methods of government (state administration), attaching Mongolian supervisors to Chinese officials, leaving tax collection, courts and other issues to the competence of the mandarins. Moreover, this experience was far from being unique – a century before the Mongols, the Chinese state, or, more exactly, its northern part, had been conquered by another nomadic people called the Jurchens. They were later called the Manchus and the latter returned to rule in China immediately after the Mongols left, founding the last imperial dynasty. But the same Mongols actually seized control in the Chinese state system, having learned the values of statehood.

As a result, according to some researchers, we can observe the indirect influence of the Chinese political and legal experience on the formation of Russian statehood.

²³ Вернадский Г.В. Монголы и Русь [Vernadsky G.V. *Mongoly i Rus* [G.V. Vernadsky, *The Mongols and the Rus*] 251 (Lomonosov, Moscow 2015).

The Chinese approach to the flow of government processes is based on Fa-Jia school of philosophy. 'Han Fei Tzu suggested encouraging less and punishing more severely. The unity of the state power and the strength of the ruler's power can be ensured by legislation, an elaborate system of rewards and punishments, a system of collective responsibility (frank pledge) and universal surveillance. This ideology played a significant role in the creation of a single, centralized state of Qin. Particular importance was placed by legists on the economic function of the state, its regulatory role in the economy, in maintaining prices in the market, etc. To strengthen the power of the ruler, they suggested introducing a state monopoly to exploit natural resources and handover of profits to the state treasury.'²⁴

Were the Chinese the only exporters of state and legal values? Of course not. For example, the influence of the French law on the development of the Russian legal order can be traced at the levels of both the 'spirit' and the 'letter' of law. Even in the Instruction (Nakaz) to the Commission about drafting a New Law Code (the Instruction of Catherine II), written mostly in French, we can find numerous correlations between the ideas of Catherine II about the state and legal structure of the country and the concept of a political system by Ch. L. Montesquieu. Young L.N. Tolstoy, while being a student of the Department of Law at Kazan University, following a suggestion by Professor D.I. Meyer, prepared a comparative study of The Spirit of the Laws with Catherine's Instruction obviously showing determinant connections between these two conceptual documents. Catherine II herself wrote about the fact of borrowing from Ch. L. Montesquieu's The Spirit of the Laws in the Instruction as follows: 'For the sake of my empire I pillaged President Montesquieu, without naming him in the text. I hope that if he had seen me at work, he would have forgiven this literary theft if only for the good of 20 million people which it may bring about. He loved humanity too much to be offended; his book was my breviary.'²⁵

The practices of reconstructing Russian civil law through the prism of the corresponding French experience became a story of its own, full of characters and events. For example, the French Civil Code (the **FCC**) actually functioned in the Kingdom of Poland during the period of 1815–1914: first in a direct way (introduced by Napoleon in 1808) and later, since 1825, through the transfer of its provisions to the Civil Code of the Kingdom of Poland which was significantly influenced by the FCC. The Draft Civil Code of the Russian Empire, which also experienced a strong influence of the FCC should not be overlooked as well. It was submitted to the State Duma in 1913, but did not become a law due to war followed by revolution.

²⁴ Доступное объяснение Мо-цзы. [*Dosruonoeye obysnenie Mo-chzu* [Understandable Explanation of Mozi]] 28 (Beijing 1956).

²⁵ Сборник Российского исторического общества. Т.10 [*Sbornik Rossiyskogo istoricheskogo obshchestva* [10 Russian Historical Society Compilation]] 30–31 (St. Petersburg 1872).

But when the New Economic Policy (NEP) by V.I. Lenin, which temporarily allowed the existence of a market economy, required proper legislation, the text of the pre-revolutionary Draft Civil Code was very widely (albeit without mentioning it much) used for the preparation of the first Soviet Civil Code – the 1922 RSFSR Civil Code. Later on, when creating the 1964 Civil Code, ‘approximately 3/5 of the provisions contained in the first Civil Code of 1922 were used (as they were or in a redrafted form) in the new Civil Code.’²⁶ Finally, we should mention the planned but failed reception of the French Civil Code provisions – the draft codification by M.M. Speransky. The system of the draft Civil Code was brought in line with the system of the French ‘Code Civil’: it was to consist of three books – on persons (I), on property (II) and on contracts (III). The internal structure of the first book of the draft Code was almost identical to the structure of the first book of the ‘Code Civil’. Most of the texts of specific provisions were also borrowed from the ‘Code Civil’ (albeit not always literally) – with the exception of the provisions of the draft Code chapters corresponding to titles II (On Acts of Civil Status), V (On Marriage) and VI (On Divorce) of the French Civil Code. M.M. Speransky’s fall from grace (he had to resign in 1812) largely prevented the implementation of the reception of the French-style civil law in Russia. However, as eloquently mentioned by M.M. Vinaver in an article dedicated to the 100th anniversary of the ‘Code Civil’: ‘And who knows: if it wasn’t for the patriotic explosion leading to Speransky’s fall from grace, perhaps, ‘this book, put together by six or seven ex-lawyers and ex-Jacobins’, would have ended up being openly put – despite Karamzin’s emphatic indignation – on ‘the holy altar of the Fatherland.’²⁷

At the end of the 20th century, an intense search for political identity caused by the breakup of the Soviet Union also led the Russian political elite to look at the French models and images – this time it was a peculiar state structure model. We mean the partial reproduction in the 1993 Constitution of the Russian Federation of the French ‘mixed republic’ model. This model became the theoretical basis for the establishment and functioning of the state authorities in the French 5th Republic. A characteristic feature of this variant of republican government is in the established balance of political rule in the country: neither the President nor Parliament has a monopoly on forming a government.

The influence of French law on the Russian legal order can also be observed at the level of the ‘spirit of law’. For example, we can see that the French sociological school of law had a significant influence on the formation of the doctrinal foundations of the Russian jurisprudence. Its origins lie in the works by the French civil jurist François Géný. It was he who, at the end of the 19th century, suggested a fundamentally new

²⁶ Развитие кодификации советского законодательства [*Razvitiye kodifikatsii sovetskogo zakonodatel'stva* [Soviet Legislation Codification Development]] 139 (Moscow 1968).

²⁷ Маковский А.Л. О кодификации гражданского права [Makovskii A.L. *O kodifichanii gragdanskogo prava* [A.L. Makovskii, *Codification of Civil Law*]] 409 (Statut, Moscow 2010).

model of interpreting legal provisions – ‘*méthode de la libre recherche scientifique*’ (the method of ‘free scientific research’²⁸). In accordance with this method, ‘in case of the incompleteness or unavailability of a law, a judge cannot refuse to administer justice and should find a solution through analyzing the facts outside law, i.e., based on the ‘free law’. This method is widely used in the modern judicial systems of France and Russia together with the principles of traditional dogmatic jurisprudence.

As for the ‘other milk’ for the ‘Russian legal coffee’, it is mainly represented by the ‘lactose’ of the Anglo-American origin. The Anglo-American tones and shades are clearly visible both on the regulatory and the functional level of the legal system in the practice of the Russian judicial authorities. For example, in Ruling No. 16404/11 of 24 April 2012 of the Supreme Arbitration (Commercial) Court of the Russian Federation in the case of Parex banka, the Supreme Arbitration Court of the Russian Federation used the term ‘corporate veil’ and made the following note: ‘the entrepreneurial activities on the territory of the Russian Federation are being carried out precisely by the defendants through affiliates (the doctrine of ‘piercing the corporate veil’²⁹).

Today, a Russian lawyer and (or) a statesman, who – very much like a hero of a famous play – is facing the dilemma: ‘Law borrowing: to take or not to take: that is the question’, sometimes without deliberation nods in consent to any donor infusions from the outside, forgetting the comparative principle of G. Rolin-Jaequemyns ‘the unity should not destroy the variety.’³⁰

7. Conclusion

The whole history of Eastern Europe after Batu Khan’ can be described as a clash of two alternative types of statehood or as a competition between two social technologies. For ease of reference, they can be called the Western and the Eastern social technologies: the former was born and developed in China, while the latter grew and matured in Western Europe. The former has been investigated and described by European science and is an example of a model social self-description. The latter has been examined and qualified in terms of deviation. Eastern Europe became the ground for a collision of the two that continues to this day.

²⁸ See: Gény François, *Méthode d'interprétation et source en droit privé positif* (Paris 1899).

²⁹ The doctrine of ‘piercing the corporate veil’ or ‘lifting the corporate veil’ was first used in the case of Salomon v. A. Salomon & Co (UK 1897).

³⁰ Реннекампф Н.К. О современной обработке сравнительного правоведения // Сборник Российского исторического общества. 1869. № 3. [Rennekampf N.K. *O sovremennoy obrabotke sravnitel'nogo pravovedeniya* // *Sbornik Rossiyskogo istoricheskogo obshchestva*. 1869. No. 3. [N.K. Rennekampf, *On Modern Treatment of Comparative Law*, 1869(3) Proceedings of the Russian Historical Society 177]] (Zarya).

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