

The Role of the Russian Legal Mentality in Shaping Legal Policy in Present-Day Russian Society

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Abstract

Background/Objectives: Through the example of the Russian Federation, this article discusses issues in shaping effective legal policy. **Methods:** We used the methods of theoretical analysis, the method of comparison, and the method of simulation. **Findings:** Our proposals do not just reflect the Russian experience but could be of interest in all countries undergoing reform at the moment. We view legal policy as an integrated activity by the state aimed at reforming all the elements in the legal system. In the end, we come to the conclusion that the degree to which law-making is currently being enhanced is insufficient. **Application/Improvements:** There is a need for the state to actively develop other forms of legal policy, namely those related to nurturing, educational, and ideological activity. Besides, effective legal policy ought to be founded on what the mentality of a particular social community is like – otherwise, any progressive innovations in the legal area are just doomed to failure.

Keywords: Legal Policy, Russian Legal, Russian Society

1. Introduction

Present-day notions of legal progress in Russian legal thought are inseparably associated with the category of legal policy. The process of radical reform in Russia's legal system began in the 90s of the 20th century. Following the adoption of the current Constitution of the Russian Federation, the state undertook a wide range of large-scale reforms: re-codifying legislation on a nationwide scale, fundamentally overhauling civil legislation, reforming the legal process through the introduction of jury trials and constitutional proceedings, reforming prosecution agencies, the courts, and the police, reforming local self-government, reforming the system of higher education, and much more. Today, 20 years into the reform process, many lawyers and politicians are critical of the current outcomes of the process. There is much talk of the scrappy, fragmentary nature of legal regulation and reformatory activity, to which many researchers are attributing the disputable (or clearly low) effectiveness of many changes. The low efficiency of particular sec-

toral reforms, as significant as they are, is quite evident today. Frequent changes to legislation have become a scourge to and an indispensable characteristic of the Russian legal reality. Between 2008 and 2010, a number of Russian research and educational institutions undertook a large-scale project aimed at developing a concept for Russia's legal policy for the long run. The Research and Education Center for Federal and Regional Issues in Legal Policy, put together by the Saratov branch of the Institute of State and Law of the Russian Academy of Sciences, in association with the Saratov State Academy of Law and supported by the Russian Academy of Sciences, conducted monitoring of law-making activity by the Russian parliament with a view to assessing the quality of the laws that are passed. The study revealed that a law that is not amended within the first month after it is passed is a rather rare exception in Russian law-making practice. Out of several thousand analysed documents, only a few dozen did not undergo changes during the very first month after they came into force, and documents that were not amended within the first

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year after taking effect numbered just a few. Note that the highest degree of stability is exhibited by federal constitutional laws and federal laws concerned with issues related to the constitutional order (laws related to the national emblem, the anthem, the flag, the introduction of a new constituent into the Federation, the procedure for citizens' appeals to government agencies, etc.). As significant as they are, such documents have little to do with the everyday lives of ordinary citizens. However, laws regulating the economy, entrepreneurship, administrative procedures, or social support tend to change multiple times. The study found that, in some instances, amendments to the Civil Code and Tax Code have been made twice in a single month! Currently, Russia is going through the third cycle of pension reform, i.e. the pension support system is undergoing radical change for the third time in the last 15 years.

All of these examples attest to the chaotic and ill-advised nature of law-making and reformatory activity by the Russian legislature. The need for frequent changes testifies to the low quality of the draft laws and the lack of coordination among particular committees of the Russian parliament. In spotting a loophole in legislation or an idle regulation, relevant committees tend to use a "band aid" approach to fix legislation, instead of giving legal regulation a comprehensive overhaul. This kind of scrappy law-making has given rise to a paradoxical situation in Russian law: There is concurrently both an excess and a lack of legal regulation. Its excess is revealed by the huge number of disjointed regulatory legal acts regulating particular issues in the mind-boggling number of amendments to laws and in the ambiguousness of legal regulation and the obscure legal nature of many of the clarification and information documents that accompany legislation. The lack of legal regulation is expressed in the large number of loopholes in it, in the declarative and formal nature of many proclaimed rights, and in the lack of legible procedures for realising the subject rights.

Today, Russia is drowning in the ocean of regulatory acts. In this situation, the future is seen not in terms of episodic reforms, but in terms of developing legal policy as a scientifically substantiated program for the comprehensive development of the legal system for the long run.

Legal policy is among the more actively developing focus areas in today's Russian legal science. The term is widely used in the policies and policy documents of the Russian government. In contrast with the episodic reform-

mation of particular areas of social life, the state's legal policy ought to provide for the orderly and coordinated development of society as a whole and ensure the systemic nature of legislation, which will boost the effectiveness of legal regulation and elevate the standing of law in Russian society.

Legal policy is viewed as a scientifically substantiated, consistent, and systemic activity by governmental and non-governmental establishments aimed at creating an effective mechanism for legal regulation, ensuring the comprehensive development of all elements in the legal system, and facilitating legal progress in society.

The main feature that legal policy ought to ensure is the civilized and maximally effective use of judicial means. The major objectives of legal policy are fully ensuring the rights and liberties of man and citizen, reinforcing discipline, law and order, and fostering rule-of-law statehood and a high level of legal culture and legal life in society.

The Russian doctrine features the following major forms of legal policy: 1) law-making; 2) legal enforcement; 3) interpretative; 4) doctrinal; 5) legal educational, etc.¹ These forms have been recognized by numerous studies on legal policy (Legal Policy in Present-day Russia: Issues in Shaping it, 2011). There are also more detailed classifications, such as the following one, which contains 10 means of realizing legal policy: 1) protecting human rights, 2) making laws, 3) enforcing laws, 4) administering control and supervision, 5) providing legal support for the operation of the government and its agencies, 6) organizing the activity of law enforcement agencies, 7) training certified lawyers at educational institutions, 8) organizing scholarly activity, 9) formulating doctrine, and 10) fostering legal enlightenment⁶.

Thus, on the whole, legal policy is an activity aimed at the comprehensive development of all of the elements in the legal system. The legal system is a complex of all legal phenomena on a nationwide scale. The major elements in the legal system are positive law, law-making, legal practice, jurisdictional institutions, and legal consciousness. Legal policy cannot be limited to changes in positive law. Moreover, the state's law-making activity proper also ought to be carried out in a way that is inclusive of the nation's socio-cultural background, the characteristics of society's mentality, and its national and religious traditions. In our view, the ineffectiveness of many Russian reforms is due to the following reasons. The legislature has considered the progressive experiences of foreign states

and has adopted legal institutes that have proven to be efficient in the practice of other nations. However, these legal institutes and values have not prospered on Russian soil. In effecting the reception of Western European law, the legislature has failed to factor in the mentality of Russian society, the public legal consciousness, and spiritual and ideological factors in the development of the legal system.

Putting together effective legal policy requires the doctrinal development of various forms of legal policy. There is a need to investigate the factors affecting law-making and the realisation of law within a specific society.

Therefore, our study will examine the major cultural/historical and political/legal characteristics of the Russian legal consciousness, which, in our view, ought to be taken into account in the process of the development of the legal ideology and formation of the Russian rule-of-law state.

The main characteristic of the Russian public consciousness, in general, and its legal consciousness, in particular, is ethico-centrism, i.e. the ideological subjugation of law to higher, i.e. moral and religious, values. This treatment of law is due to a number of specific conditions under which the legal consciousness of Russian society has formed, starting in the 10th century, when Russia adopted Christianity. According to Prof. A.V. Polyakov, the Orthodox consciousness does not treat law as an auto-telic value, but as only one of the means of attaining religious/moral goals. This, in large part, explains the absence of the cult of the rights of man in Russian legal ideology, which is so inherent in Western European legal thought, where it is associated with a cultic attitude toward glory and wealth⁷. Self-actualization as a social value and a life goal is not inherent in the Russian mentality. Russian spiritual culture is aimed at the ideas of serving society and collectivism.

Thus, we need to point out characteristics of the Russian legal consciousness, such as the indissoluble link between law and moral spiritual principles – above all, Christian virtues. In the legal consciousness of the Russian people, the moral principle has always prevailed over its legal counterpart. It has been common in Russia to act based on the laws of conscience, rather than on written laws. This, by the way, is another reason why Russians have snubbed legal norms and laws, especially those which are at variance with moral norms.

Because legal consciousness is closely associated with the category of legal mentality, we will take a close look at some of the characteristics of the Russian legal mentality.

The Russian legal mentality is an equivocal, extremely complex, controversial – and, at the same time, original and distinctive – social/legal phenomenon. R.S. Baynilyazov has identified the following characteristics of the Russian legal mentality and legal consciousness⁸.

1. The juridical mentality of Russian society has intrinsically been distinguished for its negligent and negative attitude towards law. Legal nihilism has firmly lodged itself in the consciousness of the people.

An attitude of nihilism towards the social value of law has, unfortunately, been a specific trait of the Russian mentality. The centuries-long history of the Russian state is vivid evidence of this fact. To this day, juridical values in Russian society have not been perceived as crucial to its existence. On the contrary, what has been common is the violation of legal norms, laws being covertly or overtly flouted, and a failure to apprehend (or an unwillingness to apprehend) the fundamental values of living under the rule of law.

2. Etatism is intrinsic to the Russian legal mentality, which has been attested by Russia's entire history. An excessive, unjustified orientation towards government authority has been a characteristic trait of the national mentality, which does not portray it favorably, compared to the Western legal mentality and legal consciousness. In Western civilization, one predominantly relies on one's own potential and capabilities, while the state is viewed as a juridical "referee" that strictly protects individual freedom, security, and the assets of its citizens and operates according to the prescriptions of law. In Russian society, an individual does not possess the sense of positive legal responsibility and duty that is inherent in the citizens of Western European democracies, which tangibly impedes its national legal progress.

When we analyze the characteristics of the etatism psychology of Russian society, we should also note the specificity of the interaction between the government and people of Russia. Formally, this relationship has had an equitable, fair, and mutually beneficial character; however, as Russia's history attests, in reality, the people have always been powerless before the government.

3. The specificity of the Russian mentality is also evident in the interaction with society's juridical culture and in the distinctive way of perceiving legal values. More specifically, we are referring to the natural, inalienable rights of man, the legal autonomy of individuals within the juridical community, the prevalence of law over the state, etc. These social/legal values have not been assimilated into the

Russian consciousness, because it has not been rationalized.

4. In this legal light, a naïve, totally unsubstantiated, idealized perception of the significance of law in public life is vividly manifested. In the literature, this phenomenon has been termed “legal idealism”.

This state of affairs appears to be an extremely original phenomenon. On the one hand, Russians have not really evinced any special emotions or feelings, states of mind or emotional upheavals in respect of law and laws. On the other hand, there is augmented faith in the unlimited regulatory capacity of law.

5. The Russian juridical mentality is unduly politicized, which encumbers it (mentality) with qualities that are not typical of it. This state of affairs is due to the excessive degree to which present-day Russian society is politicized, the Russian political establishment’s penchant for demagoguery, and the naïve faith of the have-nots in populist slogans and calls to action.

6. The present-day Russian mentality is characterized not just by political demagoguery and populism, but by eclectic beliefs, notions, views, ideas, etc. Ideological confusion, economic, political, legal, and other views of a fickle and inconsistent nature, and a combination of incompatible mental schemes and stereotypes in the public consciousness are typical of it. Russian society lacks an understanding of the objectives of its state building. The government has not provided answers to this question, limiting itself only to a reference to the transitional nature of the present stage in the development of society, which only aggravates popular mistrust in the government’s efficiency.

Such are the major characteristics of the Russian legal mentality, which we, at least for the purposes of this short study, are considering in conjunction with the concept of legal mentality as a whole. The Russian mentality (including its legal component) is a difficult phenomenon with both positive and negative qualities and features. It is the corresponding characteristics of the Russian legal mentality that, in large part, have determined the specific traits of the Russian legal consciousness.

Apart from those we have already identified, we can also point out some other characteristics of the Russian legal consciousness, which substantially affect state/legal building in Russia.

The specificity of Russian legal arrangements has always hinged on the standing of a figure incarnating a strong and fair authority. A.A. Kupriyanov suggests that

this phenomenon is associated with the deep religious undercurrent permeating the Russian legal consciousness, as it is also grounded in the standing of the omnipotent and fair Creator. As we know, in ante-revolutionary Russia, the Tsar (Emperor) acted not so much as a body or institute of power, but rather as the Lord’s anointed⁹. The Russian legal reality still retains this tendency to personalize state authority. As a consequence, it leads to the centralization of power.

Another consequence of this phenomenon is the alteration of state authority and the renunciation of the principle of the separation of powers. Of course, this principle has not yet been abnegated, because it is prescribed in the RF Constitution (Article 10). However, in practice, it has not been realized in full measure. There is a characteristic of the Russian legal system that was practiced under the Tsar and during the Soviet era and is still present today: the so-called “ukase (edict, decree) law”. The term underlines that rule-making by the head of the state shapes the legal reality, often runs counter to the law (which, theoretically, that is, “on paper”, possesses supreme juridical authority), and results in juridical collisions. The issue has been quite fundamentally researched by Ye.A. Lukyanova. The scholar has suggested that the ukase law phenomenon has given rise to the perennial problem of a latitudinal understanding of law and a dual interpretation of the term “legislation”, which makes a serious muddle of the hierarchy of regulatory legal acts and results in problems in legal enforcement practice. Ye.A. Lukyanova also stresses that the recent amplification of ukase law attests to “how firmly historical roots have lodged themselves in our legal consciousness and how tenacious the national stereotypes of conduct are”¹⁰. Thus, just as in the past, state authority is, in large measure, associated with a certain figure upon whom the system of making politically authoritative decisions centers. Perhaps this is a consequence of the so-called “unimposed character” of Russian etatism, the people’s deep-seated respect for and acceptance of the government as a wise “styler” of regular legal norms, and also, as the carrier of a divine mission who is God’s vicar on Earth. Therefore, the Russian authoritarian ruler has been intrinsically seen as a man who is more loved than respected, and his decrees have been sincerely held in high regard and accepted by the people. What is termed “imperial thinking” and “backwardness” in science has been a typical characteristic of Russian legal culture.

Another crucial characteristic of the Russian legal consciousness is its stereotypes about private ownership. In the West, private ownership and its untouchability is the cornerstone of its world order, but in Russia, there is differentiation in this regard. By tradition, the issue has been a concern for an insignificant portion of the Russian population, the rest evincing a negative or simply indifferent attitude towards it. In this regard, the view of German political writer K. Eggert voiced in the early 90s is of interest: "You see, Eastern Germans are not capable of working the way a market economy expects them to... They lack respect for private property. And without this quality you just can't have a normal economy"¹¹.

One of the major mistakes made by reformers in the first half of the 1990s was an underestimation of these characteristics of the Russian legal consciousness: Specifically, they did not take into account that Russian legal culture is socio-centric and is founded on solidarity, responsibility, and obligations in respect to society, the group, or the collective; the right of ownership does not play the same role in Russia as in the Western system. M.A. Butenko notes that the state, in socio-centric societies, suppresses and subjugates society, not merely particular individuals¹². According to V.V. Sorokin, the person-centric type of legal culture can only work in a society with a high level of overall culture, as well as under a more or less fair system for the distribution of material goods¹³.

Another characteristic of the Russian legal consciousness is that its concept of the equality of citizens is substantially different from its Western counterpart: Russians can accept inequality as fair. Thus, I.A. Ilyin, a proponent of the monarchical state and the monarchical legal consciousness, saw the principle of inequality as one of the major principles of a state. In his concept, people are unequal by nature and in the spirit, and achieving their equality will never be possible. For this reason, the equality proclaimed by the Republicans is just a prejudice, and it will not work in Russia by any means, because the "monarchical consciousness is inclined to accept that people are different in terms of quality and worth both before God and by nature and therefore have to be unequal in their rights"¹⁴. This reflects the Russians' idiosyncratic, historically entrenched attitude towards freedom. The Russian people have always dreamt of freedom, but it is not the kind of freedom found in the West, where it is incorporated into a particular public order regulated by the law, i.e. into a system of political and legal institutes.

Freedom, to Russians, is merely an individual, inner, deeply subconscious characteristic that is not restricted by social norms and the law.

Thus, Russian culture, including its legal component, has developed over many centuries into a quite complex and controversial phenomenon, and its interpretation is a serious scientific problem. Its controversial and complex nature is, in large measure, because Russia has been a venue for the collision and interaction of two major streams of global history – the West and the East. Therefore, the Russian people and its culture cannot be viewed as either purely European or purely Asian. Normally, the term "Eurasian culture" is used to denote this phenomenon⁷.

In order to sort out the current state of the Russian legal culture, we need to identify the characteristics which have been historically inherent in it. The aspects we have pointed out in this article comprise just some of the characteristics of the Russian legal consciousness that we regard as fundamental and basic to the formation of the foundations of legal ideology and an efficient and realizable legal policy. And all of these characteristics ought to be taken into account by the legislature in working out particular regulatory legal acts, because the successful realization of legal norms – and, consequently, of legal regulation – depend on it. Legal norms instituted without taking account of the characteristics of the Russian legal consciousness may prove to be non-viable. Thus, for instance, the legislature quite often adopts Western models for legal regulation which, under the conditions present in Russia, are realized in totally different ways. This results in ineffective legal regulation.

We believe that, currently, the top priority on the agenda of the Russian government and all of its institutes, as well society as a whole, ought to be boosting the level of the legal consciousness of the Russian people and that of the legal culture of the entire society, as well as fostering an orientation in them towards the "right" Russian legal mentality and its distinctive characteristics. In other words, in effectuating the law-making function, the legislature ought to take account of not only the requirements of legal engineering, but also, the characteristics of the Russian legal consciousness and the interests and needs of individuals and society. The legislature should not just mechanically capture the characteristics of the legal consciousness that are actually formed in legal norms, but ought to try to facilitate its formation through legal nurturing. If we do not achieve this objective, we will not

be able to improve the quality of legal norms, and consequently, the effectiveness of legal regulation.

Based on what has been said above, we believe that there is a need to reconsider the priority of the forms of implementing legal policy in Russia. In rational Western society, the form of legal policy that is given priority is the law-making activity by the state. Yet, in our view, there is simply no point in giving great importance to law-making when it comes to the Russian legal mentality. The overriding priority for Russian society should be ideological activity by the state. With its intrinsically “non-legal” mentality, the Russian state ought to prioritize the legal nurturing, legal education, and doctrinal forms of legal policy. The state’s ideological activity ought to ensure mutual support for legal and ethical values and should try, in the public consciousness, to tie the objectives of legal regulation with the spiritual ideals of patriotism, national self-consciousness, and fairness. The effectiveness of legal reforms in Russian society can be achieved only with this kind of ideological accompaniment.

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