TEXT AND CONTEXT IN RUSSIAN LEGISLATION WITH SPECIFIC REFERENCE TO THE RUSSIAN CONSTITUTION

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Law and politics have a closer inter-textual relationship in Russian jurisprudence than would be understood generally of any European legal system. The closeness of this inter-textual relationship can be partly explained by history, culture, and language, as also by dialectics, ideologies, and literature. Concepts of law, government, and the state, together with concepts of federalism, democracy, and the rule of law, can vary so markedly from their apparently translatable equivalents that, even when recognising the formal concept of a codified Constitution, the inter-textual relationship between the enacted law and politics remains so dynamic as to be impossible to tell which it is, of law or of politics, that is the text, and which the context. This inter-textual relationship remains so strongly and continuously dynamic at the level of public and international law that the customary division by which lawyers, and common lawyers especially, assume law to be the text and politics to be the context carries a critical risk. This paper identifies that risk in terms of law, literature, and logic, as well as in terms of history, politics, and dialectics. To focus solely on law as a specialism without any more syncretic and synergic account of the other contributing disciplines, is to make the textual tail of the law wag the contextual dogsbody of the other disciplines, and this perhaps only by false assumption or begging the question. Lawyers obviously, but in literature also with such writers as Edward Gibbon, George Eliot, Harper Lee and John Galsworthy, we too are apt to assume, perhaps by way of excusing ourselves or in self-justification for inaction, that the text of legal command is always for us, no less than ultimately for the logicians and politicians, at least the prescriptive pivot from which descriptively wags the ensuing cultural context, but what if it were, at least in the Russian sphere of things, the other way about for text and context?

Le Droit et la politique nourrissent une relation étroite dans la jurisprudence russe et ce de manière beaucoup plus importante que ce que l'on peut retrouver dans les systèmes de droit européens.

Les raisons de cette symbiose peuvent partiellement s'expliquer par l'histoire de la Russie, sa culture, sa langue, mais aussi par les dialectiques les idéologies et la littérature russes.

Les concepts de droit, de gouvernement ou d'État comme ceux de fédéralisme, de démocratie et de règles de droit, peuvent une fois traduits, varier de manière extrêmement importante du contenu de leurs équivalents européens et ce quand bien même il sera tenu compte du cadre formel imposé par une Constitution.

Cette interaction particulière entre la loi et la politique engendre une dynamique qui lui est propre au point qu'il est impossible de distinguer clairement ce qui relève de la loi ou de la politique ou encore du texte et le contexte.

Ces relations étroites sont surtout prégnantes en matière de droit public ou de droit international de telle sorte que la distinction traditionnelle retenue par les juristes de la Common Law selon laquelle la loi repose sur le texte et la politique sur le contexte, n'a plus véritablement de sens.

Cet article identifie la nature et l'étendue des conséquences attachées à cette confusion notamment pour la science juridique, la littérature, la logique mais aussi sur le plan historique politique et dialectique.

Pour l'auteur, vouloir concevoir le droit russe en dehors de ce contexte particulier n'aurait aucun sens.

Les juristes russes mais aussi les spécialistes de la littérature de ce pays comme Edward Gibbon, Georges Eliot, Harper Lee et John Galsworthy, sont prompts à rappeler que les percepts de la loi doivent être suivis tant par le commun des mortels que par les politiciens, formant ainsi le socle fondateur de ce qui donnera ensuite naissance au contexte culturel.

Mais l'auteur se demande si tous comptes faits, l'exemple russe ne nous propose pas une grille de lecture bien différente.

"The most striking thing", wrote the poet Alexander Blok of Nicholas II shortly after his abdication in March 1917, "was the utter unexpectedness of it, like a train crash in the night".[1] The resulting power vacuum left by the abdicating Emperor of All the Russias could not be adequately filled by the well-meaning, but utterly unprepared-for Provisional Government. The Soviets – those councils of deputies of various persuasions drawn up to protest against the waste of human life and resources exacted by the Great War, and soon to be led by Leninist extremists into the first exposition of World Communism – would explosively fill the vacuum.

"Like a train crash in the night", so too, as it had begun, would come the end of the once mighty and apparently impregnable Soviet Union. And, in turn, the first Soviet Constitution of 1917, however much reconstituted as it had been in 1918, 1925, 1937, and 1978, would be simply superseded, professedly, by the Constitution of the Russian Federation in 1993. And so "the [same] most striking thing" again happened, just as Blok had earlier written of "the utter unexpectedness of it, like a train crash in the night … ".

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1 *Collected Works of Alexandr Blok* (edit V I Orlov, Vols I-VIII) VII, 254-255.

There is a matryoshka-like process of encapsulating context within text, and successive texts within subsequent texts, each in turn with its own encapsulated context.[2] Entailing (in itself a legal concept) a significant part of their participation in their legal profession, lawyers take this matryoshka-like process of proliferating documents, and subsuming them within files, and files within folders, largely for granted, although it is (at least for them) a serious process. Thus, there is a folder for public law, and a folder for private law – and the relative bulk or size of each of these folders may vary from time to time and for almost every legal system. We can see, as between Tsarist and Soviet Russia, for example, the extent to which the folder for private law could be almost swallowed up and absorbed into public law, no less than for the reverse process of privatisation in New Zealand, where the folder for public law – dealing with public utilities like electric power, postal services, and railways, would be swallowed up and absorbed into the folder for private law.

Of course, even within these folders, there are all sorts of dynamic shifts and functions going on between different files that the lawyer knows as contract, tort, equity, property, criminal, constitutional, and administrative law. Thus equity erodes contract law, and environmental law erodes property law, and so the folders for public and private law either swell or shrink as the files move around or are transferred from one to the other folder.

This is told by way of an allegory on legal classification,[3] not for its own sake; but rather because for the purposes of comparative law, especially between socialist and capitalist legal systems, it is essential to mark and monitor such differences; and also because, for the purposes of this paper on the rejuvenation of former Soviet values within the new Russian Constitution, one needs to understand the legal dynamics of this matryoshka-making process.

It is a process by which legal files are folded, re-folded, and re-enfolded to encapsulate differing social, economic, and political contexts within the same text,

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2 There is a Russian saying that to learn the language you must crack it like a nut. The Russian legal system is an even harder nut to crack than the Russian language. Often, like a set of matryoshka dolls, the Russian legal system turns out to be yet another nutshell within a nutshell. For the Russian law student, the state is to be found within society, and within the state is to be found the law, and within the law is to be promulgated the constitution, and within the constitution are to be found the various branches of the law giving substantive expression to the basic norms of good government … One can go on cracking nutshells for ever": Nigel Jamieson "The Russian Legal System in a Nutshell" (1996) 8 Otago Law Review 579.

3 Legal classification is the prerogative of the European and largely Civil Law systems as distinct from Anglo-American and related Common Law systems: see N J Jamieson "Legal Classification and the Science of Law" (1988) 6 Otago Law Review 550-562.

and then, such is both the depth and wide sweep of most constitutional histories, within subsequent texts, and yet within successively subsequent texts, each in turn with its own, but by no means always the same, far less congruent, encapsulated context. Then, "What did Mikhail Gorbachev mean" we might ask with Jeffrey Kahn,[4] when Gorbachev "(incidentally a lawyer by training) … expressed the need to return to a *pravovoe gosudarstvo* (rule-of-law state)"?

"The over-arching ideal that governs [such] discussions", wrote Martin Krygier and Adam Czarnota,[5] "is the rule of law, and the first thing to appreciate about this ideal is its complexity. Too often, discussion of the rule of law takes the form of simple recipes for institutions … but the rule of law is not simple and it is not a recipe. It is a cluster of values which have to do with the functions of law and the purposes of good laws."

To "a cluster of values" dealing with "the functions of law and the purposes of good laws" we could devote the rest of this paper to the now almost forgotten branch of metaphysics, which, in its dealing with values or standards of behaviour, their analysis, relationships, and evaluation, was made known to the world by Aristotle as axiology.[6] And this is what we shall be doing, although indirectly of theoretical metaphysics, but directly, although both comparatively and constitutionally of both Anglo-American and Slavonic jurisprudence, specifically of the present Russian Constitution as the previous Soviet Constitutions have purportedly been reconstituted, after the fall of the Soviet Union in 1993, into the present Constitution of the new Russian Federation.

And so whatever Gorbachev (as a lawyer) then meant by *pravovoe gosudarstvo* (neither he nor we may now ever really know for all Gorbachev's description of it as "a large-scale turning point"[7]) – when more by re-turning rather than any mere

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4 Jeffrey Kahn *Federalism, Democratization, and the Rule of Law in Russia* (Oxford University Press, Oxford, 2002) 56.

5 Martin Krygier and Adam Czarnota "The Rule of Law After Communism – An Introduction" in Krygier and Czarnota (eds) *The Rule of Law After Communism – Problems and Prospects in East-Central Europe* (Ashgate, Aldershot, 1998) 4.

6 "As a philosophic enterprise education must be based on the root epistemological assumption that it is possible to have knowledge – to know and to learn – and the root axiological assumption that it is better to know than to be ignorant": Charles J Brauner and Hobert W Burns *Problems in Education and Philosophy* (Prentice-Hall, Englewood Cliffs, 1965) 5, and see for axiology 7-11.

7 See *Cherez demokratizatsiiu-k novomu obliku sotsializma: Vstrecha v Tsentral'nom Kommitete KPSS Pravda* 11 May 1988, 1-2; and see also András Schweitzer in conversation with Mark Kramer discussing "Gorbachev's Go-Ahead" together with the theories of the Hungarian historian, László Borhi, that this large scale turning point, by its destruction of a bi-polar power system, was not welcome in the West: The Hungarian Quarterly 15 December 2009 at www.eurozine.com/articles/2009-12-15-kramer-en.html.

turning point came the re-incorporation and re-encapsulation of a constitutional concept that had been denounced as "bourgeois" and disallowed in any discussion of Soviet law for many years. The previous vacuum of *pravovoe* (or rights-based) law in Soviet jurisprudence, which, up until Gorbachev's "large-scale turning point" had been filled by *zakonnoe gosudarstvo* (ironically the *Rechtstaat* concept that had displaced and uprooted the far more culturally entrenched *pravovoe gosudarstvo* of Russian jurisprudence since the 1918 Revolution) had now been, at least ostensibly reversed.

This matryoshka-like process of incorporation and re-incorporation is typical of the time-binding character of the legal, and, in particular, of the legislative process; although in case-law, as distinct from codified jurisdictions, there is at least a parallel if not a superior matryoshka-like process of juridical encapsulation.[8] Nevertheless, a country's constitution, proclaiming the most formal, fundamental, and autochthonous character of the nation, provides, both by its profession and practice as well as by its proclamation and fulfilment, one of the most obvious (in being both abstract in profession and concrete in practice) resources for researching this encapsulating process. Likewise, the genealogy or legal history of any country's constitution neither is, nor ever can be disregarded. Researching this constitutional resource, both by its profession and practice, provides a verification procedure to determine the juristic authenticity and the jurisprudential integrity of the resource.

There are sham constitutions no less than sham trusts.[9] How do you legislate and draft for a genuine constitution? How do you recognise a sham constitution, and how would you repair and restore it to the status of a genuine constitution? As a legislative and parliamentary counsel might ask, these questions are asked as pre-

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8 Consider *Proust v Starr* (1903) 188 US 537, 543, where it was held that "The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity". In relation to the paradox of self-amendment afflicting or affecting constitutions, any repeal is no less an amendment: see Peter Subor *The Paradox of Self-Amendment* (1990, New York, Lang) 7-16. *Prout's Case*, writes Subor (420) "relies on what I have called the homogeneity of the constitution, the theory that new amendments and conflicting pre-existing sections coexist in the manner of inconsistent sections of the original text, none amending any other, and none hierarchically privileged because it is newer". That sounds more than a little artificial until, corresponding to the doctrine of incorporation or homogeneity, one is faced with the phenomenon of reversion – whereby constitutions, despite their repeal or amendment, have a tendency to slip back or revert to a pre-existing and perhaps strongly habituated way of looking at things.

9 For sham trusts to provide a means of distinguishing sham from authentic constitutions, see Jessica Palmer "Dealing with the Emerging Popularity of Sham Trusts" [2007] NZL Rev 81, and Jessica Palmer "What Makes a Trust a Sham?" [2008] NZL Rev 319-320; as well as Nicola Peart "Can Your Trust be Trusted?" (2009) 12 Otago Law Review 59.

eminently practical and not just theoretical questions; although amongst positivist legal thinkers there is a recognisable tendency to regard, as with the law being the law being the law, no argument by which any recognised constitution can be anything less than a genuine constitution.

The forcefulness of this legal positivism (which is valid for its formal recognition of primary as against other categories of legal resources) must be recognised; but we would disagree with the legal positivists who rely solely on the law being the law for what it commands (say hypothetically wholesale slaughter) in its being the law. So there are genuine constitutions and there are sham constitutions. And such is human nature, to quote Schopenhaur's Parable of the Porcupines[10] no less than Le Bon's *Study of the Popular Mind*[11] and Freud's *Group Psychology and Ego-Analysis*[12] that there are also mixed constitutions – for the most or some part genuine, despite their being or becoming more or less a sham.

Certainly, by "its very first breath of post-Soviet life," to borrow a phrase from Jeffrey Kahn's dramatic description of a resurrected Russia's post-Soviet reception, "Russia, the largest country on Earth,"[13] was being nothing less than genuine. With all its accustomed *sympathique* of Russian character, yet while still working within the long accustomed crisis of its constitutional sphere, there was nothing backward in what it felt to be going forwards again, albeit now in a reverse direction to its former direction. In declaring itself by Part One, Chapter One, Article One, and Section One[14] of the *Konstitutsiia Rossiiskoi Federatsii* (1993) to be a "democratic, federal, rule-of-law state", this "very first breath of post-Soviet life", although genuinely inhaled, might not be so genuinely exhaled as first conceived of and so sincerely first expressed. What, through the lengthy and sometimes risky gestation of the new Russian Constitution, would be heard as the resurrected Russia's first newborn cry?

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10 Arthur Schopenhaur *Essays from the Parerga and Paralipomena* (trans T Bailey Saunders, Allen & Unwin, London, 1951) "Studies in Pessimism – A Few Parables" 84-85.

11 Le Bon *Psychologie des Foules* (trans The Crowd: A Study of the Popular Mind, Fisher Unwin, 1920).

12 Sigmund Freud *Massenpsychologie und Ich-Analyse* (trans Strachey, Group Psychology and the Analysis of the Ego, Vienna, 1922).

13 Jeffrey Kahn *Federalism, Democratization, and the Rule of Law in Russia* (Oxford University Press, Oxford, 2002) 18.

14 We cite "Part One, Chapter One, Article One, and Section One" purposely in full, because first principles, as these so formally appear in the renewed Constitution are given that same cumulative first position of formal recognition.

The question may always be asked, not only of Russia, but of every born-again, professedly "rule-of-law state", whether the newly reborn state knows what it is about by way of keeping faith with, and practising its new profession? At the legislative, no less than at the linguistic level, Part One, Chapter One, Article One, and Section One – each rhetorically convey[15] a figurative, yet heart-felt first priority for the "democratic, federal, rule-of-law state". Yet one by one, although as if capriciously, each of these new or reborn concepts – what it is to be democratic, federal, rule-of-law, and even a state itself – starts to strike jurisprudential sparks, if not, indeed, to risk short-circuiting the entire constitution. The threat of regressive or repressive counter-revolution, or more regressively still, the reversion to some state of chaos or primitive anomie (as faced by Belarus and even Poland among the once Soviet satellites[16]) grows apace with the problems encountered in safeguarding the newborn infant state. How does any genuine constitution, sincerely and seriously formulated, retain its infant innocence, and, through what may be a troublesome adolescence, maintain its constitutional authenticity[17]?

Constitutions, however legally pragmatic in providing for principled ways and institutional means, usually also proclaim political creeds of almost religious faith by which to inspire their citizens to participate in singing their state doxologies of populist[18], if not also always genuinely popular praise. This is one of the pragmatic ways, more cultural than legal, by which constitutions seek to retain their original charisma of constitutional authenticity among their citizens. Thus, by the way in

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15 For legislative stylistics, see Frederick Bowers *Linguistic Aspects of Legislative Expression* (University of British Columbia Press, Vancouver, 1989) 327-352. Legislative stylistics, a branch of legislative linguistics, is a remarkably telling, yet relatively unstudied aspect of the lawmaker's art.

16 "It appears that the entire process of private-capital creation – the basis of the systemic change in Poland – relies in considerable measure on criminal economic schemes related to the privatisation of the state economy, international financial operations, money laundering, and so forth": Maria Los and Andrzej Zybertowicz, "Is Revolution a Solution?" in Krygier and Czarnota (eds) *The Rule of Law After Communism – Problems and Prospects in East-Central Europe* (Ashgate, Aldershot, 1998) 261, 292.

17 No constitution born by political revolution has ever escaped this problem. Consider the USA Constitutionalists who, after the widest and most intense of antebellum debates on whether to adopt either the civil or common law legal system fell back to espouse whole-heartedly that same (although reinvigorated) common law system under which their revolt or fight for independence had begun. And consider correlatively how this continued acceptance of the common law would be confirmed for the USA, by their judges, not under the Constitution but by a resurgence of their common law powers, to adjudicate not just all cases under the Constitution, but also, by resumed or assumed authority of the common law, to adjudicate on the Constitution itself.

18 The *narodnik* or populist movement, even among Western-oriented thinkers and writers such as Turgenev and Chernyshevskii, played a huge part, as for Lenin's preoccupation with Marxist (essentially Western) thought, in almost everyone of the forthcoming Russian revolutions.

which the Russian Constitution – proclaiming itself to be that of a "federal, democratic, rule-of-law state" (art 1.1), acknowledging the doctrine of "separation of powers" (art 10), "equality before the law" (art 13.4, 14.4, and 19), "supreme legislative power being vested in a representative parliament" (art 94), "executive power vested in government" (art 110), "judicial power administered only by the courts" (art 118), "independence of the judiciary" (art 120), "local self-government guaranteed" (art 133) – recites its faith,[19] we may conclude, both simpliciter and prima facie, that the new Russian Constitution is bound ex proprio vigore to be a genuine constitution.

Could this vigorously explicit profession of faith nevertheless prove to be less than genuine either (or both) as promulgated or in its practice? As pointed out by Polanyi[20] secular faith, whether in politics or progress, in science or the humanities, differs very little from religious faith. And since what the Soviets had seemed to be doing, as with their secularising of church painting into state posters and their secularising of church creeds into state sloganeering, was to create not only just a new state-religion, but also in terms of world communism, a new world-order and quasi-world-religion. Yet how much loss of faith had resulted – not only to overturn the old order as it usually does or professes to do in any revolution, but also by way of political or experiential hangover to diminish the faith-level required for the effectiveness of the new Russian Federation in 1993?

A deeper jurisprudential examination may provoke some distress. This distressing outcome is more especially the result of examining the cultural context rather than the legal text of the new Russian Constitution. Whatever justification for Soviet State sociology and psychology[21] might lie in its task of hauling recently released serfs into the twentieth century, its poster sloganeering permeated every

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19 We should always remember how much the USSR relied for law and order on legislative sloganeering.

20 Michael Polanyi *Personal Knowledge – Towards a Post-Critical Philosophy* (Kegan Paul, London, 1958, 1973) 405.

21 This, if such be the case, should evoke our intellectual caution, for, just as scientific justification now exists for the earlier repudiated Lamarckian and Michurinian theories of Trofim Denisovich Lysenko, "the barefoot scientist" (by which sloganeering and proletarian form he was made to enter into Soviet folklore), so also we should be cautious of dismissing Soviet State sociology and psychology for what appears to be their overly exalted position among the proletarian life sciences. This most recent justification of what until now has been dismissed in the West as Lysenkoism for its opposition to now outgrown Darwinist and Mendelian theories of evolution, is currently obtained through the relatively recent science of epigenetics, by which it can be verified that genes are susceptible to being turned on and off, not only for and sometimes by the individual, but also for ongoing generations, as so chosen or commanded by their epigenes. For an epigenic overview of the Lysenkian and Darwinist positions, see John Cloud "Why Genes Aren't Destiny" (2010) 175:2 Time 26.

level of education to re-capture and re-prison the centuries-old Slav-slave mind. Likewise, as with the Potemkin villages built to deceive Catherine the Great into her believing in the well-being of her realm, Russian governance traditionally relied on good-natured, and at other times, not so good-natured deception. So too, the comic and the tragic still remain so close in Russian culture – *smyech skvoz' slyosi* (laughter through tears) as Gogol defined the phenomenon – that other more Western cultures still remain both startled and dismayed by the suddenness and intensity of Slavic mood-swings. Furthermore, the entire history of every one of the Soviet Constitutions of 1917, 1918, 1925, 1937, and 1978, until professedly superseded by the Constitution of the Russian Federation in 1993, both in print looks impeccable, and reads impeccably in print, so why should anyone conversant with the deviousness of Russia's constitutional history (or lack of constitutional history through gulags and show-trials and outright executions) be more hopeful of this 1993 impeccably printed edition? Finally, and even more tellingly for the present than the previous failures of the Soviet Union to implement impeccably printed constitutional texts is today's continuingly comparative linguistic context. More especially when comparing previous constitutional failures with the success-rate of Soviet sociology and psychology in its counter-constitutional efforts to effect law and order through pamphleteering, poster-painting, and sloganeering, the immediate outlook looks more gloomy than inspirational. This is so since it is especially by way of English translation (rather than in the original Russian) that these declarations of faith in the Constitution ex proprio vigore ring so true. In the original Russian language of the Constitution, these words and concepts nevertheless remain, at least for the present in both thought and action, somewhat unaccustomed and as yet poor carriers of their Western meanings.

Accordingly, one of the sad thrusts of this paper is that, at least for the present and as far as one can see for the immediate future, the Russian Constitution, although genuinely formulated and without being as yet anything like a total sham, is something less, perhaps much less than a genuine constitution. The charisma of its birth process has been defiled both by its previous history and by the political exigencies of its birthing process as well as by being distorted by its confused cultural origins, limited legal resources, and overwhelming difficulties of political implementation. One prays for its recovery as an act of constitutional faith, no less than for almost all written and unwritten constitutions which are to some degree, although some more than others, despoiled by history or distorted by concurrent events, or soured by subsequent happenings.

These difficulties, summed up in terms of cross-cultural conflict, demonstrate themselves with a jurisprudential particularity, for the most part common to those who would counsel this constitutional course of action (sometimes with exuberant

delight in seeing themselves to have won the Cold War) and, on the other hand, those former Soviets who would grasp or seize at the only straw of available opportunity to extricate themselves, in as civil a way as possible, from the impasse presented by the collapse of communism. Bernard Rudden comes the closest to describing the irony of the collapsing Union's clutching at this proffered straw of Western jurisprudence by writing allegorically of the way in which, "During the last years of its life, the Soviet Union turned to law like a dying monarch to his withered God."[22]

What might prove to be the lasting result of this effete but last-minute turning to law is difficult to discern. Although as Rudden writes, "the Soviet Union turned to law like a dying monarch", the fiduciary strength of this last-minute turning away from proletarian communism to the rule of law had already been forthrightly expressed. It had been forthrightly and explicitly expressed over several years in an outpouring of strongly reformist legislation. This veritable fireworks display of political and jurisprudential retraction from previously strongly expressed Soviet values at least led up to, if not indeed made inevitable, the ultimate turning-point or reversal of political values in 1991 that could no longer remain hidden from the West. There is really no doubt, so startled and even shocked by this final turning away from positivist politics to positivist law were those Western Sovietologists who had been mesmerised by the career charisma of Gorbachev rather than researching the reformist output of the Lenin Institute, that much more than any mere splinter of truth must be credited to László Borhi's claim[23] that at least some Western leaders did not want to leave behind the security of the bi-polar world order in which they had grown up.

The case for some considerable evidence existing (to be expected and most often realised of every revolution) as to what, at the time of this 1991 Russian Revolution (epitomised in that same year by the creation of CIS[24] – the

22 Bernard Rudden "Civil Law, Civil Society, and the Russian Constitution" (1994) 110 LQR 56, 56. Rudden's conclusion suggests we should consider this last gasp of the Soviet Union to be an expression of the effete. In terms of specifics, I take a somewhat different and less ironic view; for which exuberance of the dying Union's engagement in revisionist and reformative lawmaking, see my "Last Indian Summer of Soviet Law Reform": Part I (1995) Statute Law Review 68-89, and "The Last Indian Summer of Soviet Law Reform: Part II" (1995) Statute Law Review 125-143.

23 Above n 7.

24 CIS, or SNG (*Sodruzhestvo Nezavisimykh Gosudarstv*), signalling the dissolution of the Soviet Union, was first constituted near Brest-Litovsk, close to Minsk, Belarus, by a so-called Creation Agreement (*Soglasheniye*) between the Russian Federation, Belarus, and Ukraine on 8 December 1991. In January of 1993, the CIS Charter (*SNG Ustav*) supplanted the original Creation Agreement. This continuingly viable organization, with its headquarters still in Minsk, having established the Eurasian Economic Community with the objective of promoting a tightly-knit

Commonwealth of Independent States) constituted a genuine commitment to constitutional change that would be later downsized, perhaps as having been merely symbolic (as erroneously claimed of the CIS), or crisis-provoked by the threatened demise of the Soviet Union, or even just serendipitously experimental, is beyond the scope of this paper. That by both leading up to the ultimate turning-point (when seen startlingly as an isolated event) as well as looking back after the turning-point (when seen as merely one of many spikes in an otherwise extenuated episode of a hugely historic reform phase) both the first and last bursts of exuberant energy for reformist lawmaking may allow for both Rudden and this writer being roughly right in our respective and apparently conflicting views[25] of what differentially could be entailed by any dying (but perhaps since recovered) monarch by force of his having "turned to law [as if] to his [not quite so] withered God". Soviet jurisprudence has always retained the right, through fudged or *nichevo* concepts of "socialist" legality, "socialist" democracy, and "socialist" democracy, of re-defining apparently straight-forward concepts of Western legal and political thought.

If is true that purely political power – *vlast'* or *samodyerzhaviye* in place of *spravyedlivost'* and *avtorityet*[26] – remains as the rationale for *rukovodstvo* (or leadership) – as this appears, for example, with some aspects of the changing presidency in the newly reconstituted Russia – then the reversion to this species of absolute power has already begun to overtake the constitutionally avowed rule-of-law. This alternative fallback or quickening process testifies to one of two things. It testifies either to some continued sense of powerlessness and innate lack of legality in the so-called former Soviet Union by which the reconstituted but still effete Russia remains either vestigially static, or else, by reason of this not-unheard-of-before cross-fertilisation experiment with Western thought, it testifies to a no-longer effete Russia having become regeneratively dynamic (although each still subject to the prognosis of becoming progressively more Soviet in its outlook). The static or dynamic alternatives, either by way of an exclusive disjunction, or by *nichevo* as an inclusively fudged disjunction in place of either the mutually

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common market, has not only trading, lawmaking, peacekeeping, military, security, and crime-prevention powers within the 22 million square kilometres of its currently 9 official, 1 unofficial associate, and 1 other de facto participating member states, but also undertakes extraterritorial responsibility for UN peace enforcement.

25 Above n 22.

26 That is, this means the exercise of absolute and self-referential power (*samodyerszhaviye*) and politically enforced physical power (*vlast'*) in place of conscientiously considered power (*spravyedlivost'*) when exercised under some legal and duly appointed authority (*avtorityet*).

exclusive disjunctive answers *nyet* or *da*, are each still problematic for their outcome.

Could there be more of a capitalist contribution to this dynamic rather than merely the wishful thinking of those in the West who, having overcome their fear of the former Soviet Union, and having been scarred enough to be still scared by the disturbed balance of power among formerly East-West (and now among other more open-ended) alternatives to the breakdown in the previously bi-polar world order, now worry more than before over the prospects of, or confrontation over any single, one-world, global alternative? This issue of winner takes all is, after all, exactly the same issue as between East and West, according to László Borhi's claim, although ironically, since both the USA (implosively) and USSR (explosively) as the chief protagonists in this warring competition may have lost the Cold War, the new threat, to borrow a metaphor from the Gorbachev-Yeltsin political debate, comes, as Gorbachev himself correctly foretold, from whatever "third party waits in the wings".

Gorbachev's lawyerlike contribution to the fast-changing jurisprudence of twentieth-century Russia, without which not even debate over the concept of legality in its taking priority over *samodyerszhaviye* or absolute political power could have been conceived of, not only innocently smoothed over (for Gorbachev himself would have been appalled by its outcome) but also radically led the way into the reconstituted Russian Federation. If only this continuing if not proliferating respect for Western legality in the reconstituted Russian Federation could take deeper root is most certainly what the West wishes for the East, but against most, if not all kinds of legal transplant there is some level of systemic rejection. This risk of rejection can be diminished in three ways; first, by avoiding every expression of competitively induced political and legal condescension, secondly by cultivating a deeper understanding of the culture, heritage and jurisprudence of the constitutional context into which the legal transplant is to be made, and thirdly, by engaging in appropriate follow-up procedures by way of tending to the transplant. The right path to be taken for a Slavic nation (as distinct from a Scandinavian or Germanic nation, despite all three being Indo-European) to become law-empowered under the rule of law, could not possibly be the same as for the others (any more than the Erse concept of law could be importunately Anglicised) and this for Slavonic jurisprudence by virtue of Slavic history, culture, and legal system. This task of transplanting some deeper and more commanding concept of legality into a Slavic nation is as generally remote from any Anglo-American power of communication to the Slavic nation as it is as specifically difficult for the Anglo-Saxon common lawyers to decide on how the rule of law should be so transplanted – unless, of course, literally, legally, and institutionally in accordance

with the West's accustomed rubric of "the rule of law". Nevertheless, as epitomised by the West's involvement in Afghanistan, Iraq, and Iran, "the rule of law" cannot be legalistically imposed, but needs first be understood and accepted, and this before it can be enforced even in those countries (such as our own) where "the rule of law" is not always recognised for being more than a sloganeering token. Indeed, there are even now many tokens in Western jurisprudence, especially since the perceived downfall of the Soviet Union, that the West has not the same need for any rule of law.

Both East and West seem cursed, either to have the institutions but not the mind for the rule of law, or else to have the mind for the rule of law but not the institutions. And sometimes although we can readily vacillate between having either the constitutional mind or the institutional resources, we rarely either have, or exercise both mind and resources at one and the same time. Furthermore, the same twofold equation can be compounded three ways by the permutations arising from the presence or absence of the right-minded and fully empowered leaders. We thus pray that some ongoing burst of exuberant energy for lawmaking, and more importantly for rule of law enforcement, by which the outcome, although still highly speculative and hypothetical – as one would expect of any apparently huge swing (or 'turn-around', to use Gorbachev's description) – will integrate the political or proletarian biomass with its own needfully correct jurisprudential direction for the reconstituted Russian Federation. Meanwhile, however, this faction still blames that faction, in the course of which most factions splinter into still smaller factions – witnessed earlier by the "Rumyantsev draft", the "Saharov model", "the Alekseev-Sochak variant" or "the Shakhrai draft" as each faction once competed for its own reconstituted Russian Constitution and vociferously dismissed other factions for being variously "socialist", "dictatorial", "eclectic", or "Russophobic".[27]

In the course of this earlier and now historic State-splintering process, the still Soviet State, whether originally convened as a federal fiction or not (as the USSR had been purportedly convened as a *soyus* or union by its Treaty of Creation in 1922, and the RSFSR[28] as one of the federated republics in this union from 1917 to 1991[29]) is suddenly exposed as a legal fiction and cover-up for no more than the

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27 See Gordon B Smith *Reforming the Russian Legal System* (1996) 88, 292 (quoting Anatoly Kostyukov, *Megapolis Express*, 22 April 1992, 3)

28 The Russian Soviet Federated Socialist Republic – the largest member state (referred to usually as Russia) in the USSR of United Soviet Socialist Republics (usually referred to as the Soviet Union).

29 The USSR had its roots both in the 1917 Russian Revolution and thus most strongly in the RSFSR republic; and despite choosing 1991 as the date of demise for the USSR (most obviously

Communist Party.[30] So, too, the long-entrenched might of this Communist Party, which had been assumed to be reliably stable for almost a century, is suddenly pitted against the radical transformation of Gorbachev's Office of Presidency, changed as it is from a symbolic, purely token office to that of a full-powered Chief Executive.

The Soviet State, which for so long has been merely a cover-up for the Communist Party, suddenly explodes into instability. The concept of statehood, if it is to be recovered in accordance with the Preamble to the Russian Constitution, has obviously, for almost a century but never until now with hindsight, been properly understood. This is such an explosive revelation, and on such a multitude of fractiously different levels – legislative, judicial, and executive – that for the sake of any viable constitutional action, those on whom the revelation explodes must achieve at least conditional, if not full political consensus. In the process of working towards conditional if not full political consensus, the forward-looking focus will be on achieving consensus – while forever afterwards, as on reaching any conditional or even just contextual consensus, the focus will be backwards looking towards the context in which, or towards those conditions by which the conditional or contextual consensus was achieved. Thus, in terms of fulfilling the consensual process, the teleological focus on reaching and obtaining that consensus transmutes to an instrumental focus on observing and fulfilling the conditions, or else (as for the revolutionary inception of both the USA and the USSR) maintaining and even revering the respective contexts required for their individual consensus. Accordingly, in the face of such fractious complexity and much earlier than Valerii Zorkin, Chairman of the Constitutional Court, would later declare it, Russia stood "on the edge of catastrophe".[31] Better to live "under a bad constitution" he warned than "with no rules at all".[32]

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being then superseded although lingeringly upheld by the CIS or Commonwealth of Independent States) but the Soviet character, as testified to by the theme of this paper, still strongly survives, even to the extent, as noted and catalogued by several commentators, of the increasing Sovietisation and Socialisation of the West (with or without any perceived threat of World Communism) as a result of the demise of the Soviet Union in the East.

30 In the context of such legal fictions one should carefully consider what it will take to renew the sovereign statehood of Russia as proclaimed by the Preamble to the Russian Constitution.

31 Such was still the prevailing context of assumed Party power, that this simple warning from the Chairman of the Constitutional Court was mistaken for a veiled threat to return to the 1978 Constitution of the Russian Soviet Socialist Republic: see Kim Lane Scheppele "A Comparative View of the Chief Justice's Role, Guardians of the Constitution, Constitutional Court Presidents, and the Struggle for the Rule of Law in Post-Soviet Europe" (2006) 154 University Pennsylvania Law Review 1757, 1792 n 121.

32 See Smith, above n 27, 92 (citing *Itogi*, Ostankino television broadcast, 14 March 1993).

Now, looking back from some seventeen or eighteen years later, when such events can be considered with hindsight, the Russian experience – it could hardly any longer be labelled then either a Federation or a State – obviously tottered precariously on the edge of this catastrophe from day to day. It tottered in both domestic and international affairs, it tottered through every sphere of influence from the political to the military, from economics to education, from finance to health, and from housing to sanitation.[33] It continued to totter like one of its later drunken presidents would totter when telling the constituent republics to "take as much sovereignty as they could swallow".[34] For as long as the Soviet State had provided no more than a mask for the *rukovodstvo partii* of the Communist Party, the legal concept of *suvyeryenityet* or sovereignty had been in abeyance. Yet everyone, particularly those who had been through the Gulags, knew what *verhovnaya vlast* (or supreme power) really meant. Nor, of course, under the Soviet regime, could the classical concept of *res publica* survive the notion of *partiinoe rukovodsto*, any more than the classical concepts of Roman law might be applied by Soviet administration.

Perceptions from both within and without the former Soviet Union were both comically serious and seriously comic – serious in both senses because so many people were suffering very seriously; and comic in all sorts of other often quite coincidental senses, from the philosophically ironic to the retributively satiric. Western input ranged from sex magazines and horoscopes to revival meetings and overseas aid – often in the form of Western state-sponsored university professors whose expertise, whether in health or banking or law or commerce, had never been extended to meet, far less stretched to encompass anything of Slavic culture and society. For some of those so-called experts it was simply an opportunity for an overseas trip, and a chance to update their CVs and to advance their careers. The West no less than the East pursues its own brand of closely cultivated, yet often entrepreneurial ruthlessness.[35]

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33 For a New Zealand eyewitness account, see my own series of articles: "Letters from the Law Library in Minsk" [1991] NZLJ 215-220; "More Letters from the Law Library in Minsk" [1991] NZLJ 320-332; "Last Letters from the Law Library in Minsk" [1991] NZLJ 451-460; and, later from Moscow, "What's New at Emgeoo?" [1995] NZLJ 219-227; "Good News from Emgeoo" [1995] NZLJ 326-331; "Further Good News from Emgeoo" [1995] NZLJ 374-379.

34 Boris Yeltsin "I have not renounced my formula: 'Take as much sovereignty as you can swallow'" 30 May 1994, reported *Segodnia* [Syevodnya] 31 May 1994, I, quoted Kahn, 142.

35 In 1991 the author spoke with a British medical team who had visited Gomel in Belarus for just a few days and who had been reassured by what may have been the equivalent of a Potemkin village demonstration that the Chernobyl fallout was nowise as catastrophic as presented in the West. Instead of just visiting Gomel for a few days, by just walking the streets of Minsk and seeing the child victims of the fallout who for Mayday celebrations had been regimented in the

Even the real experts, those with life-long commitment and scholarly dedication to their subjects would either be seduced by the "voices of glasnost"[36] and the reformist project of a "restructured bureaucracy"[37], or else be trapped by the prevailing panic by which many "small fires"[38] had ignited a huge conflagration.

We could write more specifically about some of this do-gooding, financially indulgent, yet condescending and absurdly ill-informed form of overseas aid to Russia and to such states as Belarus around this time; especially of those Westerners who would be whistle-stopped through clinics, hospitals and universities by which to gauge and conclude that the fallout from Chernobyl was less disastrous and more adequately responded to by governmental authorities than generally understood. On the contrary, it was not only the fallout from, but also the cover-up of Chernobyl that swept away the last vestige of faith in the Soviet Union from its long-suffering citizens.[39]

Meanwhile in the West, some very curious paradoxes began to be perpetrated: long established and highly productive Russian Departments and Schools of Slavic Studies would be severely curtailed or even closed down, in universities as far apart as Aberdeen in Scotland is from Wellington and Otago in New Zealand. Their political purpose, apparently just in "winning" the Cold War, rather than their educational purpose in serving science and the humanities, had been accomplished. The paradox prevailed that this was being done at the same time and often by the same authorities as governmental, commercial, legal, accounting, and health expertise was being extended often by academics who had no knowledge whatsoever of the context into which their own disciplines might or might not be applicable, or of the receptivity or otherwise of the former Soviet Union.

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main square of that capital city when the radioactive djin passed over, or by experiencing for themselves the pathetic lack of primal resources in the prestigiously regarded main hospital of that capital city, that medical team would more quickly and surely have reached a better informed conclusion. Alas, perhaps more so than ever in the midst of any political catastrophe, political pride lives on!

36 Stephen F Cohen and Katrina Vanden Heuval "Voices of Glasnost – Interviews with Gorbachev's Reformers" (1989).

37 Abel Aganbegyan *Inside Perestroika: The Future of the Russian Economy* (trans Helen Szamuely, Harper & Row, 1989).

38 Voices of Glasnost: Letter from the Soviet People to Ogonyok Magazine 1987-90 Christopher Cerf and Maria Albec (eds) trans Hans Fenstermacher, 1990).

39 See the author's "M'aidez – This is Mayday" [1994] NZLJ 271 and reprinted as "May Day in Minsk and Other Rites of Spring" in *The Lawyers Weekly – The Newspaper for Canada's Legal Professionals* 14:23 (21 October 1994) 4.

Maybe this exceptionally free-floating overseas aid, sometimes completely at odds with the context, would achieve some measure of general good – a gesture of international rapport to minimise any sense of failure or of isolation – but specifically and long-term, especially in those areas of literature, legislative drafting and constitutional reform to which in formerly professional lives, many Slavic and Soviet scholars have been exposed, the West must shoulder a lot of responsibility for implanting concepts of law and justice that are so immediately at odds with the Slavic context as to give rise to serious and continued misunderstandings between the governments of East and West. And so when the West laughs at Yeltsin's emulation of a dancing bear, or waxes cynical at Putin's "dictatorship of law", it holds itself up to far greater ridicule for its ignorance of Russian law, history, and culture.

This is just some of the social and political context, sketched in very rough outline, into which the text of the Russian Constitution, as into some vast area of inland drainage in the Great European Plain, at first meanders, as all things do, towards Moscow, soporifically at first through Polish water meadows, but then meeting locks and gates at strategic points along convict-dug canals, before its catalepsy into, at first dynamic, and then eventually panic-stricken activity. Ideas likewise travel from West to East, dynamically at times, yet still at risk of becoming "bogged down" in areas of medieval inland drainage, no less than Smith (a little impatiently, perhaps) saw the Congress of Peoples' Deputies being "bogged down with trivialities" in debating the legitimacy of the Russian Constitution.[40]

Would that it had been "bogged down" a wee bit more, since the legitimacy of the Russian Constitution depends on a clear consensus of informed understanding, without which there is either a risk of reversion to formerly held views, or else a deeper intensity of disappointment between those of irreconcilably different views. There is thus no room for pointing any finger of blame for wrongful intentions; yet it frequently befalls the case that those who promote and rely on legal transplants as a "quick fix" have an overly easy enthusiasm for new ideas, but not a terribly wide experience of, or deep feeling for old ideas, nor any real flair for bridging the gap between old and new. They are *nyekulturnii* (uncivilised) even in their specialised subject.

So what does the so-called "new" Russian Constitution, equipped as it is with both literary (art 1-9) text (legal and jurisprudential), and a non-literary context (Preamble) encompassing ethnic (*my mnogonatzionalni narod*), historical (*sohranyaya istoritzeski*) and political (*voshrazdaya suvernnuyu)* issues, really

40 Smith, above n 27, 89.

mean? It is worthwhile remembering that the State-authorised commentary of Grabko and Kurnosov[41] depicts the new Russian Constitution of 1993 as still having four previous levels of solely Soviet development. These four historic constitutional levels are described as offshoots of a direct line of legal continuity with the present[42]. What exactly will the future make of that legal genealogy by which the 1993 Constitution is already by 1995 being jurisprudentially portrayed by these authors, not as being any radical reform in itself, but rather as encapsulating and incorporating, however transcendentally, a basic survival kit for the Soviet inheritance?

The risk of reversion, which is no less for jurisprudential replanting than for any botanical hybridisation or horticultural endeavour, is never remote. Even though there be no fault other than that of too quickly and superficially moving legal transplants into unsupportive contexts, other factors also endanger the outcome. A basic misunderstanding of the juristic bedding mixture into which the transplants are being made, the degree of political, economic, legal, and social stress under which the transplanting is undertaken, the lack of any adequate means of linguistic expression to identify and convey the transplanted concepts, together with a failure of that jurisprudential understanding required to bed the transplant and prevent its rejection, give very little hope, especially as between entrenched Soviet and entrenched Capitalist economies for success.

We could and should go back to first principles. These are either abstract or allegorical. One opens up a country's current constitution, and, within that constitution, more and more deeply embedded within the outer shell of that country's superficially current constitution, one finds whatever successively gave rise to the outermost and perhaps most current constitutional shell. There's nothing new in this – Plowden compared the English common law to a nut,[43] and Russian law teachers proverbially require of their students to crack the law as if it were a nut – both of which concepts account for lawyers in their squirreling away of laws

41 I Grabko and S Kurnosov, Frunze *Osovy Gosudarstva I Prava* [Fundamentals of State and Law] (1995) 12.

42 Thus making exactly the same point as Brezhnev made earlier in May 1977 (whether by way of legal fiction or not) of the 1978 Constitution before the Plenary Meeting of the CPSU Central Committee – "As we were working on the draft, *we stood firmly on the ground of continuity."*

43 "The Law may be resembled to a Nut, which has a Shell and a Kernel within, the Letter of the Law represents the Shell, and the Sense of it the Kernel, and as you will be no better for the Nut if you make Use only of the Shell, so you will receive no Benefit by the Law if you rely only upon the Letter, and as the Fruit and the Profit of the Nut lies in the Kernel, and not in the Shell, so the Fruit and Profit of the Law consists in the Sense more than in the Letter": Edmund Plowden in *Eyston v Studd* (1574) 2 Plow 460, 465.

as if laws were nuts, and in their expected capacity as lawyers to act for others as competent nut-crackers of the law.

Having begun again with an allegory – the first was the matryoshka-like process of filing, enfolding, and encapsulating context within text, and successive texts within each other – let us continue for a moment to consider the outer shell or husk round this particular legal topic, that is to say the text and context of Russian legislation, before trying to crack the nut to find and release the kernel. The husk or shell, being jurisprudential rather than legal, is hugely fibrous rather than compact, and, as one might thus infer, intensely abstract. We shall allow ourselves some leeway, therefore, to dispose first of the husk.

Codes and constitutions, by their character (of *zakonchenost* or legislative completeness) for any legal system, and by their other characteristics of being paramount, fundamental, entrenched, or autochthonous, occupy some exclusive position of assumed authority in any legal system. The history of any such code or constitution, is the most obvious resource for researching this time-binding phenomenon of encapsulating, not only context within text, but also successive texts within subsequent texts. In the case of successive texts, each importing its own inchoate context, we are dealing not just with text and context, but also with the inter-textual relationships of successive texts. And these successive texts may be extremely diverse, and, if not in open conflict, are, to say the least, not always well integrated. Witness the Russian Federation in the early 1990s during the so-called War of Laws, the so-called War of Decrees, and the so-called Parade of Treaties, for successive failure to implement and observe the principles of inter-textuality.

Radical and revolutionary moves in moments of crisis – using that word with its classical connotation of the need at any crossroads for decision-making – often provoke, once the crisis has been resolved, counter-revolutions that are just as radical, or else promote reversions that just as radically boomerang back to the old way of seeing and dealing with things. Take the United States Constitution, for example: there is no provision in the Constitution empowering the judiciary to adjudicate on the constitutionality of the legislature's lawmaking, yet by a resurgence of Common Law justiciability, the judiciary took that power upon itself by which to evaluate, adjudicate, and, if necessary, invalidate, the enactments of the United States legislature according to the Common Law principles of statutory construction and interpretation.[44]

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44 "An inescapable consequence of the amending power of interpretation is that the supreme law, the constitution, is not utterly supreme so long as it is subject to authoritative interpretation": Peter Suber *The Paradox of Self-Amendment* (Lang, New York, 1990) 197. Could the same

In the case of the United States, the inchoate context of the Common Law triumphed over the complete separation of governmental powers postulated by the constitutional text. This resurgent triumph for the Common Law over the ardently argued case for a completely disparate, novel, transatlantic legal system (especially when the Common Law was being relegated to State and not Federal jurisdiction)[45] testifies to the forcefulness of inherent context. Would, or could an avowedly Constitutional Court, institutionally established, as it is, for all such and similar purposes in the Russian Federation, do better or would the inchoate context of the formerly Soviet way of doing things be disposed to resurface and rebound to the disadvantage and detriment of a new beginning?[46] In other words, vastly different in coming from a South Pacific culture but expressing exactly the same concept – *Po tutata, ao pahorehore* – in times of common crisis we agree and unite, but when the crisis is over we disperse and go back or revert, each to our own old tribal ways.

There is no example more explicative of the matryoshka-like process of legally encapsulating the past within the present than that of today's Russian Constitution. It becomes a hard nut to crack because of all the successive squirrelings by long lines of legislators from Lenin to Putin,[47] yet all the input into the current text makes it harder and harder to depart from – in any truly reformative, far less revolutionary way – from the continuously encapsulated context. The paradox is that the resulting continuity of process confirms a harder and harder formal shell – a strongly casehardened (and therefore explosive) container, rather than a loosely fibrous husk – within which it proves more and more impossible to depart from the kernel of legal function.

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argument be given for the interpretation of the Communist Party when in authoritative control of the former USSR Constitutions?

45 It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system only by legislative adoption: J McLean *Wheaton and Donaldson v Peters and Grigg* (1834) 33 US (8 Pet) 591, 658.

46 The same resurgent reversion affects Hebraic jurisprudence, as with its transplantation to the early Anglo-Saxon kingdoms, or as with pre-Treaty days of New Zealand, where the *rongo pai* or good news of the New Testament Gospel soon reverts under stress to the concept of Old Testament legality; and this at risk of continued reversion, as with the New Zealand Wars, to anomic if not anti-nomic values.

47 We quizzically stick with both domestically and internationally expressed views that, constitutionally, and whether by legal fiction or otherwise, yet in a typically Russian way, Vladimir Putin rather than Dmitry Medvedev continues to exercise presidential power.

There, deep within the matryoshka-like genealogy of the legal system is the first and truly Leninesque Constitution of 1918 still spinning off successive drafts that centrifugally give rise to the Constitution of the Russian Federation in 1993. By studying the legal history of its textual revisions and amendments we learn as much about Lenin's first, as we do about Stalin's second and third, Brezhnev's fourth, and Gorbachev's fifth Constitution. Arguably also, the political characters, from Lenin through Stalin, Brezhnev, and Kruschev, to Putin, and thence further to Medvedev, when traced against Gogol's literary types,[48] maintain a cultural if not also collective status quo. In the face of such cultural continuity, who but any lawyer would insist on legal continuity?

By way of politico-legal examples drawn from radical reversals of legally constituted text the outcome of which is nevertheless decided by traditionally ongoing context the Russian Constitution affords the most concrete example as well as being the most current instance of this encryptive, incorporative, and as often restorative as radically reformative process.

This phenomenon either in closed or open context might well be taken to indicate the forcefulness of politics over law, or else simply the failure of law. In other words, the law by itself – no matter how meaningfully intended and clearly expressed at any time of constitutional crisis – is insufficient by itself to change the established context once that crisis has passed. The restructuring or perestroika of governmental processes slips back into the old familiar state patterns and a lethargic fog of unclear and often conflicting decrees overwhelms the promised transparency of glasnost.

Thus the current Russian constitution reverts to an increasingly traditional and conservatively Soviet and perhaps even pre-Soviet document despite every avowed intention of radically new leaders to revolt against some or all of the old ways of Soviet process and to institute in their place – to quote article 1 of the new and current Russian Constitution – "a federal, democratic, and rule-of-law state". In short, and because of this circular legal logic of encapsulating successive contexts within successive texts, all attempts so far to federalise and democratise Russia as a rule-of-law state, as demonstrated both by text and context, *seem* to be doomed. Why should this be, hoped for as the reversion to a former context maybe by some, yet radically opposed in favour of a new context by others?

The lawyer's reply, constrained by the four-cornered doctrine of documentary evidence, is to concentrate on the constitutional text. This is the microsphere of

48 Most forcefully, by way of *smech skvoz slyozi* (laughter through tears), say those of *Myortviye Dushi* (Dead Souls).

legal interpretation. The implication conferred on every code and constitution being complete, consistent, and autonomous, concedes any constitution to have almost scriptural authority – and indeed, as with the Constitution of the USA, recourse to divine authority may well be made explicit. Otherwise, integrity of interpretation (if no paradox[49] committed) lies within the certainty of the language and the logic of the text, although some claim, as of innovative recourse to new legal and legislative forms, there are no solutions – and, as even Descartes felt, there is no escape from such paradoxes, either in mathematics or logic, but for the divine.[50] Indeed, the rising recourse by Orthodox Russians to the divine in their trying to escape such political paradoxes seems to substantiate the Cartesian solution.

In relation to the Russian Constitution, we would do well to look at both of these spheres of influence. First, and sovereignly as lawyers, we need to look within the microsphere of four-cornered textual construction and interpretation. Then, as lawyer-citizens we need to look without the text, in so far as that macrosphere of legally extraneous context, in which or for which (or even but for which) the text was written (or left unwritten) explains the text. Sometimes, as with intentionalist interpretation, it is the once outer macrosphere of context alone that is being invaginated to become the inner microsphere for solely textualist interpretation.

The macrosphere relies as much on the individual as on the jus commune – the fellowship founded on the communal need for law and order; secondly, on the civil society by which the need for justice and righteousness transcends legality ("the dictatorship of law" to borrow Putin's phrase); thirdly, on the collective need for leadership – the rationale for *rukavodstvo* by which to follow those who would lead; fourthly, on sentiment and feelings (closer to the surface in Slavic than in other societies) – and so for sentiment in its most serious sense, on not just casual hopes and fears but deeper Dostoevskian feelings of compassion as well as seriously motivated concerns for Turgenevian redemption; fifthly on faith – trust or distrust made manifest by the fiduciary responsibilities in leading (*rukavodstvo* rather than *vodityel'stvo*) as well as for following the leader; sixthly, on intellect – by way of argument and reasoning; seventhly, on experience – wide or narrow, comic or tragic, classical or modern; and eighthly, to complete the generic octave, all such macroscopic components as culture.

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49 But on the paradox of interpretation, see Peter Suber *The Paradox of Self-Amendment – A Study of Logic, Law, Omnipotence, and Change* (Peter Lang, New York, 1990) 197-202.

50 Descartes writing to Mersenne in 1630, quoted by Suber, above n 49, 292-293.

From within the text, we then look for the redeeming forcefulness of new ideas – from Slav-revised rather than merely borrowed-Western concepts of federalism, constitutionalism, and presidentialism. If merely borrowed, plagiarised, or worse still stolen (for the purposes of political window-dressing or sloganeering), these ideas will not stick long enough to bed in, take root, and work in their transplanted location. There are other ideas, such as the renaissance of classical values (importing the Socratic meiotic[51] into Western education) and the rise of the individually-enquiring rather than the collectively-conformist conscience (springing from religious reforms and informational revolutions) which are hard for any culture to drink deeply enough without having experienced them first-hand or having been baptised into their history. Most perplexing of all, whether from Athens to USA, or from USA to Afghanistan or Iraq, appears the attempt to transplant the classical concept of democracy. In the case of the former Soviet Union, not just to renew and restore the concept as Pericles[52] first extolled it as being fundamental to Athenian culture, but also to safeguard its practice in Slavic culture, suddenly with constitutional checks and balances – providing for a "federal, democratic, rule-of-law state" (art 1.1), acknowledging the doctrine of "separation of powers" (art 10), "equality before the law" (art 13.4, 14.4, and 19), "supreme legislative power being vested in a representative parliament" (art 94), "executive power vested in government" (art 110), "judicial power administered only by the courts" (art 118), "independence of the judiciary" (art 120), and "local self-government guaranteed" (art 133) – is, indeed, a very tall order.

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51 This self-revelatory and autochthonous educational experience, conducted humbly from the bottom-up through a relaxedly conversational and two-way dialectic where the individual's hidden understanding of his own reality is birthed to an objective awareness with the meiotic help of an intellectual midwife (just as, autobiographically and thus experientially, Socrates saw himself as a teacher, first and foremost in his being the son of a midwife) is the opposite of the doctrinaire, dogmatic, from the top-down, and often institutionally imposed means of highly programmed, excessively curricularised, and one-way-of-looking-at-things state education.

52 Despite each belonging to opposing political factions, both Herodatus (regarded for his *Histories* as the "father of history"), and his counterpart Thucydides (regarded for his *History of the Peloponnesian War* as the "father of scientific history"), were strongly united in their admiration for the statesmanship of Pericles who led the democratic faction. Herodatus, in tracing the genealogy of Pericles from the great Alcmeonid family from which Pericles was maternally descended (Bk VI, 131) – with which we should compare the maternal descent of the Socratic meiotic (previous footnote) – praised and upheld democracy (*contra* Plato) as being the source and strength of Athens (Bk V, 78). To Thucydides, although exiled from Athens by the demogues, we owe our only extant account of Athenian democracy in jurisprudential terms. This account, delivered by Pericles in his Funeral Oration at the conclusion of the Peloponnesian War, was admiringly transcribed by his political opponent Thucydides, word-for-word, for the purposes of archiving (one of the earliest examples of the scientific archiving function) in his *History*. For the significance of Periclean democracy to modernist jurisprudence, see K R Popper *The Open Society and its Enemies* (Kegan Paul, London, 1945, 1973) 2 vols.

Words need meanings, meanings need understanding, understanding relies on culture, different cultures promote different (often contrary) understandings – thus, the same words tend to be misunderstood for different concepts between different cultures. Even within one and the same culture, as in democratic Athens with the trial of Socrates no less than in Jerusalem with the trial of Jesus Christ, the same massive mistakes can happen. In Athens, the meiotic of Socratic method (one of the continuingly intellectual and educational strengths we attribute in all our walks of modern life to ancient Athens) was mistaken for religious heresy, just as in Jerusalem, Christ, after more than twenty-two failures of due process during as many as six (sometimes secret, sometimes show) trials, was put to death[53] for revealing the prevailing righteousness of the law he was born to, and did fulfil.

For democracy, as with all big issues, the risks of misunderstanding are at least as big as the issue. We are apt, by reason of being conventionalised by our own individual culture, to idolise our own brand of Western democracy, and to forget, as we do with Socratic meiotic and Christian righteousness, that most big ideas have flowed from the East. It is all too easy to export the idols we worship rather than the concepts they stand for, and it is all too easy for us to export the idols we worship because we ourselves would not worship them as idols if we truly understood what all they stood for.

Accordingly, and in the context of the history of ideas, what is the likely prognosis for the legal transplants introduced into the Constitution of the Russian Federation in 1993? Will the legal transplants promote deeper Slavic study into what they truly mean – perhaps as much into what they really mean for the West, as into what they could rightly mean for the East, but also and more importantly, into what these legal transplants rightly mean for their own sake and truly for themselves?

The risk of unsurveyed and critically-oriented (ie crisis-aversive) transplantation, is that the legal transplants, proving in themselves troublesome to

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53 "Father, forgive them; for they know not what they do", Luke 23:34. For more than 22 failures of due process – ranging from effecting arrest by bribe, engaging in criminal proceedings after sundown, holding secret trials, reversing the onus of proof, delivering verdicts during the night, reaching a unanimously guilty but thus invalid decision (a decision thus invalidated by law for conspiracy) since it was presumed by law that without conspiracy not all members of the Sanhedrin would agree to a guilty verdict, to the participation of the judges or Sanhedrin members in the arrest process, the charges having originated with the investigating judges, the High Priest rending his robes (legally forbidden: Leviticus 21:10), the lack of two or three independently corroborative witnesses (Deuteronomy 19:15), to the enormity of being tried at least six separate times, in three ecclesiastical and three civil trials for the same purported offence see Dr Arnold Fruchtenbaum, Ariel Ministries; and also David K Breed *The Trial of Christ* (Wilder Pub, 1948, 2008) 51-61.

implement, provoke a repulsive reaction by which a resurgence of earlier cultural values rejects these transplants. Nevertheless, as demonstrated by both the Socratic and Christian phenomena, the known legal process for conserving traditional legal values comes off usually badly in the long run when faced with the desire or need to radically change those values. And perhaps this is more especially the case in the context of what has been for long accepted and continuously regarded by the previous Soviet Union as being for itself – and so why not also for its successor – likewise a revolutionary regime.

As long as a suitable level of need or desire for legal change persists, there is enough cultural sustenance to support and succour the transplants. For the moment, however, what was first promoted as being revolutionary in the new Constitution has settled back, encapsulated within formal rather function-promoting legal language, to be given at least a cultural if not also a jurisprudential breathing space, before any further revolutionary onslaught can make any more functional advance. In the context of this intellectual breathing space, the indications, however in themselves contingent on the present changing context, suggest a regressive slipping back, sometimes into the old Soviet way of looking at law, and at other times substituting anomie for capitalism in its exchange for communism.

This, then, is one view, and perhaps only one facet of Putin's dictatorship of law, a political dictatorship as it has always been in Soviet terms, rather than any rule-of-law. We should not blame Vladimir Putin – this is lawyer's logic determined or resolved as much by the pragmatic need for both cultural as well as legal continuity to implant the foreign transplants, as it is by any formalist, fundamentalist, and legalist way of thought. And ultimately the only way of changing the present Slavic process by which to keep the state within any rule-of-law system, is to adopt the Socratic meiotic[54] (which, without contradicting its own principles, can doubtfully be done pro-forma or by direct legislative decree[55]).

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54 As earlier described (above n 51) this self-revelatory educational experience, conducted through a relaxed conversational dialectic, where the individual's hidden understanding of reality is birthed to awareness with the meiotic help of an intellectual midwife (just as Socrates saw himself autobiographically as a teacher in his being the son of a midwife) is the opposite of the didactic, often doctrinaire and dogmatic, and sometimes also stoutly-imposed means of highly programmed, excessively curricularised and one-way-of-looking-at-things state education.

55 Nevertheless, the Yaroslavian acceptance (under Grand Prince Vladimir I) for Kievan Russia of Christianity in 988, by baptism in the Dnieper, was done, under pain of death for every citizen who refused baptism, directly by State decree.

The key or clue to securing any state-of-the-art rule-of-law system is thus culturally constitutional and not just legally constitutional.[56] For this safeguarding of what everywhere is always bound to be any critically balanced rule-of-law system, nothing less will do than to change the whole process of Slavic legal education. Indeed, that has already been proved by the way in which the radical reforms of Gorbachev's era almost immediately overthrew, right out of all working kilter, not just the existing school texts and examining systems, but also, as more embarrassingly unforeseen for teachers and professors, the long-standing dictates and processes of Soviet education.

"*Chto Delat"* – What is to be done? first asked Chernyshevsky before being exiled to Siberia, and then again Lenin, although in both asking and answering this very same question, each answered in their own idiosyncratic yet remarkably syncretic ways.[57] Without any more direct and indigenously developed experience of Aristotelian logic (as this rigorously two-valued Parmenidean-inspired,[58] Protagorean-based[59] and Pythagorean-developed[60] thought system came to the

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56 This may be seen to be the secret of the hitherto unwritten and so therefore culturally reliant English constitution (notoriously frayed around the culturally deviant Welsh, Scots, and Irish edges) when contrasted with the dangers of the USA or any other written constitution, where the legislatively codified constitution, especially when exacerbated by judicial forays of radical interpretation, takes the legal constitutional mode beyond or outside of the acceptable cultural mode needed to underpin the legal constitution.

57 In 1862 – ten years after Harriet Beecher-Stowe's novel of *Uncle Tom's Cabin* had begun the end of slavery and to ruin the Southern aristocracy in the USA – Nikolai Gavrilovich Chernyshevskii had been sentenced to life imprisonment for his revolutionary writings, some of which are held to have brought about the emancipation of the serfs (and the ruin of the Russian aristocracy) in 1861, after which, while in prison, and before being exiled with a sentence of hard labour to Siberia in 1864, he wrote the celebrated novel *What is to be Done? Tales About New People*, which, when smuggled out of the Peter and Paul Fortress in St Petersburg and published in 1864 immediately became the standard literary text on social and political freedom – as much for young women ruled by overbearing families as for poor peasants and radical socialists. Lenin, who carried the novel into European exile, traded on this same, and by then classic title for his political pamphlet – held to bring about the Bolshevist-Menshevist split – first introduced in *Iskra* (The Spark) No 4 (May 1901). Significantly for the issues of text and context investigated by the present paper, the translator Lars Lih in his *Lenin Rediscovered: What is to be Done? In Context* (Brill Academic, Leiden, 2005) argues that Lenin's work, because of falsely translating *stikhinyi* as "spontaneity", *konspiratsiia* as "conspiracy", *tred-unionizm* as "trade-unionism", and *revoliutsioner po professii* as "professional revolutionary" has been always deeply distorted and widely misunderstood.

58 Among the pre-Socratic philosophers, Heraclitus of Ephesus, Parmenides of Elea, and Pythagoras of Samos, each made their own input into the cosmological concept of conflicting opposites, without which concept Aristotelian logic would be defunct.

59 This cosmological idea of a conflict of opposites eventually became so all-consuming, as between subject and predicate in the process of predication, definition *per genus et differentiam* in categorisation, and eventually through the elaboration of Aristotelian logic and its twentieth-century expansion into mathematical logic by the atheistic Russell at the expense of his mystical

West through the renaissance of classical learning where it would be still further developed through centuries of medieval scholasticism) the prevailing Slavic answer to this and any similar question will always be, until faced with some insurmountable crisis, the fuzzy logic of *nichevo*[61] Yet possibly with resulting hindsight of this learning, if not foresight for its absence, the Russian legal system in turn will change, whether with or without an explicit Bill of Rights,[62] to embrace a more open rights-oriented and rights-responsible-outlook.[63]

Since this cultural as well as jurisprudential outlook entails a radical revolution in legal logic, legal linguistics, and legislative expression, the lost Cold War for the former Soviet Union could turn out to be a cultural campaign won by the new Russian Federation. Paradoxically, since for what the USA has crowed over as being the Cold War won by the USA and lost by the former Soviet Union, events may turn out differently for the Russian Federation through ongoing educational and jurisprudential change. As memorialised for both East and West not only by

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but now almost forgotten colleague Whitehead (with their celebrated *Principia Mathematica*, 1910) that the equation of man with method revived again the maxim of Protagoras of Abdera (ca 490-420 BC) to the effect that "Man is the measure of all things: of things which are, that they are, and of things which are not, that they are not". This now resurrected idea, of man being his own self-measure, although thought to be heretically radical in its own most ancient of times, is once again explicitly claimed (although as by Erich Kahler disconcertingly unsourced in his *Man the Measure: A New Approach to History* (Meridian, Cleveland, 1943)) to be innovatively radical for our own time.

60 The underlying but all-encompassing issue, now again gone underground and remaining hidden from even Western culture, but directly and more explicitly affecting every discipline from theology to politics through language, logic, and law, is that of the One and the Many: see N J Jamieson "The One and the Many" (1984) 5 Otago Law Review 664.

61 Far-Eastern culture has the equivalent, as in Japan, of *mokusatsu*.

62 Sadly productive of much ongoing dispute, Bills of Rights are baldly declarative, and very rarely explicative and expositional, thus exposing the great degree of their generality and abstraction, especially in relation to declarations of freedom – freedom of speech and freedom of religion – and rights – as to education or to employment or to health care – to vastly different and conflicting evaluations. The same disputatiousness, if not also authoritarian impost, obviously afflicts doctrinal issues of what constitutes a baldly declared but never before experienced rule-of-law state. The outcome for baldly declarative Bills of Rights is therefore bleak; and, borrowing from Lord Beaverbrook's adage by which "Men say they can accept the Gospels if the Miracles are removed from the text" (*The Divine Propagandist*, 1962, Heinemann, 48) so likewise we may claim to "accept [Bills of Right] if the Miracles are removed from the text".

63 A rights-responsible-outlook, so-called because, under the Kokourek-Hohfeldian scheme of jural relations, extended as it may be from private to public, and from individual to civic or societal relationships, the rights or claims expressed both descriptively and prescriptively under this scheme of jural relations require from others correlative duties or responsibilities, just as privileges, powers, and immunities require for their exercise equivalently correlative responsibilities to be recognised and fulfilled by others. See Nigel Jamieson "A Legal Logic for Public and Private Rights" (2003) 10 Otago Law Review 371.

Tolstoy's *War and Peace* but also by histories of both the earlier Mongol, and later Fascist invasions, Holy Mother Russia has a remarkable if not indeed miraculous history of reasserting herself as an instrument of saving grace. Losing the Cold War, should that be the case, may well be the clue to winning the ultimate campaign. Indeed, much of the presently failing Russian Constitution, not to mention financial, commercial, and banking legislation introduced to Russia while already at its Western breaking point, emanates from our faulty and short-sighted Western understanding.[64]

This professional failure shows up most in the legal processes of federation, codification, and in the drawing up and sequential incorporation of constitutions. Thus a constitution first emanating from, although still encapsulating a prior revolutionary context, may be obliged, after a series of radical reforms, to revert to its first forcibly entrenched and revolutionary outlook. This inability to retract from its origins, and from the consequences of those origins as demonstrated by its history might be termed the bitter-root expectancy of the Russian Constitution. As Yakovlev writes of the Russian presidency, for example, he describes the roots of this presidency to remain hidden in the late Soviet period. So, too, leadership that continues to be permeated with *vlast* or khanate power rather than responsibility derived from *spravyedlivost* or conscience gives rise to very different results than one might think in misconceiving this to be congruent with the rule-of-law.

These bitter roots of *vlastiye* or khanate power (occurring some 65 times in the new Constitution) instead of *avtorityet* (and of a continuing self-satisfaction with *iustitiia* by way of jural administration rather than the more heart-felt *spravyedlivost* for justice) continue to surface all too readily in Russian jurisprudence. *Polnovlastiye* whether encapsulated in the slogan of all power to the soviets or to the party or to the presidency will keep on sending up wilding shoots for as long as the bitter-root remains viable.

We may, without the slightest intention of being cynical, refer to this as the bitter-roots theory of Soviet law. The Western rule-of-law concept will simply not work within this limited linguistic and often brutally simplistic context. There is a need in Russian jurisprudence for a deeper, less sloganistic, yet wider experience of how law can work when given the appropriate cultural context.

It has been said that "nothing demonstrates the resulting room for political manoeuvrability more than the history of the successive constitutions – from 1918,

64 Since shown up, surely, by the financial meltdown throughout the West.

1925, 1937, to 1978 – of the former Russian Soviet Federal Socialist Republic",[65] but it could just as easily be said (and justified) that either despite or because of this room for political manoeuvrability, there has been a constant resurgence of the same primeval legal values – principally that of *samodyerzhaviye* or absolute power in place of conscience-derived responsibility.

This *samodyerzhaviye* or absolute power would be identified with the privilege of *rukovodstvo* or leadership. This issue of *rukovodstvo* or leadership would continue to perplex the Russian nation, whether or not recognised as the cult of personality, throughout continuing constitutions. Thus, in terms of psycholinguistics, and probably also personal speech profiles,[66] the Constitutions of 1918, 1925, 1937, 1978, no less than that of 1993, can be identified as those respectively of Lenin, Stalin, Brezhnev, and Gorbachev (with Khrushchev's reformist profile portrayed in Brezhnev's 1978 Constitution.

Despite all constitutional proclamations of *demokratzia*, this same concept of *demokratzia* had no less perplexed and preoccupied those drafting the 1918 and successive constitutions than it did the drafters of the current reconstituted Russian Constitution. There always had been a so-called "democracy deficit" – although one way of squaring the Soviet circle was to preface every jurisprudential concept, from legality through statehood and federalism to democracy itself, with the self-referential epithet of "socialist". Thus the fuzzy logic of "socialist legality", "socialist statehood", "socialist federalism", and even "socialist democracy" was used to fudge, among many other deficits, both the "legality deficit" and the "democracy deficit".

In consequence of all these diverse and constantly accumulating deficits which would be kept shrouded from public awareness by the buzzword of the adjectival "socialist" administered through a public relations system of psycholinguistic abuse, it would be the much-vaunted concept of "socialism" that would eventually fall victim to this process of psycholinguistic but by then deeply entrenched sociolinguistic defalcation. We can witness, on this account, the fast, fierce, and furious acceptance of "capitalism" that so swiftly and impulsively superseded

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65 Nigel J Jamieson & Alexander Trapeznik "A Legislative (Logico-Linguistic) Analysis of the Common Law Components of the Russian Constitution" (2007) 16 Transnational Law & Contemporary Problems 431-489, 437.

66 The new Constitution was not created as "a stage prop": L I Brezhnev, On the Draft Constitution (Fundamental Law) of the Union of Soviet Socialist Republics and the Results of the Nationwide Discussion of the Draft, (Novosti, Moscow, 1977) 29; and "as we were working on the draft, we stood firmly on the ground of continuity": Leonid Brezhnev speaking to the Plenary Meeting of the CPSU Central Committee, May 1977. See, too, for Brezhnev's commentaries on the 1978 Constitution, Osnovnoi Zakon SSSR (Progress, Moscow, 1978).

"socialism" in both the last days of the Soviet and early days of the former Soviet Union. Ultimately, it would, and need take no more than the consequences of this sociolinguistic abuse engendered over several generations on behalf of the merely mythic yet strongly adjectival "socialist", to explain the downfall – as happened on almost all the "socialist" fronts of "socialist democracy", "socialist legality", "socialist federalism", and "socialist statehood" that could no longer sustain the Soviet Union – of the entire Union of Soviet Socialist Republics.

To other than the dedicated linguist, this may seem a preposterously climactic conclusion to no more than a verbally trivial (however poetically ironic and paradoxically intriguing) set of premises whereby in return for its own strongly entrenched sociolinguistic abuse the Soviet Union finally engineered its own downfall. Through what the Soviet Union masqueraded of its own "socialist" identity on almost every possible level of legality by way of indoctrinated word of mouth, writing, and publication, we ultimately have an instance, not of "publish or perish", as the old academic slogan goes, but rather in reverse, of perishing by what we publish. This self-referential, self-justificatory, yet, in the end self-annihilating Soviet outcome rapidly devolved into one that, as a matter of both logic and linguistics, would be treacherous for, if not also treasonable towards both socialism and communism.

The lesson remains, and this none the less viable for democracy and the rule of law. Because the currently reconstituted Russian Constitution (like any written constitution) still pivots on linguistic issues, and this especially for the Russian Constitution's avowed "democratic, federal, rule-of-law state", it becomes critical for that selfsame "democratic, federal, rule-of-law state" to discern and learn from the historic lesson of the Soviet Union's downfall, the moral by which comparative and constitutional lawyers still need carefully to monitor the prevailing sociolinguistic lesson built into each and every proclamation of the law both written and spoken.

The resulting general and as often constitutional psycho-logistics (as often as not expressed at a thought-to-be lower psycholinguistic level) of establishing and maintaining continuity in the Soviet Union, no less than in any other – but more especially revolutionary – legal system, expresses itself in a strongly sequential equation. Thoughts lead to words, words lead to actions, and actions can lead to conflict unless regulated by rules of law but never, at least in any democracy, by thought-police, by propaganda, nor even by educationally-inculcated political correctness. When the prevailing psycho-logistics are compounded by the often more frictional socio-logistics (expressed as often through the thought-to-be lower level of sociolinguistics) the psycho-logistic equation is established and maintained for the stability of any "democratic, federal, rule-of-law state" by being expressed

sovereignly either in political action, juridical decision-making, governmental administration, or legal documentation. The risk is that by perpetuating the previous psycholinguistic mismanagement of the Soviet Union, without any but the most minimalist separation of powers, absolute power or *samodyerzhaviye* is continuingly dispensed through a "stew pot" or, worse still, through an historic *pot pourri* (or "rotten pot") mixture of undifferentiated and "one size fits all" politically-still-absolute governmental power. For the purposes of ascertaining the conveyed meaning and the most likely operation of the *Konstitutsiia Rossiiskoi Federatsii* of 1993, we shall thus continue to concentrate on the psycholinguistics of the Constitution's legal verbalisation. We cannot do so on all linguistic counts (semantics, syntactics, pragmatics, and stylistics) so we shall be content to examine (most minimally from a semantic viewpoint) only the etymological issues.

There is no end to etymological argument. This is so for at least as long as the record holds to take us as far back into researching the evidence we have for the earliest meaning of signs, symbols, and the meanings of words. The psycholinguistic and as frequently sociolinguistic trail takes us from one language to another, and often from one language grouping to another language grouping. There are risks, among those most blatant (as in the biology of life design) being that of mistaking an analogous for a homologous expression. This occurs in etymology by misattributing a derivatively semiotic or semantic relationship to a purely coincidental (but analogous) conflation of sight or sound. By distinguishing semiotics from semantics (as if there were little but a fortuitous conceptual correlation between signs and meaning, and nothing of more than crossword significance to be gained from tracing either the derivational changes in meaning or the root concepts (and sometimes also the root signs) from which those derivational changes derive, modernists may avoid those risks that arise from implementing either overly conjectural or overly prescriptive etymologies. Nevertheless, although today's diminished status of etymology tempts moderns, who profess dictionaries to be of only descriptive but not prescriptive usage, to discard any prescriptive forcefulness (neither earlier over later nor later over earlier) to be accorded any changes in the genealogy for both words and their meanings, moderns rarely practise what they preach.[67] Accordingly, the paradox of non-prescriptive linguistic usage presents itself by which linguistic pragmatics (linguistics in practice) contradicts current linguistic theory by asserting the prescriptively positivist force

67 From a fun game of scrabble through the formally academic thesis to the law case that decides on the dictionary meaning of a word after consulting that dictionary, we all prescribe authority to the Oxford or other dictionary of merely current usage, even although, professing itself to be compiled descriptively on the basis of current usage, the dictionary denies all prescriptive forcefulness for its own compilation.

to be attached to current linguistic usage. Positivism, whether linguistic or legal, thus turns out to be its own most self-prescriptive force, whether in law or language, by hoodwinking itself into substituting its own self-made *ought* for what merely *is*.

For any stoutly semiotic as well as semantic linguistic system such as the Russian where the etymological tracking through conceptual word-building or *slovoobrazovaniye*[68] remains not only clearly self-evident and current but also inherently ensconced in the linguistic user's self-awareness, it is much harder to deny the prescriptive forcefulness of the etymological lineage of words or to deny the way in which tracing and keeping alive that etymological lineage was not just a scholastic preoccupation of our forefathers in any language, but also both a real means of keeping linguistic stability through an authorised and ongoing code of established usage as well as a means also of maintaining a consistently steady core of meaning by which to assert, both unambiguously as well as prescriptively, all courteous, good-mannerly, accustomed, conventional, moral, political, legal, and religious rules and precepts. Of course, as we shall see from a comparative review of the original Russian and English translations of the Russian Constitution, there are other revelational advantages by which to avoid, through translation theory, mistaking one formal concept for what appears to be its functional equivalent in another language.

An earlier work of the present writer refers to the way in which some of the concepts by which *Sovyetskii* (literally meaning 'counselled or advised on'), together with *Obychnoye* (literally meaning 'customary') may give a higher semantic profile to *Soviet* in East-European circles, and, as seen certainly by the Soviets for *Obychnoye* a lower semantic profile to *Common* (as in the Common Law) in Western, particularly Anglo-American circles.[69] By way of a resultant legal paradox (at odds with both the higher semantic profile given to *Sovietskii* and the lower semantic profile given to *obychnoye* in Soviet circles) is the very root concept of *obshchina,* standing for the collective community from which the Common Law emanates. As everyone knows, the fundamentally self-evident and axiomatic concept of the collective community or *obshchina* figures forcefully in the scale of Russian popular, and in consequence, politically proletarian values.[70]

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68 See the two-volumed, 1739 paged Dictionary of Word-Building in the Russian Language (AN Tihonov, Slovobrazobatel'niyi Slovar' Russkovo Yazyika: v 2 t, 2-e izd, (Russkoye Yazyik, Moscow, 1990).

69 Nigel Jamieson "Source and Target-Oriented Comparative Law" (1996) XLIV American Journal of Comparative Law 121-129.

70 A Yakovlev *Striving for Law in a Lawless Land: Memoirs of a Russian Reformer* (1996) 24.

Likewise, a more meticulous source-oriented translation than is given in that earlier enquiry might care to unravel the related concepts of court or fate inherent in *sud*, or the closer conceptual affinity between *duma* and *witan* than with any parliament or dialectical talking-shop. So too one needs be cautioned against conflating apparently homologous, rather than distinguishing between analogous concepts. It is all too easy to equate *demokratsia* conceptually with *democracy* and *partiya* conceptually with *party*. Similar cautions are required for the apparent but unreal homologues of class and *klac* and republican with *respublikanskii*.

The class theory of law versus dialectic materialism[71] promotes huge disparities of social and economic outlook – and, in turn, hugely different world-views which are encrypted, incorporated into, and encapsulated within the respective semiotics of apparently similar signs. Allowing for, and overlooking the typographical barrier, these hugely different world-views may be apparently conveyed by exactly the same signs. Orally, of course, which is the medium (short of blows) in which most folks vehemently disagree, party and *partiya*, democracy and *demokratsia* are tantamount to making the same sound. Nevertheless, Yakovlev[72] has since taken the inherently different semantic basis of such words extremely seriously in his accounting for the debates over the drafting, and thereby the likely prognosis for fulfilment of the Russian Constitution.

Chelovyek, for example, possesses both a far deeper etymology as well as a far wider semantic latitude in Russian than does "person" in English. *Chelovek* incorporates the concept of not just person (the plural for which in Russian is *lyudyi* or people), but also that concept which would be rendered in English as *man* or *human*. This may make for a certain equivocality, although as pointed out by Finer, Bogdanor, Rudden[73] the "rights and freedoms of man and of citizen (*prav i svobod cheloveka i grashdanina*) echo the 1789 French Declaration for what we might now distinguish between civil rights and human rights.

In any event, the Russian *chelovyek* (as distinct from the English *man* or the German *Mensch*) is notable for its inbuilt semantic sensitivity. This is achieved through the process of conceptual word-building (*slovoobrazovaniye*), since *chelovek* is compounded from the elements *chelo* for forehead and *vek* for century, age, or lifetime. This arguably endows *chelovek* with a greater built-in semantic affinity for the evolution of humanity than the Germanic *Mensch* or English *man*. For person in Russian, there is also the word *litzo,* which is used three or four times

71 Ibid, 17.

72 Ibid, 9-25.

73 Ibid, 250.

in the Constitution (mostly on lesser or distanced occasions – *litza byes grashdanstva*[74] – or else in more trivial contexts). More frequently, but with perhaps less excuse for its casual informality in the context of declaring and acknowledging fundamental rights and freedoms – and on this point of over-colloquialism some may feel the need to correct this suggestion – the adjective *kashdyii* is used elliptically for everyone.

We have already looked at *rukovodstvo* in relation to *samoderzhavie* or absolute power, and *spravedlivost* or conscience. Now, in terms of the reconstituted constitution all (or *kashdyii*) are called to reconsider *rukovodstvo* in relation to Russia's rather new concept of *prezidentstvo*.

What exactly is meant by *rukovodstvo* or leadership in Russian culture, in all its truncated and telescoped development (perhaps in itself a axiological palimpsest of different and overlapping if not inconsistent values rather than a strongly sequentially told myth) is as unique to Slavic society when personified in its folklore of heroes (poets as well as peasants and martyrs as well as warriors) as the concept of leadership is uniquely personified in the different folklore of the West. For Russia, as late as the twentieth century, it took the Soviet Union to turn a rural peasantry, still subject to a feudal and largely medieval way of life, into a highly urbanised and technological society. The root *ruka*, meaning hand conveys a practical connotation expressing the guidance of a manual team leader who, to use an English phrase, will give or lend you a hand, or from the Greek directly into Russian the *gubyernator* or steersman who is meant to have his hand on the helm.

As to what *prezident* or by *prezidentstvoi* means to Russians after a near-century of Soviet rule is hard to say. The totem or titular concept of presidency is so artificial if not alien to the Slavic mind and culture (perhaps also to the New Zealand mind and culture) that its use, as of many other only vaguely understood Western terms (including that of premier – which poses the question of deciding premier of what?) – is vacuously frightening in terms of waiting to be filled – and once again by what?

It will be recalled that a return to monarchy was one of the many alternatives debated on the collapse of communism. To be without a monarch – meaning monarchy (not as royalty) but in its essentially Greek concept of one single ruler – is scary to those who have become accustomed to being ruled and led by someone appointed to rule and lead. To lose or be without a monarch conveys the existence of a gubernatorial vacuum in the ship of state – a helm without a helmsman – that is at grave risk of being taken and held by whom we know not. The risk is that

74 "Stateless Persons": Art 62.3.

some totally reverse concept, or some process of complete reversion – of which the debated return to Russian Imperial Royalty is one example – takes place either sooner or later at the expense of ongoing development in self-government. In the Russian case, the risk is that this continuing concept of monarchy would resurface from the most recent and Soviet experience of *samodyerzhaviye* or absolute power. As Yakovlev writes, "the roots of the presidency are hidden in the late Soviet period."

So, too, *vlast*, although most often formally translated into English as power, and so translated because of *vlast* being thought of to be the functionally equivalent of 'power' in any AngloAmerican politico-legal context, really stands for forcefulness – and often as much for 'forcefulness' in the physical as in any other sense. Take, for example, the old fashioned if not obsolete and serf-like expression in Russian of *vasha vlast* – meaning "just as you like, as you would decide, it being your business". This makes our shock at Communist exercise of *vlast* as *naïf* when identified with politico-legal power; and this simply because, as distinct from *avtorityet*, Russian power (with authority as so derived) is more strongly identified than it is in the West with forcefulness.

Then, following on from that basic etymological root, take the issues of *polnovlastiye* and *dvoyevlastiye*, for example – since each, and with others, are constituent subjects of *verkhovnaya vlast* or state sovereignty. From 1917 to 2000, and despite the legal fiction of state legality, the Soviet State had been merely a legal fiction – a political cover-up for the *verkhovnaya vlast* of the Communist Party.[75] In the context of its troubled constitutional history – since 1917, almost a century in which the might of the Party had been administered as of right – Western concepts of legality and sovereignty, not to mention federalism, and even of the state itself, would be, to say the least, indecipherable. By the increasing liberalisation achieved by the many politico-legal changes of the "reform socialism" from 1987 to 1989, however, the Party's policy-making power would be transferred to a restructured legislature, yet concepts of legality, sovereignty, federalism and statehood would go on troubling the reformers of, and apologists for the re-born Russia.

One institutional task of the new Congress of People's Deputies, born of this "reform socialism" – a new brand of "socialist legality" for the late nineteen-eighties – was to elect a new Supreme Soviet. By the same "reform socialism" the Presidency was transformed from a symbolic office to that of a full-powered Chief

75 Cf Kon, Preamble: Renewing the sovereign statehood of Russia …

Executive[76] thus achieving democratisation from above. The West marvelled at Gorbachev's strong-arm audacity to pit his newfound presidential strength[77] against the long entrenched might of the Communist Party. Added to the old jurisprudential problems of defining legality, sovereignty, federalism, and statehood, however, came the new bogeyman of first "presidentialism", and then, later with Putin and Medvedev (and as easily as it could have been with Ivanov instead of Medvedev), "nominee-presidentialism".

Presidential powers were expanded substantially in 1990, giving the President power to issue binding decrees, especially on economic matters. The President also gained the power to suspend the Congress of People's Deputies, and to declare "presidential rule", a form of martial law. Not even the catch cry of "all-power (*polnovlastie)* to the soviets" which Gorbachev had resurrected at the Nineteenth Party Conference could disguise the fierceness of the present slide towards – was it medieval absolutism or populist presidentialism? By these measures, the incoming tide of "legal democratisation" for which Gorbachev himself had called at the Nineteenth Party Conference in June 1988 to secure "the supremacy of law" was now ebbing fast. The old khanate bogeyman of *samoderzhavie* which had given rise to Stalinist-styled autocracy again seemed ready to rear its ugly head to deal with the breakdown in republic relations. The rapidly disintegrating political Union of Soviet Socialist Republics now entered into that period of extreme jurisprudential and constitutional conflict illuminatingly known either as the "War of the Laws" or the "War of Decrees".

The new Congress under Gorbachev would act as a full-time parliament. Elected from among members of Congress, this new parliament of 544 members (formerly 1500 members) would have, as before, two chambers: the Union Soviet and the Nationalities Soviet. They would meet for two sessions annually, for up to four months each, instead of, as before, for the two sessions of two days each. Nevertheless, to preserve legal, but more especially political continuity, this newly reformed and restructured legislature for the USSR would be explicitly presented as an historic return of the Congress to its first roots in the 1918 Constitution of the Russian Soviet Federal Socialist Republic.

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76 Gerald M Easter "Preference for Presidentialism: Postcommunist Regime Change in Russia and the NIS (1997) 49 World Politics 184, 191. For further developments under Yeltsin's presidency, and a prognosis for Putin, see Ian Richard Brown, "Clinging to Democracy: Assessing the Russian Legislative-Executive Relationship Under Boris Yeltsin's Constitution" (2000) 33 Vanderbilt Journal of Transnational Law 645.

77 For the roots of this second – the first was Khrushchev's – assault on Stalinization, see Christian Schmidt-Häuer *Gorbachev: The Path to Power* (Pan Books, London, 1986).

This explicit presentation of the continuingly ongoing socialist revolution of 1987-1989, as returning the Congress to the first principle of all-power (*polnovlastiye)* to the soviets expressed by the 1918 Constitution, substantiates the matryoshka-like process of constitutional incorporation and legal encapsulation described by this paper. It is a process, basically of ancestor worship, where the process of honouring earlier stages of evolutionary development and encapsulating them within the current constitution achieves a formal continuity often at the threatened expense of any real change.

Whatever the window-dressing by way of political compromise to ensure legal continuity to be effected by the socialist revolution of 1987-89 might mean, the result would provoke a political paradox with both explosively constitutional and implosively unconstitutional consequences for the Soviet Union. How Gorbachev himself might have seen his attempt at constitutional reform by espousing once again all-power to the soviets might have been as a return (sentimental or otherwise) to pure Leninism.

All law is history, and constitutional history provides its own context for constitutional law. From 1977 to 1988 the Constitution of the USSR had been altered only once, but in 1988 alone, a third of its articles were amended. The perhaps principal change, shifting the locus of power from the Communist Party to reconfigured state bodies, in particular to the Congress of People's Deputies, has already been mentioned. Other amendments included the guarantee of an independent judiciary, a Constitutional Supervision Committee, and expanded rights to judicial review. Further changes between 1989 and 1991 included the establishment of an Executive Presidency, a Constitutional Court, and abolished the monopoly on political power of the Communist Party. Ratification of some new constitution[78] became politically necessary to fill, first the gubernatorial, then progressively the legal vacuum in sovereignty after the collapse of the Soviet Union in 1991.[79]

Turned one way, as Gorbachev intended, the Congress would secure communism for the prevailing USSR, but faced with opposing democratic forces, the key would eventually turn away from the double-standard approach (*dvoyevlastiye*) of the former Union in favour of the new Russian Federation.[80]

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78 Smith, above n 27, 86.

79 Article 11, Agreement on the Creation of a Commonwealth of Independent States.

80 See Yakovlev, above n 70, 101 for a discussion of "the double-standard" approach. Yakovlev was, to quote David M Kotz with Fred Weir (op cit) 54, "perhaps the most influential of Gorbachev's close associates". That citation is enough to move mountains since Gorbachev's close associates included Abel Aganbegyan, Gorbachev's "architect of perestroika", his new

That the key would break in the lock and that the lock would be discarded with the key threatened a return to the summer of 1917. Then the competing councils of the Provisional Government and the Bolsheviks led to the disintegration of law and order (the Bolsheviks seizing State sovereignty by force for the Communist Party and so perpetuating the fiction of State legality through its separation from State sovereignty[81]). Now the threat of disintegration lay in the future, if not already predictable War of Decrees between Parliament and President. For the purposes of this paper we are nevertheless concerned more with the implosive, than the explosive constitutional consequences.

The two-valued logic of *dvoyevlastiye*, a projection perhaps of biological bisymmetry,[82] is more around in both West and East than first thought, perpetuated as it often is between Church and State, Senate and Representatives, and Lords and Commons. So, too, symbolised perhaps by the Byzantine double-headed eagle (looking both East and West), and reincarnated now once more as the national symbol of the new Russian Federation, *dvoyevlastiye* seems destined to go on dealing out difficulties for the government[83] – and this notwithstanding the more monolithic St George defeating the dragon on the same reborn coat of arms. So too, seems to be the case with all past presidents, whether ousted by election or effluxion in Russia or the USA, that they never seem to let go altogether of their presidential power; but instead, however shadowy a figure they maintain of looking back or beyond or ahead, evince, either through their affirmation or contradiction

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Chairman Nikolai Ryzhkov of the Council of Ministers, "the incorruptible Yegor Ligachev" to be Gorbachev's second-in-command of the Politbureau, and the pragmatic new Foreign Minister, Eduard Shevardnadze. Yakovlev, formerly the Soviet Union's Ambassador to Canada and a foremost intellectual, became the Central Committee Secretary in charge of ideological matters. See also Schmidt-Häuer (op cit) 207-209.

81 Cf Kon Preamble: where this constitution is adopted in terms of "Renewing the sovereign statehood of Russia …".

82 The bilateral symmetry which we take for granted of ourselves in being obviously bi-pedalled, twin-armed organisms who are provided mostly with either two separate, or else bilaterally lobed organs, when projected into two-valued logic, predicative linguistics, or two-valued politics (as with *dvoyevlastiye*) is a systemic but embryological reduction of the radial symmetry of some unicellular or of otherwise communal but multicellular organisms projecting the more radial symmetry of proletarian politics or of democratic governance.

83 By Presidential Decree 2050, 30 November 1993. Formerly St George-Pobyednik – ie, St George-Victorious according to Imperial Decree of 1730, questioned at the time by some as now being rather St George Degenerate, or St George At-All or Not-at-All St George? For commentaries, see Flags of the World website.

of, or dissimilation from any present incumbent,[84] the same concept of drawing a juridical comparison, however shadowy, of *dvoyevlastiye*.

Russia is now declared by its Constitution to be a rule-of-law (the phrase is hyphenated) state. The outcome of such hyphenation (worthwhile in giving food for thought) will depend on whether this whole phrase is no more than sloganeering. The hyphens are desirable, but they may not be enough to safeguard what is meant by the rule-of-law, and just how that expression differs conceptually from both rule-by-law and role-of-law. Instead of understanding the role of law to be the rule of law, any and every expression of rule-by-law is all too often misunderstood for being the rule-of-law. The subconscious pun between role and rule, and the differing prepositions of "by", "from", and "of", are rarely explicitly recognised – unless with irony in prison camp speech and criminal argot.[85] The two things *role* and *rule* can thus be hell and heaven apart, but sometimes it is a play-on-words, and at other times a refusal to think through their vastly different concepts, which obscures the difference. As with hyphenating rule-of-law, so too keeping the circumflex in *rôle* may help to highlight the distinction between *rôle* and *rule*.

The conflation of *rôle of law* for *rule of law* is most seriously open to abuse by anti-democratic, autocratic, and totalitarian legal systems. Law is no more immune than any other regime from vanquishing the rule of law. Since perhaps the legal profession is suspect for its expertise in being the more insidiously capable of subverting the rule of law, one is called to ask what constitutes this legal profession, whether one can maintain the rule of law without a legal profession, and how one could set up and nurture such a profession of faith as every legal profession must have in the rule of law without the backing of several centuries of common or civil law development. The legal profession has been defined at every possible level of human endeavour from that of spiritual calling through vocation for service to modern entrepreneurial skills and the possession of business acumen,

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84 The publication of presidential memoirs, either to provide a retirement nest-egg, or in self-justification, or simply for the sake of their own telling, and whether the publication be the two-volumed *Memoirs* of a Harry S Truman (Doubleday, New York, 1955-56), or the two-volumed *Khrushchev Remembers* of a Nikita S Khrushchev (Andre Deutsch, London, 1970-74) conveying "the substance of my viewpoint" as that gossipy, yet delightfully-compelling old windbag (or *boltun*) called it – has become the conventional post-presidential means of demonstrating, first, that institutional loyalty is contingent, and secondly, that the individual, when returned from highest office, is once again the individual.

85 *Zakon – taiga!* (The law is that of the wilderness); *sovyetskii zakon, chto dyishlo: kuda vyernul, tuda u vyishlo* (Soviet law is like a wagon-pole: it can be directed anywhere); Meyer Galler and Harlan Marquess, *Soviet Prison Camp Speech – A Survivor's Glossary* (University of Wisconsin Press, Wisconsin, 1972) 23, 24, 98.

but without any semblance of defined consensus over what constitutes the legal profession of faith in Russia, how possible could it be to institute and uphold the rule of law?[86]

In conclusion, let us recapitulate some of the findings previously made to substantiate the risks of returning to a Soviet jurisprudence.[87] We could begin by emphasising certain elements of commonality of several key concepts in both legal systems. The Russian word *zakonodatelstvo*, like its corresponding English word *legislation*, literally means *lawgiving*. Both languages are, after all, Indo-European in origin. The Slavic roots *zakon* – a *law*, with *dat – to give*, equate with the Latin roots *legis – laws*, and *(fero) latum - to bring or to bear*. The respective etymologies thus demonstrate a common semantic content for each of those words in the Russian and English languages.

At the same time as demonstrating this degree of linguistic commonality it must nevertheless be recognised that *zakon* is not the only Russian word for law, although as with *zakonodatelstvo* or legislation*, zakon* also prefixes *zakonost* or legality. *Pravo*, with the same root as *pravda* for truth, secures a more prominent place in any general word count.[88] Likewise in terms of indigenous word-building (*slovoobrazovaniye*) throughout the Russian language, *pravo* has more of both analogues (*pravo=recht=right*) and homologues (*pravoslaviye=orthodox*) than those derived from *zakon (eg zakonodatelstvo=legislation)*. Such conclusions as these can be drawn from and demonstrated by any standard word-building dictionary.[89]

Likewise, the same commonality between both legal systems is demonstrated by the distinction between *pravo* (being the older word) and *zakon* tends to reflect the distinction between the customary *volkgeist* and the declared official directive, between the implicitly understood legal mores[90] and the explicitly proclaimed

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86 See Donald D Barry and Harold J Berman "The Soviet Legal Profession" (1968) 82 Harvard LR 1; Dina Kaminskaya *Final Judgement: My Life as a Soviet Defence Lawyer* (Harvill Press, London, 1983); Olympiad S Ioffe and Peter B Maggs *Soviet Law in Theory and Practice* (Oceana, London, 1983); and B I Lifshitz, *Slovo Advokatu* (Yuridicheskaya literature, Moskva, 1990).

87 Nigel J Jamieson and Alexander Trapeznik "A Legislative (Logico-Linguistic) Analysis of the Common Law Components of the Russian Constitution" (2007) 16 Transnational Law & Contemporary Problems 431-489.

88 See E Steinfeldt *Russian Word Count* (Progress Publishers, Moscow, 1962) where *pravo* (in its nominal form) has a frequency-count of 104, as opposed to *zakon* which has a count of 57.

89 AN Tihonov, Slovobrazobatel'niyi Slovar' Russkovo Yazyika: v 2 t, 2-e izd, (Russkoye Yazyik, Moscow, 1990); pravo – 130 entries, zakon – 75 entries.

90 *Russkaya Pravda*, being the compilation of customs by Yaroslav the Wise in 1016. Note the conflation *pravo/pravda* of law with truth.

dictate, between the incorporeal common law and the concrete codes of canon and civil law,[91] between the purposive sense and the literal word, and between the oral (and thus also situational, personal, and often oracular) utterance with the time-fixed and rigorously documented written word.

To the disastrous disadvantage of the legal system, Soviet law never lost its medieval, far less mongoloid character of customary law – which is one explanation, perhaps, why countless soviet legal and political dictionaries have mockingly misunderstood the same characteristic of common law systems. Indeed, according to the matryoshka-like process of incorporation, law has been encrypted by both language and logic as well as by both law and politics, into the Russian Constitution. The concept of state law rendered by g*osudarstvennoye pravo* thus offers some considerable customary latitude and room for less legal and more social and political manoeuvring. This latitude is rendered none the less by fundamentally differing concepts of what constitutes the *gosudarstvo* for which we might all too readily translate the State.[92]

Yakovlev[93] makes much of the distinction, as it may provoke problems for Slavic jurisprudence, between *pravda (nomos* – or normative truth*)* and *istina (physis* – or scientific truth*)*. So, too, in the West, we have similar deep and sometimes violently volcanic arguments between different schools of jurisprudence – as between the science of law, or the morality of law, or just the practical art of lawyering. In many ways these scholastic problems will be amplified for systems of jurisprudence (such as those originating in or conforming to common law) in which any science of law is seen to be no more than a figure of speech. The issue can be couched in terms of the perennial conflict between *lex* and *jus*, or as between *juris-scientia* as distinct from *juris-prudentia*. In one, and perhaps its essentially religiously original sense, *pravo* (or law) in its relation to *pravda* (or truth) has far fewer problems (although not for an avowedly secular state (Article 14.1).

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91 Apart from the exposure (more fearsome than reassuring) of the Russ to the *Great Yasa* of Ghengis Khan, it was the Yaroslavian reception of Christianity in 988 which, through the canon law of the Orthodox Church from Byzantium, came the notion of a written, and thus ascertained, as well as being instrumentally ascertainable law. Even though the early reception of Roman law through the Kormchaya kniga, the *Zakon sudnyi lyudem,* and the *Knigu zakonnaya* would be merely second or third-hand, the identification of written and particularly codified laws with *zakonchenost'* (completeness) would enhance the scriptural sophistication of the *zakonik* (literate lawyer) as against the illiterate soothsayer of the *obyichnoye pravo* or common law.

92 Yakovlev, above n 70, 14, 18, 64-97. See also the concepts of *Federatsiya* (Federation) or *Soyus* (Confederation).

93 Above n 70, 62.

Nevertheless, a similar distinction to that between nomos and physis needs be drawn[94] – especially in any culture which has escaped the trial of individual conscience from exposure to the Protestant Reformation – between what we have already spoken of as *spravyedlivost* and *iustitiia (justitia)*. These are two concepts of justice – the first personal and subjective, the second public and collective – which can quickly open out into conflict. In Russia, whole oceans of conflict can suddenly open up between *spravyedlivost* (justice, as we know it) and *iustitiia (*the administration of law). Likewise, the same distinction between inner and outer (individual and collective) conscience can give rise, as a result of law versus conscience, to the growth of a third, easily conformable, but patently false conscience (of which a "seared conscience" or a "compromised conscience" are two examples) by which to reconcile one's personal *spravyedlivost* or inner conscience with *iustitiia*[95] or the administration of law.

Lastly, but perhaps the most important of all the general semantic differences we chose to mention is that played out by the concept of power itself in Russian jurisprudence. We have already treated of the deeply historical significance of *samodyerzhaviye* as the concept of absolute rule in the Russian State. Under the Tartar Yoke, desperate remedies called for desperate means; but it should also be remembered that Russians (on pain of death) were ruthlessly baptised into Christianity by their ruler's decree.[96]

There is a similar measure of historical ruthlessness still inherent in the concept of *vlast*. This inherent ruthlessness continues to permeate the legal consciousness of Russian leadership. The result differs from that of being held responsible for leadership and adjudged by conscience (*spravedlivost*). Several variants of *vlast* as they make up the related concepts of *narodovlastiye, dvoyevlastiye*, and *polnovlastiye* have already been referred to in this short paper. Almost every expression of *vlast* poses problems for democracy.[97]

The word *vlast* for power unsurprisingly occurs some 65 times in the 1993 Constitution. Of all the constitutional relationships dealt with in this document, that of power (*vlast*) as against right (*pravo*) or freedom (*svoboda*) is the most prevalent. A detailed lexical comparison is still in the making; but of this total of 65 usages of *vlast* as power, *gosudarstvyennaya vlast* (or state power) occurs some

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94 Yakovlev, above n 70, 10-11.

95 Ibid, 12, 15, 17.

96 Vladimir I of Kiev, AD 987.

97 See Francis H Foster "Information and the Problem of Democracy: The Russian Experience" (1996) 44 American Journal of Comparative Law 243.

50 times. Executive power (*ispolnityelnnaya vlast)* occurs only 12 times. Legislative power (*zakonodatyelstvennaya vlast)* is mentioned only twice. Judicial power (*sudnyie vlast*) occurs only once. So, may we presume that executive power is six times more relied on than legislative power and twelve times more than judicial power. *Avtorityet* is not mentioned at all, either explicitly in word or concept.

By reason of their cultural history, Russians find it very hard to distinguish *vlast*[98] from *avtorityet* (*auctoritas)* and to keep both respective concepts within their proper provinces short of *samodyerzhaviye* – self-determination or absolute rule. As noted earlier, Yakovlev[99] writes, "*Vlast* fosters compulsion, *avtorityet* agreement." In the context of their long-continued medieval history of *samodyerzhaviye* or absolute rule, the new Constitution's overwhelming recourse to defining so many relationships in terms of *gosudarskaya vlast* or State power – the easy way out in terms of existing conventions – puts the future at risk in its falling back into the old familiar medieval rut conveyed feudally by the expression of *vasha vlast* – meaning literally "your will be done". Presidentialism – indistinguishable at its worst from the ravages of absolute monarchy or autocracy – often affords only a euphemism for so much else – whereas nominal presidentialism (whether real or apparent) reintroduces *dvoyevlastiye* in place of either titular *polnovlastiye* or real *samodyerzhaviye*, or absolute rule.

How shall we conclude our so very partial investigation into the logico-linguistic and politico-legal attributes of Russia's dynamically changing legislation? First by pointing to the way in which so much jurisprudence and legal thought is encrypted into our choice of both everyday and not-so-everyday language – *zakonnoe* instead of *pravovoe, vlast* instead of *avtorityet*, and this to the confusion of power with both *pravo* (right) and *svoboda* (freedom). As Yakovlev writes,[100] "[*Vlast* fosters compulsion, *avtorityet* agreement". And underlying all exercise of Russian power, especially in any circumstances designated or felt to be critical, slumbers the old khanate bogeyman of *samodyerzhaviye*, or absolute rule.

Secondly, the resulting confusion, "the majestic indeterminacy", as Schauer[101] would call the outcome for legal logic, of compromising and fudging different

98 Yakovlev, above n 70, 11-12; cf *dvoevlastiye,* Smith, above n 27, 91.

99 Ibid.

100 Above n 70, 11-12.

101 Frederick Schauer "Free Speech and the Cultural Contingency of Constitutional Categories" in Michael Rosenfeld (ed) *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* (1994).

views, especially those pertaining to any constitutional crisis, exacts a toll on the exactitude of the intended constitutional change. Thus, as Kahn[102] points out, "conceptual confusion about *pravovoe gosurdarstvo* did not wither away with the proclamation in a new constitution of the existence of a new 'federal, democratic, rule-of-law state'." Within ten years of the Soviet Union's collapse, the new Russian President Vladimir Putin would proclaim a 'dictatorship of law' to restore and legitimate federal power.

Thirdly, and finally, there is the context of pragmatic experience, as distinct from jurisprudential theory and idealistic aspiration, which, together with the weight of legal history and the forcefulness of long established ways of thought, all motivate towards the re-incorporation and continued encryption of previous contexts. Thus the United States, notwithstanding the forcefulness of its pre-bellum debate over establishing some new system of jurisprudence, quickly reverted to long-established conventions of the English Common Law. What we have by way of any legal system is often a palimpsest of differing, incongruent, and often-conflicting provisions that spring up, die down, and may either nurture or suffocate law's autochthonous root. Within any legal system, it is this palimpsest of current provisions that provokes the fiercest and most forceful of politico-legal as well as logico-linguistic arguments over the autochthony of law.

102 Jeffrey Kahn *Federalism, Democratization, and the Rule of Law in Russia* (Oxford University Press, Oxford, 2002) 57.