

Is Russia Part of the Civil Law Tradition?



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1. Recurring question on Russian legal identity

Linking codification to rationality indicates that the civil law tradition also includes Eastern European countries and Russia. Looking at Russia from the outside, we examine its legal tradition in a way similar to that of other countries with civil law tradition.¹ In 2014, Martin Avenarius published a comprehensive work in German on the influence of Roman law on Russian legal culture in the 19th century.² I began my review of Avenarius's work with the observation that the results of his legal-historical research, after the Russian invasion of Crimea, seem to be more relevant and inspiring for discussion than its beginning.³ I had the same feeling when, shortly after the Russian aggression against Ukraine in February 2022, I read

Law and the Christian Tradition in modern Russia, edited by Paul Valliere and Randall A. Poole.⁴ An interesting work published in the Law and Religion series on the significant influence of Orthodox Christianity on the thinking of selected Russian jurists from the 17th to the early 20th centuries. This book has inspired me to return to the question, is Russia part of the civil law tradition? Common to both the works mentioned here is the use of a conceptual framework, typical of civil law tradition. A precise description of the impact of Roman law on the modernisation of civil law in Russia, from the beginning of Tsar Alexander I's reign in 1801 to the promulgation of the Civil Code of Soviet Russia in 1922, led Avenarius to recognise that today's Russia belongs to the Western legal tradition; although, he recognised that the historical experience of the Russian Empire and Soviet Russia reinforced the risk of individual rights being dominated by the

1 Patrick Glenn, *Legal Traditions of the World* (Oxford 2014), 142–3.

2 Martin Avenarius, *Fremde Traditionen des römischen Rechts* (Göttingen 2014).

3 Paul Valliere, Randall Poole (eds.), *Law and the Christian Tradition in modern Russia* (Routledge 2022).

4 Wojciech Dajczak, "Tradycja recepcji a recepcja tradycji, czyli o prawie rzymskim w Rosji," *Forum Prawnicze* 6 (2014): 50.

interests of the state and its associated ‘conglomerates’.⁵ In a review of this work, I expressed the doubt whether relying exclusively on the formal premises of the academic concept of the reception of Roman law and noting the tensions between this theoretical model and the social reality of Russia, was legitimate to include Russian law in the civil law tradition.⁶ This doubt may be reinforced by Yosif Pokrovsky’s view of the relationship between private law and freedom, which he set forth in a book he published in Russia between the February and October revolutions of 1917. This author, considered by Avenarius to be the most eminent Russian private law specialist at the turn of the 20th century, stated that at a time when “Russian citizens had truly become the creators of their own law”, they should strive towards the good, the direction of which is determined by “the combination of freedom with social solidarity”.⁷ In my review of

legal tradition.⁸ The book edited by Vallier and Poole is a stimulus to revisit the question of how the cultural identity of Russian law shaped the Bolshevik Revolution. It inspires one to ask to what extent legal-historical considerations can enrich today’s discussions of the world’s legal traditions and the interpretation of contemporary political-legal processes.

2. Western legal concepts in a Russian context

John Witte Jr, in his foreword, declares in a manner familiar to the Western legal tradition that “volume included careful analysis of a range of Russian arguments for human dignity, religious freedom, rule of law and ordered liberty”.⁹ The thirteen jurists or ideologues of Russian law discussed in the book are presented by Witte as “the Russian equivalents of Western legal titans like Grotius, Blackstone, Beccaria (...) all



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Avenarius’ work, this sentence acted as the starting point for my doubts concerning Russia’s inclusion in the civil law tradition. I formulated the hypothesis that the further development of law in Russia without the Bolsheviks could have led to a new Russian legal tradition in which rationality would have been linked to the special role of social solidarity. These cultural peculiarities of Russia were also evident in the Russian theory of private law at the time. The Bolshevik Revolution excluded the possibility of such a development. During Soviet Russia, the specificity of codified Russian law was most often referred to as the socialist

of whose writings were known to their Russian legal contemporaries”.¹⁰ In Avenarius’ work, my concern was with the weight he attributed to the formal marks of the theoretical model of the reception of Roman law, when assessing the cultural identity of Russian law.¹¹ The quoted passage from Witte’s introduction raises the question of whether they will create a bias in the reader to focus attention on individual Russian ‘legal titans’ and their inclusion in the civil law tradition.

5 Martin Avenarius, *Fremde Traditionen...*, 665.

6 Wojciech Dajczak, *Tradycja...*, 55.

7 J. Pokrovski, *Osnownnye problemy graždanskogo prava* (Petrograd 1917), 2–3.

8 Konrad Zweigert, Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (Tübingen 1984), 341–349

9 John Witte Jr., *Foreword, Law and the Christian Tradition in modern Russia*, eds. Paul Valliere, Randall Poole, (Routledge 2022), IX.

10 John Witte Jr. *Foreword...*, X.

11 Martin Avenarius, *Fremde Traditionen...*, 122, 662.

To marginalize what may appear to be extraneous. It should be noted, although this does not prejudice anything, that completely different Russian lawyers are heroes of both Avenarius' and Vallier and Poole's works.¹² In reading the latter, I focused on questions designed to correct the indicated bias and relate to the hypothesis of the formation of a specific Russian legal culture before the Bolshevik Revolution. In reconstructing the reception of Roman law in nineteenth-century Russia, Avenarius recalled Slavophiles' hostility to the Western approach to law. This was the attitude of many representatives of the great Russian culture of the time. Perhaps the best-known example of opposition in Russian culture to 'modern' theories is Dostoevsky's idea of a Christian rebirth of man 'towards a new life'.¹³ The positivist approach to the law was criticised by Leo Tolstoy as seen in his novel 'Resurrection', a theme discrediting the value of an education containing Roman law.¹⁴

3. Western legal tradition vs. Russian legal tradition?

The importance of such an approach to law in pre-revolutionary Russia is confirmed and brilliantly clarified by the opinions of the vast majority of lawyers discussed in the book edited by Vallier and Poole. Konstantin Pobedonostsev (1827 - 1907), who combined law, religion and Russian conservatism, criticised the tendency to include in academic lectures "German university elements alien to an Orthodox ecclesiastical school",¹⁵ unambiguously supported "unlimited autocracy", which he saw as "critical to Russia's survival"¹⁶ and questioned the relevance of the formal law claiming that he had "more faith in an improvement of

people than institutions"¹⁷. Anatolii Fedorovich Koni (1844 - 1927) portrayed as an apostle of 'civil heroism' was a jurist who believed in the groundbreaking nature of the Russian Judicial Reform of 1864. He felt that as a result of this change judicial statutes "were not a copy of Western models (...), but a means of hearing his own people".¹⁸ He was against authoritarianism, but shared the idea that the "procedural approach to law dominant in the West reduced law to a lifeless formula, whereas in Russia law ascended directly to justice and truth".¹⁹ Leonid Kamarovskii (1846 - 1912) was a lawyer appreciated for combining Christian values with international law. Although he was a signatory to the 1905 manifesto calling for Russia to be transformed into a state recognizing the principles of legality, political freedom, and representative government²⁰, he believed that granting Eastern Orthodoxy, a pre-eminent and official status in the Russian state was not incompatible with freedom of religion.²¹ In his view, the foundations of international law regarded Russia as a "special world", a country that "differs more from Europe than the individual European nations differ from one another".²² Vladimir Soloviev (1853 - 1900) a prominent representative of Slavophiles, mystic and philosopher of law criticised socialism and legalism.²³ He believed that the "godless human individual" of modern Western civilization imposes on Orthodox Russia the mission of proclaiming, and instantiating the good news of "divine humanity".²⁴ Pavel Ivanovich Novgorodtsev (1866 - 1924), faithful to the idea of natural law, underwent an evolution from liberal

17 Gregory L. Freeze, *Konstantin...*, 123.

18 Gregory L. Freeze, *Konstantin...*, 124.

19 Tatiana Borisova, "The civic religion of Anatolii Koni," in *Christian Tradition in modern Russia*, eds. Paul Valliere, Randall Poole (Routledge 2022), 159.

20 Tatiana Borisova, *The civil religion...*, 169.

21 Vladimir A. Tomsinov, "Leonid Kamarovskii: Christian values and international law," in *Law and the Christian Tradition in modern Russia*, eds. Paul Valliere, Randall Poole, (Routledge 2022), 188.

22 Vladimir Tomisinov, *Leonid...*, 189.

23 Vladimir Tomisinov, *Leonid...*, 186.

24 Pau; Valliere, "Vladimir Soloviev: Faith, philosophy, and law," in *Law and the Christian Tradition in modern Russia*, Paul Valliere, Randall Poole (Routledge 2022), 197.

12 The jurist mentioned in both of these books is Leon Petrażycki.

13 Martin Avenarius, *Fremde Traditionen...*, 298–302.

14 George Pattison, "Dostoevsky," in *The Oxford Handbook of Russian Religious Thought*, eds. G. Pattison, C. Emerson, R. A. Poole (Oxford 2020), 169–83.

15 Leo Tolstoy, *Voskresenie*, chapt. 21.

16 Gregory L. Freeze, "Konstantin Pobedonostsev, religion, and Russian conservatism," in *Law and the Christian Tradition in modern Russia*, eds. Paul Valliere, Randall Poole (Routledge 2022) 120.

views to a conservative turn. In his work from the early 20th century, referring to the Slaphophiles, Dostoevsky, and Soloviev linked their way of thinking with the Russian tradition of the understanding of law.²⁵ In the paper “On the Distinctive Elements of the Russian Philosophy of Law” published in 1922, in exile in Prague, he expressed his conviction that the new era of the philosophy of law would have “special features of Russian legal thought, among which “the law of Christ” as the basis of social solidarity comes first.²⁶ Sergei Kotliarevskii (1873 - 1939), the Russian theorist of the rule of law, regarded this key concept in the Western legal tradition as a step on the path

but a continent sui generis – “Eurasia”. Alekseev shared the movement’s view that the Russian Revolution was a popular reaction against the artificial Europeanization imposed by Peter the Great and expected Russia, rooted in the Orthodox religion, to become conscious of the country’s Eurasian character.²⁹ Ivan Ilyin (1883 - 1954), a philosopher of law, force, and faith, in his pre-revolutionary works, considered legal consciousness as the central concept of legal discussions. After fleeing Soviet Russia, he spent decades publishing works aimed at fighting the Bolsheviks and rebuilding Russia after its collapse. After the Second World War, he expressed the view that, because of the imbalance



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toward the realization of divine humanity following the ideas of the prominent Slavophile Soloviev, and in particular his concept, the “justification of good”.²⁷ Nikolai Alekseev (1879 - 1964), called an advocate of social justice and global peace, recalled that during the February Revolution of 1917, he was more of a leftist and “thought that the forms of Western democracy do not suit us”.²⁸ In exile in Yugoslavia, he became involved in a movement that famously claimed that Russia was neither a part of Europe nor a part of Asia

between liberty and self-discipline, the conditions for democracy would not exist following the collapse of Soviet Russia. He identified not “democracy at all costs” but an “authoritarian” model as the appropriate solution for post-Soviet Russia.³⁰

4. How legal history can help understand Russia today

This brief overview demonstrates that the belief in the cultural uniqueness of the Russian approach to law united influential jurists of the nineteenth and first half of the twentieth century, who understood legalism, the rule of law or religious freedom, in different ways. This view is further strengthened by the fact that, of all the jurists of the period discussed in the volume, this way of thinking was alien only to Boris Chicherin (1828 - 1904), who categorically rejected the Slavophiles’ notions of Russian uniqueness and religious

25 Paul Valliere, *Vladimir...*, 196.

26 K. M. Antonov, “Pavel Novogorodtsev. Natural law and its religious justification,” in *Law and the Christian Tradition in modern Russia*, eds. Paul Valliere, Randall Poole (Routledge 2022), 264.

27 Randall Poole, Sergei Kotliarevskii, “The rule of law in Russian liberal theory,” in *Law and the Christian Tradition in modern Russia*, eds. Paul Valliere, Randall Poole (Routledge 2022), 284.

28 Martin Beisswenger, “Nikolai Alekseev. Advocate of social justice and global peace,” in *Law and the Christian Tradition in modern Russia* eds. Paul Valliere, Randall Poole, (Routledge 2022) 291.

29 Martin Beisswenger, *Nikolai...*, 293.

30 Paul Valliere, “Ivan Ilyin. Philosopher of law, force, and faith,” in *Law and the Christian Tradition in modern Russia* eds. Paul Valliere, Randall Poole, (Routledge 2022) 320.

exceptionalism.³¹ This jurist made a clear distinction between private law as a “sphere in which individualism predominates” and public law according to which a “member of the community is a free but subordinate person”.³² The call to liberate Poland, an act that “would raise Russia to that height that it had once achieved in the Napoleonic wars when it became the liberator of Europe”³³, demonstrates his unique understanding of freedom in the public sphere while also shattering Slavophiles’ theories in practice. The book edited by Vallier and Poole also inspires reflection on whether

added that such interaction is ongoing. For example, on the 4th of June 2022 in criticism of free elections, cited Pobedonostsev’s opinion that “history shows that real, beneficial changes for the nation, serious changes occur on the basis of the will of people representing the central state will, or on the basis of a minority distinguished by ideology and deep knowledge, and in opposition to this, the expansion of elections led to a lowering of state thought and vulgarization of opinions among the mass of voters”.³⁸ The influence of Nikolai Alekseev is linked to the historical role



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the traces of the maturation of a specifically Russian legal tradition are merely remnants of a past that was erased from Russia by the Bolshevik revolution. The formation of legal culture and legislation after the collapse of Soviet Russia can be seen as filling the space previously occupied by the façade of Soviet law, which did not put the declared values into practice.³⁴ A very interesting element of the profiles of several lawyers is the mention of their legacy and reception in post-Soviet Russia. In this way, the lawyers Konstantin Pobedonostsev³⁵, Nikolai Alekseev³⁶ and the philosopher Vladimir Soloviev³⁷ stand out. Pobedonostsev is regularly quoted in the strongly Orthodox discussions on Russian conservatism on the Ruska liniia portal. In addition to Martin Besswenger’s chapter, it can be

assigned to him by Aleksandr Dugin, whose theory of Russia’s inevitable confrontation with the West is the ideological basis for the ongoing aggression against Ukraine since February 2022.³⁹ From the perspective of a reader familiar with the Western legal tradition, exploring the links between pre-revolutionary Russian reflection on the rule of law and contemporary developments may reveal a bright spot. The words of Chichernin’s memory-turner, the current chairman of the Constitutional Court of the Russian Federation, Valerii Zorkin, can be interpreted as a manifestation of a behaviour close to Chichernin’s legacy. In June 2022, at a conference in St Petersburg, he stated that “the reinstatement of the death penalty is not possible in the Russian Federation, neither by changing the law, nor following a referendum or amending the Constitution. The reinstatement of the death penalty would be a great mistake to depart from the human-

31 Gary M. Hamburg, “Boris Chicherin. Christian modernist,” in *Law and the Christian Tradition in modern Russia* eds. Paul Valliere, Randall Poole, (Routledge 2022) 133.

32 Gary M. Hamburg, *Boris...*, 145.

33 Gary M. Hamburg, *Boris...*, 148.

34 Olimpiad S. Ioffe, *Soviet Law and Soviet Reality*, Dordrecht 1985.

35 Gregory L. Freeze, *Konstantin...*, 130–131.

36 Martin Beisswenger, *Nikolai...*, 304–305.

37 Paul Valliere, *Vladimir...*, 210–212.

38 Albin Repnikov, *Ruskie konservatory o prirodi i sushchestnosti samodierzavnogo gosudarstva i vlasti w Rosii*, fn. 33. Retrieved from <https://rusk.ru/st.php?idar=115143> (access 23.09.2022).

39 Aleksandr Dugin, *Osnovy geopolityki*, Moskva 1999, 671ff.

istic direction of legal policy”.⁴⁰ However, we should not forget the uniqueness of Chichernin in relation to the other jurists and philosophers of law presented in the book edited by Valliere and Polle. This work can be read and interpreted in different ways. The

search for a Russian cultural and legal identity. It is justified according to *Law over the Christian Tradition in modern Russia*. However, today’s popular references to some of the pioneers of the “true Russian legal tradition” can cause concern.⁴³



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direction I chose stemmed from the doubts raised by John Witte Jr’s foreword. My concern was whether the book actually provides a basis for assuming that concepts such as human dignity, religious freedom, rule of law and ordered liberty were introduced into Russian legal thinking in a manner similar to that of the West. I believe that a careful reading of the book challenges such a presumption of similarity. Moreover, it reinforces my hypothesis, based on Avenarius’s work, that the formal similarities in Russian legal science to the civil law tradition may have led to the coalescence of Russian legal tradition, rather than the inclusion of Russian legal culture into the civil law tradition. Referring to the classical thoughts on Orthodoxy formulated by Sergei Bulgakov it can be assumed that Orthodoxy by its very nature does not determine the shape of Russian legal identity.⁴¹ After a period of façade socialist law, this became a challenge for Russian lawyers of the late 21st century. After 1991, there was interest in pre-revolutionary literature on Roman law in the study of Russian private law. Some of them were republished in the series “classics of Russian civil law”.⁴² This is part of Russia’s ongoing

There are undoubtedly two general conclusions that can be drawn from the inspiring text edited by Valliere and Polle. Firstly, we should wish Russians, who are looking for their legal identity, to disseminate the fact that the importance of social solidarity was universally acknowledged by Orthodox Russian jurists of the nineteenth and early twentieth centuries, who recognised this specificity, but only some of them associated it with authoritarianism and the primacy of Orthodoxy in relation to the restriction of other religions. It is worth remembering Bulgakov’s words that “Orthodoxy, which is a religion of freedom, combined with reactionary or class aspirations, is a contradiction that calls for vengeance, which can even be historically justified, but not dogmatically”.⁴⁴ Secondly, there is no reliable historical basis for a uniform understanding of Russia and other Eastern European countries when defining the boundaries of the civil law tradition.

Bibliography

- Avenarius, Martin. *Fremde Traditionen des römischen Rechts*, Göttingen 2014.
- Blugakov, Siergiej. *Pravoslavie. Očerki ucheniia o tserkvi*, Moskva 2014.
- Borisova, Tatiana. “The civic religion of Anatolii Koni.” In *Christian Tradition in modern Russia*, edited by Paul Valliere, Randal Poole, Routledge 2021.
- 40 Retrieved from <https://www.rbc.ru/politics/29/06/2022/62bc-244c9a79470a8a48c66b> (access 23.09.2022).
- 41 Siergiej Blugakov, *Pravoslavie. Očerki ucheniia o tserkvi* (Moskva 2014), 178–179.
- 42 Anton Rudokvas, *Il diritto romano e la privatistica russa*, (in:) L. Vacca (ed.) *Nel mondo del diritto romano* (Napoli 2012), 284.
- 43 Anton Rudokvas, *Il diritto...*, 288.
- 44 Siergiej Blugakov, *Pravoslavie...*, 177.

- Dajczak, Wojciech. "Tradycja recepcji a recepcja tradycji, czyli o prawie rzymskim w Rosji." *Forum Prawnicze* 6 (2014).
- Dugin, Aleksandr. *Osnovy geopolityki*, Moskva 1999.
- Glenn, Patrick. *Legal Traditions of the World*, Oxford 2014.
- Ioffe, Olimpiad S. *Soviet Law and Soviet Reality*, Dordrecht 1985.
- Pattison, George. "Dostoevsky." In *The Oxford Handbook of Russian Religious Thought*, edited by G. Pattison, C. Emerson, R. A. Poole, Oxford 2020.
- Pokrowski, J. *Osnownye problemy graždanskogo prava*, Petrograd 1917.
- Repnikov, Albin. *Ruskie konservatory o prirodie i sustschestnosti samodierzavnogo gosudarstva i vlasti w Rosii*, fn. 33. Retrieved from <https://rusk.ru/st.php?idar=115143> (accessed 23.09.2022).
- Rudokvas, Anton. *Il diritto romano e la privatistica russa*, (in L. Vacca (ed.) *Nel mondo del diritto romano*, Napoli 2012.
- Valliere, Paul, and Randall Poole, ed. *Law and the Christian Tradition in modern Russia*, edited by Paul Valliere, Randall Poole, Routledge 2022.
- Zweigert, Konrad, and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, Tübingen 1984.