Law and the Christian Tradition in Modern Russia

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Contents

Introduction

A Russian conception of legal consciousness

Randall A. Poole

Harold J. Berman (1918–2007) was the intellectual architect of the modern field of law and religion.[1] In 1985, he moved to Emory University from Harvard, where he had taught for thirty-seven years. At Emory he was the Robert W. Woodruff Professor of Law and senior fellow at the Center for the Study of Law and Religion, the sponsor of this book. Berman was also one of the great scholars of Russian law. In *Justice in the U.S.S.R.*, he wrote: "Law is a monument of history, constructed over many centuries.... Law is more than rules; it is the legal profession, the law schools, the technique and tradition of judging, administering, and legislating. Law is also the sense of law, the law-consciousness, of the people."[2] Here he identified the research area in which his contributions would be most renowned: legal consciousness in its historical development. One of his sources for this concept was the Polish-Russian legal theorist Leon Petrażycki (1867–1931), who advanced a psychological theory of legal consciousness against legal positivism.[3] Berman took a broad approach to understanding law as a psychological phenomenon, "rooted in the intellectual, emotional, and spiritual life of the people of a community." He adopted Petrażycki's terminology

1 John Witte Jr., "The Integrative Christian Jurisprudence of Harold J. Berman," in *Great Christian Jurists in American History*, ed. Daniel L. Dreisbach and Mark David Hall (Cambridge: Cambridge University Press, 2019), 230–44.

2 Harold J. Berman, *Justice in the U.S.S.R.: An Interpretation of Soviet Law*, rev. ed. (Cambridge, MA: Harvard University Press, 1963), 187.

3 Berman, *Justice in the U.S.S.R.*, 279, 420n3. On Petrażycki, see Andrzej Walicki, *Legal Philosophies of Russian Liberalism* (Oxford: Oxford University Press, 1987), ch. 4. *Legal Philosophies of Russian Liberalism*, a work of profound analysis, interpretation, and insight by an eminent historian of ideas, has served as a source of great inspiration for the editors and contributors to the present volume. (Walicki died on August 20, 2020, as this book was nearing completion.) It includes chapters on three Russian philosophers who are also subjects of our book: Boris Chicherin, Vladimir Soloviev, and Pavel Novgorodtsev. In addition to Petrażycki, the two other legal thinkers whom Walicki treats at length in his book are Bogdan Kistiakovskii and Sergius Hessen. Other jurists belonging to the "golden age of Russian legal philosophy" (the period between the Judicial Reform of 1864 and the Russian Revolution), as William Pomeranz calls it, include Nikolai Korkunov, Sergei Muromtsev, and F. F. Martens. See William E. Pomeranz, *Law and the Russian State: Russia's Legal Evolution from Peter the Great to Vladimir Putin* (London: Bloomsbury Academic, 2019), 52–55.

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of "legal emotions" (sentiments, intuitions), which are related to but distinct from moral sentiments, in order to make clear that a robust legal consciousness involves more than an intellectual commitment.[4] It involves "man's whole being" or, in short, faith.[5]

According to Berman, religion and law share four elements: ritual, tradition, authority, and universality.[6] These four elements "symbolize man's effort to reach out to a truth beyond himself."

> They thus connect the legal order of any given society to that society's beliefs in an ultimate, transcendent reality. At the same time, these four elements give sanctity to legal values and thereby reinforce people's legal emotions: the sense of rights and duties, the claim to an impartial hearing, the aversion to inconsistency in the application of rules, the desire for equality of treatment, the very feeling of fidelity to law and its correlative, the abhorrence of illegality. Such emotions, which are an indispensable foundation of every legal order, cannot obtain sufficient nourishment from a purely utilitarian ethic. They require the sustenance of a belief in their inherent and ultimate rightness.[7]

The fourth common element, universality, is "the claim to embody universally valid concepts or insights which symbolize the law's connection with an all-embracing truth."[8] This element suggests a connection with the theory of natural law, which has had very different meanings over the centuries, but which has tended toward normative identification with the very principle of justice and with the morality inherent in the idea of law. Possibly natural law might stand on its own, or rather on the grounds of morality and reason alone, without religious sanction. Berman noted that in fact this ambition to autonomy was characteristic of modern natural-law theory. But he was skeptical. More viable, he thought, was a legal consciousness in which law "as man's sense of the just" drew on religion "as man's sense of the holy."[9]

A very similar conception of legal consciousness was advanced by the Russian legal philosophers featured in the present volume. Legal consciousness was a central concept for Boris Chicherin, Vladimir Soloviev, Pavel Novgorodtsev,

4 Harold J. Berman, ***Faith and Order: The Reconciliation of Law and Religion*** (Grand Rapids, MI: William B. Eerdmans Publishing Company, 2000), 367–68. He cites Leon Petrażycki, ***Law and Morality***, trans. Hugh W. Babb, intro. Nicholas S. Timasheff (Cambridge, MA: Harvard University Press, 1955).

5 Berman, ***Faith and Order***, 9. Like Berman, Petrażycki held that law was a basic psychological phenomenon that encompassed very much of human thought and life, but unlike Berman, he was not a religious thinker.

6 See also Harold J. Berman, "Law and Logos," ***DePaul Law Review*** 44, no. 1 (1994): 143–65, here at 159.

7 Berman, ***Faith and Order***, 5.

8 Ibid., 9.

9 Ibid., 13–14, 19.

Sergei Kotliarevskii, Nikolai Alekseev, and Ivan Ilyin. These six legal philosophers were also religious thinkers (predominantly so in Soloviev's case) who believed that Christianity could help remedy what Novgorodtsev diagnosed as the "crisis in modern legal consciousness" by reorienting that consciousness toward the supreme value of law: the sacredness of the human person. For them, the rule of law depended ultimately on a legal consciousness that was nourished by a deep moral sense and by faith. As philosophical idealists, they were committed to natural law, following their predecessor Aleksandr Kunitsyn. As Christian theists, they believed that the moral norms of natural law (human dignity and human rights) entailed, and were grounded in, a transcendent ontological reality—God.

Natural law exemplifies law in its pure form because it is upheld by consciousness (moral respect and religious reverence), not by coercion. The more closely positive law approximates natural law (which approximation is legal progress), the less it, too, will need to rely on the threat of coercion. The general tendency of Russian philosophy of law as represented in this volume was to deemphasize coercion in favor of consciousness, but there was debate among the jurists over the proper relationship between law and morality and over the justification for the use of force. Like natural law, though perhaps not as pristinely, canon law and international law also exemplify the pure form of law. A distinctive feature of our book is its attention to natural law, canon law, and international law.

The Papal Revolution, canon law, and Western legal culture

In the West, the development of the type of legal consciousness that could support the rule of law has a long history and deep religious roots. Harold Berman stressed the paramount importance of the Papal Revolution of 1075, when Pope Gregory VII (1073–85) declared the independence of the Roman Catholic Church from Emperor Henry IV and from imperial, royal, and civil rule generally.[10] Gregory and his successors established the church as an autonomous legal entity with jurisdictional claims over many areas of life in Western Christendom. They asserted that the pope was the supreme lawmaker. The result, from the twelfth to fifteenth centuries, was a marked upsurge in the promulgation of canon laws (papal decretals being the most important), together with the formation of a corps of church jurists (canonists) to administer them and the establishment of a hierarchy of church courts (culminating in the Roman curia) to enforce them. Canon law was now systematized and codified for the first time. Gratian's *Concordia discordantium canonum* (Concordance of discordant canons), known as the *Decretum Gratiani*, was completed in 1140. The compiler may have been a monk who taught in Bologna, the center of the new science of jurisprudence and the site of Europe's first university, founded in 1088. Another collection was

10 Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983). Sergei Kotliarevskii (see Chapter 12 of this volume) assessed the significance of Gregory VII's reforms in the same way as Berman.

completed by the Spanish canonist Raymond of Peñaforte in 1234. It is known as the *Decretales Gregorii IX* because Pope Gregory IX authorized it (the same year) as a standard text for the teaching of canon law at the University of Bologna. The *Corpus iuris canonici*, compiled in the twelfth and thirteenth centuries, was published in 1582 and remained the standard collection down to 1917.[11]

Berman regarded canon law, as it developed in the wake of the Papal Revolution, as the first modern Western legal system and as the foundation for the further development of law. In Europe's new universities, both Roman and canon law ("the two laws") were studied, abetting the development of the new science of jurisprudence.[12] Roman law was more important in the early history of the law curriculum—a manuscript copy of Justinian's *Corpus iuris civilis* (529–34) having been discovered about 1080 in an Italian library. Canon law was added as the new texts became available. Berman underscores the importance of Gratian's *Decretum*, calling it "the first comprehensive and systematic legal treatise in the history of the West, and perhaps in the history of mankind."[13] Especially significant (even momentous) was Gratian's invocation of natural law. According to Berman's exposition, Gratian held that 1) natural law is found both in divine revelation and in human reason and conscience; 2) the laws (*leges*) of princes and other secular authorities ought not to prevail over natural law (*ius naturale*); 3) ecclesiastical laws must not contravene natural law; 4) *ius* (right, justice) "is the genus, *lex* [law] is a species of it"; 5) as a matter of natural law, "princes are bound by and shall live according to their laws"; 6) secular laws are subordinate to ecclesiastical laws; and 7) customary law must yield to natural law.[14] Though Justinian's *Digest* (the main part of his *Corpus*) contains many references to *ius naturale* (natural law or natural right), the concept is much better developed in Gratian. With him, the principle of the subordination of positive (enacted or statutory) law to natural law became clear, and it applied to the laws of the church as well: "Enactments, whether ecclesiastical or secular, if they are proved to be contrary to natural law, must be totally excluded."[15]

Gratian's appeal to natural law is a prescient statement of the philosophical and religious basis underlying the principle of the rule of law. His ideas, together with their roots in the classical and Christian heritage (especially with the Stoics, Cicero, and church fathers such as Irenaeus, Lactantius, and Origen) and with similar formulations among other canonists, laid the groundwork for the development of natural-rights theory among later medieval and early modern thinkers,

11 Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, chs. 2, 5. See also John Witte Jr., "Introduction," and R. H. Helmholz, "Western Canon Law," in *Christianity and Law: An Introduction*, ed. John Witte Jr. and Frank S. Alexander (Cambridge: Cambridge University Press, 2008), 9–15, 71–87.

12 Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, ch. 3.

13 Ibid., 143.

14 Ibid., 145. The quotations are from Gratian's *Decretum*, in Berman's translation.

15 Gratian, as quoted by Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, 147.

such as St. Thomas Aquinas, William of Ockham, Francisco de Vitoria, Francisco Suarez, Hugo Grotius, Samuel von Pufendorf, and John Locke.[16] But Berman thought that the Papal Revolution was the crucial threshold: "the concept of the rule of law was supported by the high level of legal consciousness and legal sophistication that came to prevail throughout the West in the twelfth and thirteenth centuries." Important steps toward the realization of the concept were taken, he notes, with the Magna Carta of 1215 and with the Hungarian Golden Bull of 1222.[17]

Legal culture in early modern Russia

In Russia, the development of a rule-of-law type of legal consciousness was a much later phenomenon, beginning with the Enlightenment in the late eighteenth century but not reaching maturity until the middle third of the nineteenth century, on the eve of the Great Reforms, and then only among a relatively small group of jurists, enlightened bureaucrats and reformist officials, professors, and other professionals.[18] Orthodox canon law was not a significant source of this development, although the study of canon law became increasingly important within the Russian Orthodox Church and its seminaries and academies in the course of the nineteenth century, with far reaching consequences for church life—and not only for it (see Chapters 1 and 10). Russian religious philosophy, drawing on Orthodox theology, became a factor in the development of Russian philosophy of law after Vladimir Soloviev brought those spheres together beginning with *A Critique of Abstract Principles* (1880) (see Chapter 9).

The delayed development of legal consciousness in Russia had very much to do with basic facts of Russian history, and very little to do with any alleged "Russian mentality." The first Russian state, Kievan Rus, did not appear until the late ninth century. Having adopted Orthodox Christianity in 988, it flourished until the Mongol conquest in 1240. Two centuries later, Muscovy emerged as a large and powerful Eurasian polity. In both Kievan Rus and Moscow, indigenous law codes were produced and enforced. A body of law was also administered by the Orthodox Church (see Chapter 1). Thus, it would be wrong to deny that nascent

16 Brian Tierney, "Natural Law and Natural Rights," in *Christianity and Law: An Introduction*, 89–103; Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law, 1250–1625* (Grand Rapids, MI: William B. Eerdmans Publishing Company, 2001).

17 Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, 293.

18 The classic study is Richard S. Wortman, *The Development of a Russian Legal Consciousness* (Chicago: University of Chicago Press, 1976, 2010). Wortman's liberal, comparative perspective informs the present essay. For a different approach (with its own valuable insights) to understanding Russia's legal tradition, see Tatiana Borisova and Jane Burbank, "Russia's Legal Trajectories," *Kritika: Explorations in Russian and Eurasian History* 19, no. 3 (2018): 469–508. Their approach emphasizes "the connection between law and sovereignty in the transforming polity, the law in its everyday functions, the intermediaries of legal connection, and the technical processes of lawmaking and communication" (472).

elements of legal consciousness existed in premodern and early modern Russia. Recent scholarship on Muscovy in particular has challenged the traditional stereotype of this state as an unrelieved despotism.[19] Nevertheless, Russian legal culture fell far short of the intellectual sophistication and institutional dynamism of medieval Western law. No authority structure comparable to the Roman papacy existed in Orthodox Christianity, nor did premodern Russia possess institutions of higher learning where law—Roman law, church law, or Russian law—could be systematically investigated and expert jurists could be trained.

Following the crisis of the Muscovite state in the Time of Troubles (1598–1613), the founding of the Romanov dynasty in 1613 brought about a period of recovery in which the Russian Orthodox Church played an important role. In 1589, the metropolitanate of Moscow had been elevated to the status of a patriarchate, and in the first decades of the new dynasty, church and state enjoyed a symbiotic relationship. Patriarch Filaret (in office 1619–33) used the title "Great Sovereign" and was effectively coruler with his son, the first Romanov tsar, Mikhail (r. 1613–45). Muscovite Russia reached the pinnacle of its development at midcentury, at the time of the promulgation of Tsar Aleksei's *Ulozhenie* (Law code) of 1649 and the printing of the chief source of Russian Orthodox law, the Slavonic nomocanon, under the auspices of Patriarch Iosif and his successor Nikon (1653). The rapid decline of the Muscovite state thereafter was in large part a consequence of the Russian Church schism brought about by Patriarch Nikon's liturgical reforms (see Chapter 1).

With Peter the Great's assumption of power in 1689, Russia entered the modern period. Peter and his successors aggressively pursued the country's modernization and Westernization. Though Russia had few of Europe's societal and institutional resources (which had developed over a long period in favorable historical circumstances), the model embraced by Peter and his successors was the absolutist *Polizeistaat*, the cameralist well-ordered police state of early modern Europe.[20] Absolutist rulers of the time regarded law as an instrument of state power, not a limit on it: rule by law, not rule of law. They sought to use law to regulate and rationally organize society in order to harness its resources for the purpose of expanding its (and the state's) wealth and power, which they saw as also promoting people's welfare and well-being. The overall framework was, or came to be, the Enlightenment ideology of progress. In the West, modernizing monarchs, in pursuing their policies, not only had to contend with but also made active use of a rich and variegated social reality, replete with long-standing,

19 See Nancy Shields Kollmann, *Crime and Punishment in Early Modern Russia* (Cambridge: Cambridge University Press, 2012). To appreciate the precise meaning of Kollmann's provocative conclusion—"Russia was not a despotism" (426)—one must read this impressive study in its entirety. For a similar assessment of the premodern and early modern Russian state, see Daniel Rowland, "Did Muscovite Literary Ideology Place Limits on the Power of the Tsar (1540s–1660s)?," *Russian Review* 49, no. 2 (1990): 125–55.

20 Marc Raeff, *The Well-Ordered Police State: Social and Institutional Change through Law in the Germanies and Russia, 1600–1800* (New Haven: Yale University Press, 1983).

relatively autonomous social groups, estates, and orders; towns, guilds, professional associations, and various types of corporations; and institutions such as the French *parlements*, other courts, and the church. These "intermediary bodies" (Montesquieu), which enjoyed various freedoms and privileges, mediated the new centralizing state power and helped to distribute and moderate it. Not least important were lawyers, who tried to uphold the standards of their profession, which long antedated the absolutist, instrumental approach to law. Rulers might disdain them, judges in particular, but they could not dispense with them.[21]

In Petrine Russia, these intermediary bodies were generally absent, and society remained largely subjugated to the state, as in the Muscovite period. The nobility was not released from compulsory state service (military or bureaucratic) until 1762. The plight of the peasantry was bad to begin with and worsened under Catherine the Great (r. 1762–96); serfdom was not abolished until 1861. The church was the one institution that could potentially threaten autocratic power; Peter neutralized the threat in 1721 when he replaced the patriarchate with the Holy Synod, a collegiate board of bishops overseen by a lay official, the chief procurator. Russian social reality meant that Russian cameralism would be highly autocratic, with the sovereign's will regarded as the ultimate source of the laws that were to be directly implemented by government officials, without social mediation. Judges were expected to enforce statutory laws, not interpret them according to higher principles. The courts, including the Senate, were subject to supervision or oversight (*nadzor*) by a procurator general and the procurators under him. Written, inquisitorial procedure was designed to ensure that judicial officials correctly applied the law. This system governed the courts down to the Judicial Reform of 1864.[22] *Zakonnost'* (legality) was a narrow interpretation of the cameralist ideal of rule by law. In William Pomeranz's words, it meant strict observance of the laws "issued by the ruler as a set of instructions for state institutions and their officials."[23]

The immediate problem Peter and his successors faced in building the well-ordered police state was the absence of a corps of jurists and of institutions to train them. Peter hoped to create a *noblesse de robe*, but the nobility's sense of identity was invested in the military and in martial values.[24] They would not easily be persuaded to take up law, especially in view of its narrow, clerical conception in early modern Russia. Meanwhile Peter, advised by Leibniz and Christian Wolff, planned the Russian Academy of Sciences.[25] It opened in December 1725,

21 See Marc Raeff, "The West European Model," in Raeff, *Understanding Imperial Russia*, trans. Arthur Goldhammer (New York: Columbia University Press, 1984), 24–31.

22 Wortman, *The Development of a Russian Legal Consciousness*, 12–16. On Petrine judicial culture, see also Kollmann, *Crime and Punishment in Early Modern Russia*, ch. 8.

23 Pomeranz, *Law and the Russian State*, 19.

24 Kollmann, *Crime and Punishment in Early Modern Russia*, 190.

25 On Peter's discussions with Leibniz about the Academy of Sciences, Russian universities, and legal education, see Vladimir A. Tomsinov, *Iuridicheskoe obrazovanie i iurisprudentsiia v Rossii v XVIII stoletii*, Uchebnoe posobie, 2nd ed. (Moscow: Zertsalo-M, 2012), 69–76.

ten months after his death, combining research and teaching (in the attached university and gymnasium).[26] Initially all members of the Academy were foreign (the first Russian member was Mikhail Lomonosov in 1745). In 1738, Empress Elizabeth invited Friedrich Heinrich Strube de Piermont (1704–90), a follower of Grotius and Thomasius, to teach law at the Academy.[27] The first professor of law at Moscow University (founded in 1755) was the Austrian Philip Heinrich Dilthey (1723–81), who taught there from 1756 to 1764, and again from 1766. Karl Heinrich Langer was appointed in 1764 and retained his position even after Dilthey's return.[28] At the Academy of Sciences and Moscow University, Roman and natural law were the main jurisprudential subjects, but Dilthey taught Russian law after 1766.[29] The Corps of Cadets was established in 1731.[30] "The Cadet Corps," Wortman writes, "was where a nobleman was most likely to learn about the law in eighteenth-century Russia.... The courses taught were in natural law and sought to convey to the noblemen the importance of the law and a general understanding of its basic principles."[31] In this period, both in Germany and in Russia, natural law was generally taught according to its Wolffian interpretation, which was absolutist in its view that the ends of human society consisted in human perfectibility, and that the realization of these ends required and justified the state's absolute (and paternalistic) power. It was not until the beginning of the nineteenth century that a more liberal, Kantian interpretation of natural-law theory could be taught, usually in eclectic combination with more traditional approaches.[32]

Russian autocrats ran a considerable risk in fostering the legal education of their officials: such officials might well learn that law had a higher calling than serving as an instrument of absolutist rule. By the middle third of the nineteenth century, that risk became a reality.

Legal enlightenment in Russia

The Enlightenment in Russia spurred the development of legal consciousness. Empress Catherine II (the Great), who took seriously the image of herself as an enlightened monarch, was the preeminent sponsor of the ideas of the *philosophes*

26 Tomsinov, *Iuridicheskoe obrazovanie i iurisprudentsiia v Rossii v XVIII stoletii*, 88–96, 99–101.

27 Ibid., 96–98, 102–110; and Tomsinov, *Rossiiskie pravovedy XVIII–XX vekov: ocherki zhizni i tvorchestva*, 2nd rev. ed., 3 vols. (Moscow: Zertsalo-M, 2015), 1:99–113. See also W. E. Butler, "F. G. Strube de Piermont and the Origins of Russian Legal History," in *Russia in the Age of Enlightenment: Essays for Isabel de Madariaga*, ed. Roger Bartlett and Janet M. Hartley (New York: Palgrave Macmillan, 1990), 125–41.

28 On Dilthey and Langer, see Tomsinov, *Iuridicheskoe obrazovanie i iurisprudentsiia v Rossii v XVIII stoletii*, 142–56.

29 See also Wortman, *The Development of a Russian Legal Consciousness*, 25.

30 Tomsinov, *Iuridicheskoe obrazovanie i iurisprudentsiia v Rossii v XVIII stoletii*, 111–16.

31 Wortman, *The Development of a Russian Legal Consciousness*, 30–31.

32 See Julia Berest, *The Emergence of Russian Liberalism: Alexander Kunitsyn in Context, 1783–1840* (New York: Palgrave Macmillan, 2011), ch. 5, "The Natural Law Tradition in Russia."

in Russia. She was committed to spreading legal enlightenment in Russia, to strengthening the country's legal culture, and to improving its laws and institutions. To this end, on December 14, 1766, she issued a manifesto announcing her intent to convene an Imperial Legislative Commission, charged with preparing a draft of a new code of laws (the last having been issued in 1649).[33] Law code commissions had met earlier in the century, but this one was different. When it convened on July 30, 1767, the commission brought together 564 delegates from all over Russia. They were elected from the "free" estates of the realm (the nobility, townspeople, state peasants, and others), as well as from governmental offices. In addition to drafting a new law code for Catherine's consideration, the delegates were to inform her about the needs and problems of their communities. The Legislative Commission met in numerous sessions, first in Moscow in 1767, then in St. Petersburg in 1768. On December 18, 1768, at the 195th session, it was announced that the Russo-Turkish War made it necessary to prorogue the full assembly, though subcommittees would continue to meet. The Legislative Commission was an unprecedented event in imperial Russia.

On the opening day of the commission, Catherine's *Nakaz* (Instruction) to the assembled delegates was published. Isabel de Madariaga called it "one of the most remarkable political treatises ever compiled and published by a reigning sovereign in modern times."[34] The main part of the *Nakaz* consists of twenty chapters divided into 526 articles.[35] Much of it was taken, often verbatim, from works of Enlightenment political philosophy. The author from whom Catherine borrowed the most was Montesquieu; 294 of the 526 articles came from *The Spirit of the Laws* (1748). Another 108 articles came from Cesare Beccaria's *On Crimes and Punishments* (1764). "Although the *Instruction* was decidedly not an original work of political philosophy," Gary Hamburg writes, "its very dependence on Montesquieu and Beccaria placed it squarely in the moderate Enlightenment current of thinking about politics."[36] In the context of autocratic Russia, that was something remarkable. In the *Nakaz*, Catherine appears to have accepted the proposition that every state should be based on certain fundamental laws. According to de Madariaga's summary and analysis:

> The fundamental laws, though few in number, are permanent, exist independently of the reigning sovereign, and provide the framework within which he must operate. Power is limited, if only by the existence of laws which the

33 On the Legislative Commission and Catherine's famous *Nakaz* (Instruction) to it, see Isabel de Madariaga, *Russia in the Age of Catherine the Great* (New Haven: Yale University Press, 1981), 139–83; and G. M. Hamburg, *Russia's Path toward Enlightenment: Faith, Politics, and Reason, 1500–1801* (New Haven: Yale University Press, 2016), 381–402, 586–87. My account relies on these two works.

34 de Madariaga, *Russia in the Age of Catherine the Great*, 151.

35 *The Nakaz of Catherine the Great: Collected Texts*, ed. William E. Butler and Vladimir A. Tomsinov (Clark, NJ: The Lawbook Exchange, 2010).

36 Hamburg, *Russia's Path toward Enlightenment*, 393.

> sovereign regards as binding. The area within which the arbitrary will of the ruler can act is limited by distinguishing between the ruler and the state. This concept was not entirely new in Russia, but it had never before been clothed in the dignified language of the *philosophes* nor publicly proclaimed from the throne.[37]

Not until the 1905 revolution would the tsarist government constitutionally adopt a similar conception. It did so in the Fundamental Laws of April 1906.

Catherine's *Nakaz* was widely distributed. In 1767, instructions were issued for it to be sent to fifty-seven government offices throughout Russia, where it was to be read regularly. It was reprinted several times for circulation at home and abroad, and was translated into French, German, English, and Latin. The first seven sessions of the full Legislative Commission were devoted in large part to reading the *Nakaz*; thereafter it was to be read (or reread) regularly for the duration of the commission.[38] The other business of the commission involved reading and discussion of the country's existing laws, and discussion of the local conditions and state of affairs of the represented social groups, based on the *cahiers*, or notebooks (*nakazy*), that the deputies brought with them to the assembly. Subcommissions produced draft codes on the rights of the various estates and orders.[39] In the end, the Legislative Commission failed to produce a draft of a new law code; nevertheless, it must have awakened a sense of law among some of its delegates, and among some other readers of the *Nakaz*.[40]

Though its work remained unfinished, the Legislative Commission had important consequences. It contributed to Catherine's 1775 reform of provincial administration and to her 1785 charters to the nobility and to the cities. The provincial reform established new district (*uezd*) courts, with judges and assessors elected by the nobility (there were also new land courts, which had appointed judges but elected assessors). The Charter to the Nobility was a veritable bill of rights for nobles—though it was bought at the terrible price of giving them almost unlimited power over serfs tied to their lands (which they now held outright as private property).[41]

In Catherine's reign, Moscow University grew in stature as the center of Russian legal education. In 1761, the Russian government sent Semen Desnitskii (1740–87) and Ivan Tret'iakov (1735–76) to study law at the University of

37 de Madariaga, *Russia in the Age of Catherine the Great*, 154.

38 de Madariaga, *Russia in the Age of Catherine the Great*, 163, 166; Hamburg, *Russia's Path toward Enlightenment*, 394.

39 de Madariaga, *Russia in the Age of Catherine the Great*, 164–83.

40 True, there seems to be little evidence of this. But de Madariaga recounts the following: "P. Nakhovskoy, one of the Decembrists sentenced to death in 1826, described in a letter to Nicholas I on the eve of his execution, with what emotion he had attended meetings of peasant communes and listened in these little republics to the simple eloquence of the Russian peasant. Here, he added, 'for the first time I heard extracts from the Nakaz of the Great Catherine'" (de Madariaga, *Russia in the Age of Catherine the Great*, 163).

41 Pomeranz, *Law and the Russian State*, 23–24.

Glasgow, where they earned LLD degrees in 1767. Then they joined the law faculty at Moscow University. Tret'iakov retired in 1773, but Desnitskii served as a professor for the rest of his life. According to Gary Hamburg, "Around them they created, almost *ex nihilo*, a network of students and intellectuals interested in the history and philosophy of law and in the patient construction of a modern Russian *Rechtsstaat*."[42] Desnitskii was the more original and significant thinker. In Glasgow he studied Roman law under John Millar (1735–1801) and attended Adam Smith's lectures on moral philosophy, political theory, economics, and jurisprudence. He admired William Blackstone (1723–80) and later (in 1780) prepared an annotated translation of the first volume of Blackstone's *Commentaries on the Laws of England*, which he bought while in Glasgow. Among the things that Desnitskii valued most in Blackstone was his defense of natural rights. The English jurist wrote that society's principal aim "is to protect individuals in the enjoyment of their absolute rights, which were vested in them by the inimitable laws of nature." Statutes, he continued, "when prudently formed, are by no means subversive but rather introductive of liberty, for (as Mr. Locke has well observed), where there is no law, there is no freedom."[43]

In 1767, Desnitskii returned to Russia to assume his professorship at Moscow University. He arrived in time for Catherine's Legislative Commission and produced two writings in connection with it. The first was "A Proposal on the Establishment of Legislative, Judicial, and Executive Authority in the Russian Empire," which he submitted to the commission in March 1768. The second was "A Lecture on a Direct and Most Sensible Method of Studying Jurisprudence," which he delivered in June 1768 as a public address at Moscow University. The lecture was directed at his new law students, "but also at the political sophisticates in the Legislative Commission," and as such was intended to provide a more general juridical and philosophical framework for the proposal.[44] According to Hamburg's analysis, the proposal attempted to reconcile the Russian tradition of strong monarchy with the Western idea of separation of powers. In some respects, Desnitskii was (in Hamburg's characterization) a Russian religious traditionalist, whose aim was to construct a just Orthodox realm. He was committed to Orthodoxy as the established Russian church and clearly hoped that it would convert Old Believers and non-Christians—by moral suasion but not by coercion, which he said was "utterly contrary" to the Orthodox faith.[45]

42 Hamburg, *Russia's Path toward Enlightenment*, 566. My summary of Desnitskii relies on "Law and Enlightenment: Ivan Tret'iakov and Semen Desnitskii," Chapter 13 of Hamburg, *Russia's Path toward Enlightenment*, 566–610. On Desnitskii, see also Tomsinov, *Iuridicheskoe obrazovanie i iurisprudentsiia v Rossii v XVIII stoletii*, 156–69; Tomsinov, *Rossiiskie pravovedy XVIII–XX vekov: ocherki zhizni i tvorchestva*, 1:131–56; and Bill Bowring, *Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power* (Abingdon: Routledge, 2013), 21–32.

43 Blackstone, *Commentaries on the Laws of England*, vol. 1, as quoted by Hamburg, *Russia's Path toward Enlightenment*, 567–68.

44 Hamburg, *Russia's Path toward Enlightenment*, 587, 599.

45 Ibid., 593, 595–96, 609.

In "A Lecture on a Direct and Most Sensible Method of Studying Jurisprudence," Desnitskii addressed such topics as the difference (and relationship) between moral philosophy and jurisprudence; "natural jurisprudence" (in which he reprised Smith's critique of Grotius, Hobbes, and Pufendorf, and endorsed the natural-rights theory of Blackstone and Smith); Roman law, which he thought was a "complete system" that had attained a higher degree of "perfection" than any other legal code; Russian law, in which he suggested the possibility of a rights-oriented approach; and the origin of social ranks. He concluded the lecture with a "Discourse on Parental Authority," in which, as Hamburg perceptively surmises, "he imbedded an oblique but powerful critique of autocracy" and of serfdom.[46]

For good reason, Desnitskii has been called "the father of Russian jurisprudence."[47] After Dilthey's initial efforts, Desnitskii was largely responsible for introducing the scientific study of Russian law into the curriculum of the law faculty at Moscow.[48] Hamburg lists the Russian philosophers of law whom he considers to be Desnitskii's followers: Aleksandr Petrovich Kunitsyn (1783–1840), Petr Grigor'evich Redkin (1808–91), Konstantin Dmitrievich Kavelin (1818–85), Boris Nikolaevich Chicherin (1828–1904), Aleksandr Dmitrievich Gradovskii (1840–89), and Pavel Ivanovich Novgorodtsev (1866–1924).[49] Redkin, Kavelin, Chicherin, and Novgorodtsev were also professors of law at Moscow University. As Hamburg suggests, Blackstone's defense of natural rights, which so impressed Desnitskii, anticipated Kant's and Chicherin's theories of law.[50] By the 1880s, Chicherin had embraced Kant's conception of human dignity and personhood, as Hamburg shows in Chapter 6 of the present volume. This order of intellectual lineage would make Kunitsyn the immediate link between Desnitskii and Chicherin.[51] Kunitsyn is the subject of Chapter 4.

"The emergence of a legal ethos"

Kunitsyn was the first Russian thinker to advance a consistently liberal, Kantian interpretation of natural law. This, together with the other reasons that Julia

46 Ibid., 599–603.

47 A. H. Brown, "The Father of Russian Jurisprudence: The Legal Thought of S. E. Desnitskii," in *Russian Law in Historical and Political Perspectives*, ed. William E. Butler (Leyden: A. W. Sijthoff, 1977), 117–41.

48 Tomsinov, *Iuridicheskoe obrazovanie i iurisprudentsiia v Rossii v XVIII stoletii*, 168–69.

49 Hamburg, *Russia's Path toward Enlightenment*, 610.

50 Ibid., 568.

51 Aleksandr Radishchev (1749–1802) might deserve this distinction, since his theory of natural rights very likely drew on Blackstone and possibly on Kant. For the Blackstone connection, see Hamburg, *Russia's Path toward Enlightenment*, 651–52. On the Kant possibility, see Randall A. Poole, "The Defense of Human Dignity in Nineteenth-Century Russian Thought," in *Iosif Volotskii and Eastern Christianity: Essays across Seventeen Centuries*, ed. David Goldfrank, Valeria Nollan, and Jennifer Spock (Washington, DC: New Academia Publishing, 2017), 271–305, esp. 275–76.

Berest adduces in her chapter, provides good grounds for identifying Kunitsyn as the first Russian philosopher of liberalism. His magnum opus, *Natural Law* (1818–20), lays out a "liberal theory of human rights."[52] In 1811 he began teaching at the new and elite Tsarskoe Selo Lycée, where young noblemen were to be educated for high state service. His teaching marked a new stage in the development of Russian legal consciousness. "Kunitsyn inspired many of his students with a genuine devotion to the law," Wortman writes, "and several entered judicial posts directly upon completing the lycée." These included Dmitrii Zamiatnin, who became minister of justice in 1862.[53] In 1817, Kunitsyn began to teach as a law professor at the Main Pedagogical Institute, which in 1819 was upgraded to become St. Petersburg University. He also continued to teach senior courses at the lycée until 1820. As Berest recounts, in February 1821 Kunitsyn's book was officially banned because it was allegedly based on ideas "contrary to the truths of Christianity and tending toward overthrowing all family and state ties." The next month, he was dismissed from St. Petersburg University. Over the following years, the quality of teaching in natural law at Russian gymnasia and universities declined, and in 1833 such courses were discontinued altogether.

The fate of Kunitsyn's book and of the teaching of natural law was a consequence of the conservative turn in Russia that began in the second half of the reign of Alexander I (1801–25) and that sharpened with the Decembrist rebellion of 1825 which opened the reign of Nicholas I (1825–55).[54] The rebellion reinforced the emperor's conservatism and conviction in the necessity of firm autocratic rule, but he did not abandon law as an instrument of exercising his absolute will—indeed, he took measures to make the law a more effective instrument. Nicholas established a new branch of his own chancellery, the Second Section, to complete the work of preparing a new law code. He placed Mikhail Speranskii in charge. Nicholas's approach to law was broadly akin to that of the German historical school of jurisprudence, which, in Wortman's words,

> presented the laws of each nation as expressions of that nation's particular characteristics and needs. It banished the notion that law had to conform to universal natural norms, and consecrating the statutes issued by the autocrat, exempted them from outside judgment. Codification then became the ordering and compilation of the ruler's legislative acts, the precondition to the precise implementation of his will.[55]

52 Berest, *The Emergence of Russian Liberalism*, 155.

53 Wortman, *The Development of a Russian Legal Consciousness*, 41, 251.

54 The Decembrists were a group of liberal and radical military officers who attempted a *coup d'état* upon the accession of Nicholas I in December 1825. The attempt failed, the leaders were executed, and almost three hundred others were imprisoned or exiled to Siberia.

55 Wortman, *The Development of a Russian Legal Consciousness*, 43.

Speranskii resisted this approach. His jurisprudential philosophy was informed by his Christian universalism. As the distinguished historian of Russian law, Vladimir Tomsinov, states in Chapter 3 of this volume, Speranskii believed

> that the Christian religion, state power, and legal culture have a common purpose—to strengthen, support, and preserve the humanity of human beings, to preserve universal spiritual values and the social norms that correspond to the essential nature of human beings (67).

Tomsinov argues persuasively that it was Speranskii's faith, genius, and determination—more than any other factor—that brought the codification project to success, resulting in the Complete Collection of Laws of the Russian Empire and the Digest of Laws of the Russian Empire (1828–33). It was an enormous accomplishment.

Codification was one of two prerequisites which Speranskii thought essential for the further development of Russian jurisprudence. The other was legal education. Here he was involved in three significant initiatives. First, in 1828, six outstanding students were selected from the Moscow and St. Petersburg theological academies for training in law at the Second Section. Another six were assigned in 1829. Then they (among others) were sent to the University of Berlin to study with Friedrich Carl von Savigny (1779–1861), the leading legal historicist of the time. According to Robert Nichols, "The students sent to Germany justified Speranskii's confidence. Beginning in 1835, with the return of the first group from Savigny's lectures in Berlin, they began occupying the chairs of jurisprudence in Russian universities."[56] Among them were Nikita I. Krylov (1807–79), an expert in Roman law who became a professor at Moscow University in 1835, and Konstantin A. Nevolin (1806–55), who in the same year joined the law faculty of the new St. Vladimir's University in Kiev.

Second, the University Statute of 1835 revised the law curriculum to emphasize the teaching of Russian law, based on the new Digest of Laws.[57] The statute also formally ended the teaching of natural law as a separate discipline, replacing it with the study of jurisprudence as a specialized science, as an independent scholarly discipline emphasizing the history of law, including Roman law.[58] Third, a new elite (noble) institution was established in 1835: the Imperial School of Jurisprudence.[59] Its graduates numbered (according to Tomsinov's count)

56 Robert L. Nichols, "Orthodoxy and Russia's Enlightenment, 1762–1825," in *Russian Orthodoxy under the Old Regime*, ed. Robert L. Nichols and Theofanis George Stavrou (Minneapolis: University of Minnesota Press, 1978), 65–89, here at 72. See also Wortman, *The Development of a Russian Legal Consciousness*, 45; and Vladimir A. Tomsinov, *Iuridicheskoe obrazovanie i iurisprudentsiia v Rossii v pervoi treti XIX veka*, Uchebnoe posobie, 2nd ed. (Moscow: Zertsalo-M, 2010), 109–28.

57 Vladimir A. Tomsinov, *Iuridicheskoe obrazovanie i iurisprudentsiia v Rossii vo vtoroi treti XIX veka*, Uchebnoe posobie, 2nd ed. (Moscow: Zertsalo-M, 2015), 33, 47–48.

58 Ibid., 49–61.

59 Ibid., 173–93. See also Wortman, *The Development of a Russian Legal Consciousness*, 49–50.

684 by May 1866, when the Judicial Reform of 1864 came into effect. "They injected," he concludes, "a spirit of truth and justice into Russia's judicial system, thereby assuring the success of the judicial reform carried out by Speranskii's student, Alexander II."[60]

Like Peter I before him, Nicholas I intended that specialized legal education would create officials who were obedient technicians. Instead, it led to "the emergence of a legal ethos" among the young jurists educated in the reformed or new institutions.[61] The professors in the law faculty at Moscow University in the 1840s—Petr Redkin, Timofei Granovskii (1813–55) (a historian of medieval Europe), Konstantin Kavelin, and Nikita Krylov—were especially effective in creating this ethos among their students.[62] They taught that law was a science of great intellectual stature. Chicherin, who was a student in the law faculty, later wrote: "Before us arose a full sketch of Juridical Science, not as a dead enumeration of facts, but as a live organism, penetrated by high principles. We learned by heart the teachings of Roman jurists that law [*pravo*] came from justice [*pravda*]."[63] The Hegelian idealism of the period was more than an adequate substitute for the proscribed teaching of natural law. It assured the young jurists that they were instruments not of the absolutist state, but of the Absolute. They would become, in Redkin's words, organs of "the full consciousness of law."[64]

The Judicial Reform of 1864 and its fate

Beginning in the 1840s, graduates of the university law faculties and of the Imperial School of Jurisprudence (*pravovedy*) staffed the Ministry of Justice and other parts of the government. Russia's defeat in the Crimean War (1853–56) precipitated a "crisis of autocracy" that gave them the opportunity to transform the Russian court system. The Judicial Reform of 1864 was the most comprehensive and far-reaching of the Great Reforms. It provided for a system of independent civil and criminal courts, open adversarial trials, a jury system, autonomous regional bar associations, and judges with lifetime tenure. In short, the reform established an independent judiciary—which made it fundamentally incompatible with autocracy. For this reason, Jörg Baberowski has written, "The

60 See Chapter 3 of this volume (90). Speranskii had served as one of the tsarevich's teachers from October 1835 to April 1837. According to Tomsinov, he gave Alexander "a complete course of lectures on jurisprudence and statecraft" (88).

61 Wortman, *The Development of a Russian Legal Consciousness*, 197–234.

62 Ibid., 223–29. See also Tomsinov, *Iuridicheskoe obrazovanie i iurisprudentsiia v Rossii vo vtoroi treti XIX veka*, 66–102.

63 B. N. Chicherin, *Vospominaniia Borisa Nikolaevicha Chicherina: Moskva sorokovykh godov* (Moscow: Izdanie M. i S. Sabashnikovykh, 1929), 37–38, as quoted by Wortman, *The Development of a Russian Legal Consciousness*, 226.

64 P. G. Redkin, *Kakoe obshchee obrazovanie trebuetsia sovremennostiu ot russkogo pravovedtsa* (Moscow: Universitetskaia tipografiia, 1846), 10, as quoted by Wortman, *The Development of a Russian Legal Consciousness*, 225.

1864 judicial reform created Russia's first constitution." "At least *de jure*, Russia was transformed into a state under the rule of law on the European model."[65] The reform provided the institutional framework (legal institutions and court procedures) for the development of civil society and the rule of law. Previously, the courts had merely enforced statutory law; now they were empowered to interpret law, which made them a source of law. The highest civil court was the Senate's Supreme Civil Cassation Department. Through judicial review, it developed family, property, and inheritance law.[66] The Judicial Reform also contributed to the development of a viable system of private law. On this point, Pomeranz cites the testimony of Russian liberal Maksim Vinaver, who in 1905 wrote that the civil law process had become the very embodiment "of the multiple guarantees of freedom of the individual against the unlimited dominion of the administration."[67]

"The task of the judicial reform was to make universal the legal consciousness of the enlightened officials," as Baberowski aptly put it.[68] To accomplish this task, the reformers placed great hope in the jury system, which they saw as a school of citizenship. Surely it would turn "peasants into citizens." Anatolii Koni, Russia's best known jurist, lent his eloquence to these hopes. He is the subject of Chapter 7, by Tatiana Borisova. She shows how Koni's "civic hagiography" celebrated the heroes of the new courts who worked tirelessly for justice in Russia. They and Koni himself understood justice as *pravda*, with all its popular and religious inflections. Koni related it especially to Christian love, mercy, and reconciliation. He rejected the view that the new courts, which drew heavily on Western models, were too advanced for Russia. Rather, he was confident that they would provide the necessary juridical form, and *pravda* the necessary moral-religious content, for the further development and expansion of Russian legal consciousness.

The hoped-for universalization (or popularization, in a sense) of the legal consciousness of Russian jurists was not achieved. Why not, and whether it might

65 Jörg Baberowski, "Law, the Judicial System and the Legal Profession," in *The Cambridge History of Russia*, vol. 2, *Imperial Russia, 1689–1917*, ed. Dominic Lieven (Cambridge: Cambridge University Press, 2006), 344–68, here at 344. See also Baberowski, *Autokratie und Justiz: Zum Verhältnis von Rechtsstaatlichkeit und Rückständigkeit im ausgehenden Zarenreich 1864–1914* (Frankfurt am Main: Vittorio Klostermann, 1996).

66 William G. Wagner, *Marriage, Property, and Law in Late Imperial Russia* (Oxford: Oxford University Press, 1994), and Wagner, "Family Law, the Rule of Law, and Liberalism in Late Imperial Russia," *Jahrbücher für Geschichte Osteuropas*, Neue Folge, 43, no. 4 (1995): 519–35.

67 M. M. Vinaver, *Iz oblasti tsivilistiki* (St. Petersburg: Tipografiia A. G. Rozena, 1908), 335, as quoted by Pomeranz, *Law and the Russian State*, 51. For an account which emphasizes the tenacity of autocratic culture within the tsarist administration and its resistance to legal limitations on *proizvol* (arbitrary power), see E. A. Pravilova, *Zakonnost' i prava lichnosti: Administrativnaia iustitsiia v Rossii (vtoraia polovina XIX v.–oktiabr' 1917)* (St. Petersburg: "Obrazovanie-Kul'tura," 2000).

68 Baberowski, "Law, the Judicial System and the Legal Profession," 347.

have been, is one of the fundamental questions of Russian history. Richard Wortman maintains that

> although the development of a consciousness of the transcendent importance of the law was of great significance for its own time and subsequent decades, it encountered formidable and eventually insuperable obstacles, and its rise appears more of a glorious but tragic episode than a central trend of Russian history.[69]

The main "formidable and insuperable" obstacle was the autocracy itself, Wortman argues. Any possibility of establishing a law-based government under Alexander II all but vanished under Alexander III (r. 1881–94) and Nicholas II (r. 1894–1917), both advised by Konstantin Pobedonostsev, chief procurator of the Holy Synod from April 1880 until October 1905. In *Scenarios of Power: Myth and Ceremony in Russian Monarchy*, Wortman shows how a new myth of autocratic power was forged under Alexander III, one which presented the Russian Orthodox Church, autocratic state, and Russian people (*narod*) as one. The myth continued under Nicholas II but emphasized the tsar's personal divine authority, unencumbered by institutions of church and state. In both forms it excluded Russia's liberal development.[70] The last tsar's notion of personal monarchy was strikingly retrograde, seeking to return Russia to a putative Muscovite unity of tsar and people, without institutional or legal mediation. The autocracy's power to enforce the myth was strong, while civil society's power to resist it was weak. Thus, Wortman concludes, "the forces inimical to a law-based state remained dominant."[71] Among those forces must be counted Konstantin Pobedonostsev himself. A nuanced and balanced portrait of him (no mean task) is presented in Chapter 5, by Gregory Freeze.

The deepening of Russian legal consciousness

The tsarist autocracy may have been able to limit the expansion of Russian legal consciousness, but it could not prevent its deepening. There was a certain logic in this: faced with the external constraints of the autocracy, Russian legal consciousness developed internally. Our volume demonstrates that the deepening of Russian legal consciousness was conspicuous in three areas: international law, canon law, and the religious-idealist philosophy of law (focused on natural law). In these areas, a distinctive Russian conception of legal consciousness took shape.[72]

69 Richard Wortman, "Russian Monarchy and the Rule of Law: New Considerations of the Court Reform of 1864," in Wortman, *Russian Monarchy: Representation and Rule* (Boston: Academic Studies Press, 2013), 3–32, here at 6.

70 Richard Wortman, *Scenarios of Power: Myth and Ceremony in Russian Monarchy*, 2 vols. (Princeton, NJ: Princeton University Press, 2000), 2: parts 2 and 3.

71 Wortman, "Russian Monarchy and the Rule of Law," 30.

72 This was also the case in the area of criminal justice, in which Vladimir Soloviev was a pioneering figure, as he was in the religious-idealist philosophy of law. See Frances Nethercott,

Vasilii Malinovskii helped to lay the foundations for the development of international law in Russia. He is the subject of Chapter 2, by William E. Butler. The remarkable extent of that development is clear in Vladimir Tomsinov's portrait of Leonid Kamarovskii in Chapter 8.[73] Kamarovskii was a professor in the law faculty of Moscow University, where he served for thirty-eight years. A person of deep faith, he believed that "Christianity is the most sublime teaching of peace the world has ever known" (ch. 8, 175). His vision was of an international order transformed by that teaching. In 1909, Nicholas II appointed him as the Russian delegate to the Permanent Court of Arbitration in The Hague. Ten years earlier, F. F. Martens (1845–1909), another eminent Russian figure in international law, had drafted the Martens Clause of the 1899 Hague Convention with respect to the Laws and Customs of War on Land. In Chapter 13, Martin Beisswenger examines the further linking of Christianity and international law through Nikolai Alekseev's active involvement in the ecumenical Life and Work movement of the 1930s. Alekseev emphasized the positive role that religion and the churches could play in the search for international peace and security.

Two chapters of our volume are devoted to canon law—Chapter 1, by Paul Valliere, and Chapter 10, by Vera Shevzov. The golden age of Orthodox legal studies, as Valliere puts it, was the second half of the nineteenth century and the first two decades of the twentieth. The Russian Orthodox Church long had been subordinated to the tsarist state through the Holy Synod, in violation of its canonical order and liberty. The desire to rectify the canonical order was one of the main reasons that Russian canon-law studies experienced a remarkable upsurge in the period following the Great Reforms. The outcome of the deepening of canon-law consciousness was momentous: the All-Russian Council of Moscow of 1917–18, which Valliere characterizes as one of the great church councils in the history of Christianity.

Six chapters of our book follow the development of Russian religious-idealist philosophy of law by focusing on some of its main figures: Boris Chicherin (Gary M. Hamburg), Vladimir Soloviev (Paul Valliere), Pavel Novgorodtsev (Konstantin M. Antonov), Sergei Kotliarevskii (Randall A. Poole), Nikolai Alekseev (Martin Beisswenger), and Ivan Ilyin (Paul Valliere). For all of the differences among this extraordinary group of thinkers, they were "religious idealists" in the same basic ways.

First was their idealist conception of human nature. They understood the quintessentially human capacities to be reason and free will. Chicherin defined reason as consciousness of the absolute, not in a specifically Hegelian sense but rather in the general sense that reason is the capacity to recognize or posit absolute ideals. Through free will, human beings are capable of self-determination according to these ideals. Kant called this dual capacity "practical reason" (he

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Russian Legal Culture Before and After Communism: Criminal Justice, Politics, and the Public Sphere (Abingdon: Routledge, 2007).

73 More generally, see V. E. Grabar, *The History of International Law in Russia, 1647–1917: A Bio-Bibliographical Study*, ed. and trans. W. E. Butler (Oxford: Clarendon Press, 1990).

also referred to it as autonomy). In their idealist conception of human nature, Chicherin and Soloviev closely followed Kant (though not only him),[74] and in this crucial respect the other four Russian philosophers followed Chicherin and Soloviev. Second, as a whole the group held that reason and free will are the grounds of human dignity and of natural rights—that they are what make us persons. All six Russian philosophers were, in this sense of the word, *personalists*.[75] Third, all thought that their idealist, personalist conception of human nature refuted naturalism and had metaphysical implications, which (fourth) they understood in terms of Christian theism. Hence, their "religious idealism."[76] In individual ways, it was both a source and confirmation of their faith.

Vladimir Soloviev, Russia's greatest religious philosopher, was the most important link in the development of Russian religious idealism and the Christian conception of law in Russia.[77] If Chicherin had elucidated the rational foundations of faith, then on them Soloviev built one of the great modern systems of religious philosophy. According to his idealist conception of human nature, human beings combine in themselves three principles: the absolute or divine principle, the material principle, and (between them) the distinctively human principle, which is rational autonomy or the capacity for self-determination.[78] Together the divine and human principles form "divine humanity" (*Bogochelovechestvo*), Soloviev's central concept.[79] It is the free human realization of the divine principle in ourselves and in the world—in patristic terminology, *theōsis* (deification). *Bogochelovechestvo* is the divine-human project of building the Kingdom of God.

Soloviev always maintained that the Kingdom of God would come through the kingdom of ends—Kant's ideal of a moral community of persons who respect each other as ends-in-themselves, whose highest end is nothing other than the

74 F. W. J. Schelling was also an important source for Soloviev. See Paul Valliere, "Solov'ĕv and Schelling's Philosophy of Revelation," in *Vladimir Solov'ĕv: Reconciler and Polemicist*, ed. Wil van den Bercken, Manon de Courten, and Evert van der Zweerde (Leuven: Peeters, 2000), 119–29.

75 On personalism, see Thomas D. Williams, *Who Is My Neighbor? Personalism and the Foundation of Human Rights* (Washington, DC: Catholic University of America Press, 2005); and *Rozhdenie personalizma iz dukha Novogo vremeni: Sbornik statei po genealogii bogoslovskogo personalizma v Rossii*, ed. V. N. Boldareva (Moscow: Izdatel'stvo PSTGU, 2018).

76 For further development, see Randall A. Poole, "The Liberalism of Russian Religious Idealism," in *The Oxford Handbook of Russian Religious Thought*, ed. Caryl Emerson, George Pattison, and Randall A. Poole (Oxford: Oxford University Press, 2020), 255–76.

77 For a classic account of Soloviev's philosophy of law, see Andrzej Walicki, "Vladimir Soloviev: Religious Philosophy and the Emergence of the 'New Liberalism,'" in Walicki, *Legal Philosophies of Russian Liberalism*, 165–212. See also *Politics, Law, and Morality: Essays by V. S. Soloviev*, ed. and trans. Vladimir Wozniuk (New Haven: Yale University Press, 2000).

78 See Randall A. Poole, "Vladimir Solov'ĕv's Philosophical Anthropology: Autonomy, Dignity, Perfectibility," in *A History of Russian Philosophy, 1830–1930: Faith, Reason, and the Defense of Human Dignity*, ed. G. M. Hamburg and Randall A. Poole (Cambridge: Cambridge University Press, 2010), 131–49.

79 For a study of the concept in Russian religious thought, see Paul Valliere, *Modern Russian Theology: Bukharev, Soloviev, Bulgakov: Orthodox Theology in a New Key* (Edinburgh: T&T Clark, 2000).

Kingdom of God, and who are self-governed by freely and inwardly accepted laws of virtue.[80] The kingdom of ends rests on and develops out of a lower stage, the political community (or state) whose laws are external and backed by coercion. Soloviev agreed with Kant that law is the basic enabling condition of all human progress and that it makes possible the advance to the kingdom of ends, which both philosophers thought of as a spiritual community or church.[81] Soloviev called it "free theocracy." For him it seems to have signified the penultimate stage of human perfectibility, the highest development of legal consciousness and morality before the full realization of divine humanity in the eschatological Kingdom of God, when God will be all in all (1 Corinthians 15:28).[82]

Chicherin and Soloviev laid the foundations for the "Moscow school" of the Russian philosophy of law. The final four chapters of this book are devoted to the school's most outstanding jurists.[83] Pavel Novgorodtsev's theory of natural law was central to the school's religious-idealist conception of legal consciousness. In 1902, proclaiming Kant's kingdom of ends to be "the supreme good of the moral world," Novgorodtsev defined natural law as "a norm and principle of personhood." He wrote of "the absolute foundation of natural law that is revealed to us in the moral idea of personhood" and of the way that the modern conception of natural law limits state power by "the idea of the inalienable rights of the person."[84] Toward the end of his life he made it more explicit that the "moral idea of personhood" entailed, for him, Christian personalism. His colleague Sergei Kotliarevskii similarly stressed that the type of legal consciousness capable of sustaining the rule of law had to draw its strength from a religious reverence for human dignity. Novgorodtsev's students Nikolai Alekseev and Ivan Ilyin concurred. Like his teacher, Ilyin wrote a major treatise on the concept of legal consciousness, which he closely related to the idea of natural law. All four philosophers recognized that natural law rests ultimately on faith, since personhood itself, in its self-determination by and aspiration toward the absolute ideal, transcends the natural world. Their faith was centered in the sacredness of the human person—the luminous core of the Russian conception of legal consciousness.

80 See Randall A. Poole, "Kant and the Kingdom of Ends in Russian Religious Thought (Vladimir Solov'ev)," in *Thinking Orthodox in Modern Russia: Culture, History, Context*, ed. Patrick Lally Michelson and Judith Deutsch Kornblatt (Madison: University of Wisconsin Press, 2014), 215–34.

81 Immanuel Kant, *Religion within the Boundaries of Mere Reason*, in Kant, *Religion and Rational Theology*, ed. and trans. Allen W. Wood and George di Giovanni (Cambridge: Cambridge University Press, 1996), 39–215, here at 130–33, 135.

82 Both Kant and Soloviev repeatedly quote this verse.

83 Another member of the group was Evgenii Trubetskoi (1863–1920). See *Evgenii Trubetskoi: Icon and Philosophy*, ed. Teresa Obolevitch and Randall A. Poole (Eugene, OR: Pickwick/Wipf and Stock, 2021).

84 P. I. Novgorodtsev, "Ethical Idealism in the Philosophy of Law (On the Question of the Revival of Natural Law)," in *Problems of Idealism: Essays in Russian Social Philosophy*, ed., trans., and intro. Randall A. Poole (New Haven: Yale University Press, 2003), 274–324, here at 305, 303, 313.

12 Sergei Kotliarevskii

The rule of law in Russian liberal theory

Randall A. Poole

Friedrich Hayek, defining the idea of the rule of law, wrote that first of all "it constitutes a limitation on the powers of all government, including the powers of the legislature. It is a doctrine concerning what the law *ought to be.*" Because its source is not the state itself but rather the "moral tradition of the community," it is, he continues, "a meta-legal doctrine or a political ideal."[1] In Germany the rule of law was the guiding idea behind the *Rechtsstaat*, a concept that was inspired by Kant and achieved currency in the 1820s as the main goal of the liberal constitutional movement.[2] After the failure of the German Revolution of 1848, however, the meaning of *Rechtsstaat* was transformed from the rule of law to "rule by law," to adopt Harold Berman's distinction.[3] In this new positivist conception, the state itself was seen as the highest source of law, and the *Rechtsstaat* was reduced to a mere formal concept (*formelle Rechtsstaat*).[4]

German works on the *Rechtsstaat* began to be translated into Russian in the 1860s and 1870s, and by the 1880s the term *pravovoe gosudarstvo*, which I will translate as "lawful state," was being used for the German word.[5] Hiroshi Oda

1 This chapter appeared in an earlier version in *Dialogue and Universalism* 16, nos. 1–2 (2006): 81–104. The journal is published by the Institute of Philosophy, Warsaw University. I am grateful to the editors for permission to reprint the article.

F. A. Hayek, *The Constitution of Liberty* (Chicago: The University of Chicago Press, 1960), 205, 206, italics added.

2 Hayek, "The Origins of the Rule of Law," in Hayek, *The Constitution of Liberty*, 162–75; on the *Rechtsstaat*, see 196–204. On the development of the *Rechtsstaatsprinzip* in Germany, see also Hiroshi Oda, "The Emergence of *Pravovoe Gosudarstvo (Rechtsstaat)* in Russia," *Review of Central and East European Law* 25, no. 3 (1999): 373–434, at 375–81.

3 Harold J. Berman, "The Rule of Law and the Law-Based State with Special Reference to the Soviet Union," in *Toward the "Rule of Law" in Russia? Political and Legal Reform in the Transition Period*, ed. Donald D. Barry (Armonk, NY: M. E. Sharpe, 1992), 43–60, here at 47.

4 "Legal positivism from the very beginning could have no sympathy with and no use for those meta-legal principles which underlie the ideal of the rule of law or the *Rechtsstaat* in the original meaning of this concept, for those principles imply a limitation upon the power of legislature." Hayek, *The Constitution of Liberty*, 237.

5 *Pravovoe gosudarstvo* is typically translated "rule-of-law state," "lawful state," or "law-based state." "Lawful state" best fits Kotliarevskii's understanding of the concept, which encom-

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argues that for Russian jurists, ***pravovoe gosudarstvo*** tended to reflect the pre-1848 meaning of ***Rechtsstaat***, so that the Russian term ***zakonnost'*** (legality, in the sense of conformity with statutory laws) better corresponded to the post-1848 positivist meaning.[6] Article 47 of the Fundamental Laws of 1832 defined Russia as a lawful state in this latter sense: "The Russian Empire is governed on the firm basis of positive laws, establishments, and statutes, emanating from the autocratic power."[7] In other words, the tsar's will had to be obeyed because it was law—a debased sense of the concept.[8]

By the beginning of the twentieth century, the Russian constitutional movement was trying to change this state of affairs and adopted as its goal a ***pravovoe gosudarstvo*** in the sense of a state under the rule of law, the original meaning that ***Rechtsstaat*** had for German constitutionalists a century earlier.[9] More generally, ***pravovoe gosudarstvo*** could designate, even for positivist jurists, an evolution from rule by law (as in the ***Polizeistaat*** or "policing state") to the rule of law, or from the unlimited sovereignty of the state to the sovereignty of law.[10] One way or another, Russian liberal theorists developed the idea of the lawful state in the direction of the rule of law.[11] Those who were most concerned with justifying the sources of the supremacy of law were philosophical idealists such as Boris Chicherin, Vladimir Soloviev, and their successors.[12] The most systematic treatment of the specific topic of the lawful state is Sergei Kotliarevskii's work ***Power and Law: The Problem of the Lawful State.***[13] It is a rich and rewarding study that merits careful exposition.

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passes the entire history of the state's evolution (beginning with the biblical theocracies) toward ever more lawful forms. For Kotliarevskii, the rule of law is an ideal that no state ever perfectly realizes, so the term "rule-of-law state" risks conflating "what is" with "what ought to be." In his meaning, the ***pravovoe gosudarstvo*** is the state that is becoming ever more lawful, or the state that is developing toward and increasingly embodying the rule of law.

6 Oda, "The Emergence of ***Pravovoe Gosudarstvo (Rechtsstaat)*** in Russia," 373, 381–84.

7 Ibid., 385; see also Marc Szeftel, "The Form of Government of the Russian Empire Prior to the Constitutional Reforms of 1905–06," in ***Essays in Russian and Soviet History***, ed. John Shelton Curtiss (New York: Columbia University Press, 1962), 105–06.

8 Oda, "The Emergence of ***Pravovoe Gosudarstvo (Rechtsstaat)*** in Russia," 385–86.

9 Ibid., 392–403.

10 Although positivism maintains that any legal limitation of state power is ultimately a self-limitation, some positivist approaches contend that law may become practically autonomous of its state origins and provide effective limits on arbitrary state power, so that rule by law evolves toward rule of law.

11 Gianmaria Ajani, "Russian Liberalism and the Rule of Law: Notes from Underground," in ***Dimensions and Challenges of Russian Liberalism: Historical Drama and New Prospects***, ed. Ricardo Mario Cucciolla (Cham, Switz.: Springer, 2019), 15–26.

12 See Andrzej Walicki, ***Legal Philosophies of Russian Liberalism*** (Oxford: Clarendon Press, 1987), and Chapters 6, 9, 11, 13, and 14 of the present volume.

13 S. A. Kotliarevskii, ***Vlast' i pravo: Problema pravovogo gosudarstva*** (Moscow: Tipografiia "Mysl'," 1915). Walicki, ***Legal Philosophies of Russian Liberalism***, succinctly identifies the thesis of Kotliarevskii's book (366). He refers to Kotliarevskii in the course of his analysis of Bogdan Kistiakovskii's theory of the lawful state (364–74), which makes clear that the two thinkers had similar ideas. Another important consideration of the lawful state is Pavel

Biographical and intellectual profile

Sergei Andreevich Kotliarevskii (1873–1939), a gentry landowner from Saratov province, was one of Russia's leading social philosophers and a public figure in the politics of Russian liberalism.[14] In 1898 he married Ekaterina Nikolaevna Orlova (a physician four years older than he); in 1906 they had a daughter, Pavla.[15] Kotliarevskii held the distinction of defending four dissertations at Moscow University, the first two on church history and the second two on constitutional law.[16] From 1899 he lectured in history as a privatdocent at Moscow University. With his second doctorate in 1910, he became a professor of state (constitutional) law. He also lectured at the Higher Women's Courses in Moscow (1908–17). In liberal politics, Kotliarevskii was a zemstvo constitutionalist (a district- and province-level deputy from Saratov), one of the organizers of the Russian Liberation Movement that culminated in the Revolution of 1905,[17] a founder and central committee member of the Constitutional-Democratic (Kadet) party, and a deputy to the First State Duma.[18] On July 8, 1906, the government dissolved the Duma. In response, the Kadets and their confrères issued an appeal from Vyborg, Finland (where they had convened), calling on the Russian citizenry to refuse to pay taxes or provide military recruits. Though he had misgivings, Kotliarevskii signed the Vyborg Manifesto, consequently losing the right to participate in Duma elections. He continued to work on the Kadet central committee, but gradually became disillusioned with the party and left it in 1912.[19] He collabo-

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Novgorodtsev's *Krizis sovremennogo pravosoznaniia* (1909), which helped to shape Kotliarevskii's ideas. See Chapter 11 of this volume and Walicki, *Legal Philosophies of Russian Liberalism*, 318–28.

14 V. A. Tomsinov, "Sergei Andreevich Kotliarevskii (1873–1939)," in Tomsinov, *Rossiiskie pravovedy XVIII–XX vekov: ocherki zhizni i tvorchestva*, 2nd rev. ed., 3 vols. (Moscow: Zertsalo-M, 2015), 3:143–92.

15 Tomsinov, "Sergei Andreevich Kotliarevskii (1873–1939)," 144.

16 The first set was in the historical-philological faculty: *Frantsiskanskii orden i rimskaia kuriia v XIII i XIV vv.* (The Franciscan order and the Roman curia in the thirteenth and fourteenth centuries, 1901) for the master's degree, and *Lamenne i noveishii katolitsizm* (Lamennais and modern Catholicism, 1904) for the doctorate. The second set was in the law faculty: *Konstitutsionnoe gosudarstvo: Opyt politiko-morfologicheskogo obzora* (The constitutional state: An attempt at a political-morphological survey, 1907), and *Pravovoe gosudarstvo i vneshniaia politika* (The lawful state and foreign policy, 1909). All were published in the year indicated. For a recent edition of the third work, together with a work published in 1912, see S. A. Kotliarevskii, *Konstitutsionnoe gosudarstvo: Iuridicheskie predposylki russkikh osnovnykh zakonov*, ed. V. A. Tomsinov (Moscow: Zertsalo, 2004).

17 Kotliarevskii was a member of the first organized group of the Liberation Movement, the Beseda circle of the zemstvo opposition, formed in 1899, and contributed to one of its volumes: *Konstitutsionnoe gosudarstvo: Sbornik statei* (St. Petersburg: Izdanie I. V. Gessena i A. I. Kaminka pri uchastii redaktsii gazety *Pravo*, 1905). See Terence Emmons, "The Beseda Circle, 1899–1905," *Slavic Review* 32, no. 3 (1973): 461–90.

18 Tomsinov, "Sergei Andreevich Kotliarevskii (1873–1939)," 145, 147, 150–51. Tomsinov indicates that in 1905 and 1906, Kotliarevskii joined Masonic lodges in Paris and Moscow (148–49).

19 Ibid., 154–56, 170–73.

rated with Petr Struve on the liberal journals *Poliarnaia zvezda* (1905–06) and *Russkaia mysl'* (1907–18), and with E. N. and G. N. Trubetskoi on the liberal newspaper *Moskovskii ezhenedel'nik* (1906–10). During this period he was also part of the "Riabushinskii circle" of Moscow industrialists and national-liberal intellectuals.[20] In 1917 he helped Struve set up the League of Russian Culture, dedicated to the propagation of Russian national values.[21]

In the Provisional Government, Kotliarevskii worked on the law commission and on a commission to plan the Constituent Assembly.[22] On July 29, 1917, he was appointed deputy chief procurator of the Holy Synod. A week later, on August 5, the office of chief procurator was abolished, and a new Ministry of Denominations was established, with Kotliarevskii as associate minister. In that role, he participated in the All-Russian Council (*Sobor*) of the Russian Orthodox Church when it opened in Moscow on August 15.[23] In 1918 he contributed to *Iz glubiny* (*Out of the Depths*), a volume organized by Struve as a sequel to *Vekhi* (*Landmarks*, 1909), the famous collection of essays about the Russian intelligentsia. In his chapter, Kotliarevskii extolled religion as the antidote to the intelligentsia's delusional "subjective psychologism": "For if religion reveals itself to us in the secret depths of our spirit, then is not religious experience the very basis of the life of the individual, the guarantee that inherent in it is the very highest objectivity?"[24] At this time he became involved in the anti-Bolshevik All-Russian National Center and was arrested in late August 1919.[25] He was released but rearrested in February 1920 and given a five-year conditional sentence that permitted him to continue to teach at Moscow University.[26] Reconciling himself to Soviet power, he taught at Moscow University until the early 1930s, while also working for the Commissariat of Justice. In 1937 he wrote to Stalin—"Deeply respected Iosif Vissarionovich!"—supplicating him for academic work, appealing to Stalin's "exceptional concern for humanity," and reassuring him that he had "mastered

20 Kotliarevskii contributed an essay to the two-volume work produced by the group: "Russkaia vneshniaia politika i natsional'nye zadachi," in *Velikaia Rossiia: Sbornik statei po voennym i obshchestvennym voprosam*, ed. V. P. Riabushinskii, 2 vols. (Moscow, n.p. [1911–12]), 2:43–66.

21 On his work with Struve and the Riabushinskii circle, see Richard Pipes, *Struve: Liberal on the Right, 1905–1944* (Cambridge, MA: Harvard University Press, 1980), 21, 182, 236.

22 Tomsinov, "Sergei Andreevich Kotliarevskii (1873–1939)," 175.

23 Ibid., 178–79. See also *Time of Troubles: The Diary of Iurii Vladimirovich Got'e*, ed., trans., and intro. Terence Emmons (Princeton, NJ: Princeton University Press, 1988), 45–46. For Kotliarevskii's involvement in the church council, see James W. Cunningham, *The Gates of Hell: The Great Sobor of the Russian Orthodox Church, 1917–1918* (Minneapolis: Minnesota Mediterranean and East European Monographs, University of Minnesota, 2002); the index lists numerous page references for him.

24 S. A. Kotliarevskii, "Recovery," in *Out of the Depths* (De Profundis): *A Collection of Articles on the Russian Revolution*, ed. and trans. William F. Woehrlin (Irvine, CA: Charles Schlacks Jr., Publisher, 1986), 145–55, here at 154.

25 Tomsinov, "Sergei Andreevich Kotliarevskii (1873–1939)," 183–86.

26 Ibid., 186–89. Got'e did not hide his contempt in writing that Kotliarevskii "wavered" and "compromised" himself. See *Time of Troubles: The Diary of Iurii Vladimirovich Got'e*, 378.

the methods of Marxism-Leninism" to such a degree that he could be helpful. His efforts seem to have yielded success, but only temporarily. He was arrested in April 1938 and executed a year later. He was rehabilitated in 1956.[27] How his reconciliation with Soviet power affected his religious-philosophical worldview must remain a matter of speculation.

Sergei Kotliarevskii was a religious idealist, metaphysical personalist, and liberal theorist whose ideas were closest to those of Sergei Trubetskoi (1862–1905), Evgenii Trubetskoi (1863–1920), and especially Pavel Novgorodtsev (1866–1924), his senior colleagues at Moscow University and in the Moscow Psychological Society. He combined philosophical idealism with a broad cultural and historical approach to liberalism. An astute student of religion and society, he became convinced that a liberal civic culture had its roots in a free and dynamic spiritual life. In his 1905 essay, "The Premises of Democracy," he described the type of religious consciousness that promotes the development and deepening of liberalism:

> Its binding force consists in the feelings of piety and worship that are inherent to a human being before the Unfathomable, the Divine. And these feelings are sufficiently powerful, sufficiently rich in creative force, to generate an infinite diversity of symbols and forms. The spiritualization of human life—here is the true premise of the principle of the "kingdom of freedom." It is impossible to imagine without religion, forging a link between the terrestrial and celestial.[28]

Not surprisingly, the author of these lines had a deep appreciation for the author of *The Varieties of Religious Experience*.[29] Through William James, Kotliarevskii became very interested in pragmatism, valuing it for its idea of the expansive possibilities of human experience, instead of the dogmatic constrictions and reductions of one or another monistic ideology. He believed that the pragmatist approach to the full range of human experience, including morality and religion, could promote the development of an integral, balanced, and liberal worldview.

Power, law, spirit

Pragmatism is the general philosophical framework within which Kotliarevskii conceives his project in *Power and Law: The Problem of the Lawful State*. The treatise opens with reflections on the nature of work—intellectual, moral,

27 Tomsinov, "Sergei Andreevich Kotliarevskii (1873–1939)," 190–92.

28 S. A. Kotliarevskii, "Predposylki demokratii," *Voprosy filosofii i psikhologii* 16, no. 2, kn. 77 (1905): 104–27, here at 126–27.

29 See Randall A. Poole, "William James in the Moscow Psychological Society: Pragmatism, Pluralism, Personalism," in *William James and Russian Culture*, ed. Joan Delaney Grossman and Ruth S. Rischin (Lanham, MD: Lexington Books/Rowman & Littlefield, 2003), 131–58. The second half of the essay is devoted to Kotliarevskii.

physical—and its value for personal, cultural, and even cosmic development. Work fashions both person and cosmos.[30] It is a creative and transforming process by which the initially given realities of the natural and human worlds are remade in a higher human and ultimately divine image.[31] Work is what brings the reality of "what is" closer to the ideal of "what ought to be." It is, in short, a spiritualizing process, the self-realization of a higher potential inherent not only in humanity but also in natural reality. Kotliarevskii relates these suggestions to the pragmatist approach to truth (1–2). His own conception was closest to the idea of the *plasticity* of reality, which the more speculative pragmatists, such as the British philosopher F. C. S. Schiller (1864–1937), used to convey the creative potential in our search for truth, a process in which reality to some extent realizes in itself our ideals.[32] As James put it, pragmatism was no mere epistemological matter. "*It concerns the structure of the universe itself.*"[33] This was precisely Kotliarevskii's idea of the cosmic-creative potential of work, including, of course, the work of discovering truth.

Kotliarevskii's pragmatist-inspired conception of work seems at first to have little to do with his main problem, power and law. In fact, however, this conception forms the underlying theme of his treatise: law is the ideal that is worked into the basic reality of the state—power—and progressively transforms it, in turn enabling higher levels of development. Law is part of the work that humanizes and spiritualizes reality, first of all the reality of unequal power in human relations. Kotliarevskii's approach was inspired not only by pragmatism but by a source closer to home: Vladimir Soloviev's concept of divine humanity (*Bogochelovechestvo*). For both Soloviev and Kotliarevski, law was integral to the work of spiritualization and ultimately of deification.

"Two Elements in the State" is the title of Kotliarevskii's first chapter. Despite the age-old striving to make the state more lawful, law is not the first, basic element of the state. Power is. It is primary and intrinsic to the state; law, as a matter of origins, is secondary and extrinsic. Power is the natural element; law is the ideal element, one that must be gradually realized in the state through work. Power, submission, and dependence are human psychological realities, and they are basic to the nature of the state. No abstract dialectical or formal juridical approaches are necessary to understand this, nor can they long deny it (5–6). Here Kotliarevskii followed the prominent Russian legal theorist N. M. Korkunov (1853–1904), who traced the source of power to the common human experience of dependence: it is the feeling of dependence in one person that

30 Kotliarevskii, *Vlast' i pravo: Problema pravovogo gosudarstva*, 1. Subsequent page references are cited parenthetically in the text.

31 Although pragmatism is the context here, Kotliarevskii could not have been unaware of Hegel's and Marx's ideas on the transforming power of work.

32 Kotliarevskii refers to the notion of the plasticity of reality in his essay, "Pragmatizm i problema terpimosti," *Voprosy filosofii i psikhologii* 21, no. 3, kn. 103 (1910): 368–79, here at 378.

33 William James, *Pragmatism* (New York: Dover Publications, 1995), 100. *Pragmatism* was first published in 1907.

gives power to another. Likewise with the state, which, according to Korkunov, derives its power not so much from coercion but from the consciousness, among its subjects, of dependence and subordination (6–8, 11).[34] Kotliarevskii thought this was paradoxical, as if to say that power is most present when it is least exercised, when people submit to it before its overt exercise. Overt or otherwise, it is basic to the state (14–17).

At this level (power), the state still has much in common with the brutish "state of nature" and is very much in need of ideal transformation and elevation to a higher level, which is the work of law. This is why Kotliarevskii insisted that power and law are two different elements of the state. The distinction is also relevant to his repeated efforts to resist political utopianism and its exaggerated claims for the role of the state in promoting human self-realization and perfectibility.[35] He wanted to stress that the possibilities of the state are limited by its own nature and means, which are relative ones inextricably tied to power relations. The rootedness of state power in flawed human nature is discounted by the rationalist faith in the realization of human perfectibility through political institutions and other external arrangements; similarly, by the anarchist faith in a natural human goodness that has been corrupted by politics but supposedly will reemerge with the state's destruction, as if power were an external matter. Both rationalism and anarchism share a "psychological utopianism" about human nature that is "one of the deepest roots of political and social utopianism" (18). In contrast to power and its reflection in the relative means of the state, law pertains to absolute ends and reaches beyond power relations to spiritual aspirations. Its possibilities, like the human spirit from which its demands come, are infinite, based on the realization that true transformation comes from within.[36]

Power is not unique to the state, of course, but pervades all types of human relationships and associations. "For a long time," Kotliarevskii writes, "dependence on kin, commune, and landlord was much more palpable and encompassed all moments in the life of the one under power and his whole field of consciousness, eclipsing the weak, dim power of the state." Gradually, however, the state triumphed over these groups, acquiring a monopoly over coercion. The general problem of power, in its relation to personal and social freedom, now tends to focus on the specific problem of state power. How, Kotliarevskii asks, are we to

34 On Korkunov's analysis of the phenomenon of power, see also Walicki, *Legal Philosophies of Russian Liberalism*, 214.

35 The philosophical critique of utopianism is a theme that runs through Kotliarevskii's works. See, for example, "Predposylki demokratii"; "Politika i kul'tura," *Voprosy filosofii i psikhologii* 17, no. 4, kn. 84 (1906): 353–67; and "Filosofiia kontsa," *Voprosy filosofii i psikhologii* 24, no. 4, kn. 119 (1913): 313–38.

36 Kotliarevskii's overall approach was much influenced by Pavel Novgorodtsev's *Krizis sovremennogo pravosoznaniia*, which argues that the specific institutions and mechanisms of the liberal democratic state are relative means that could never produce a perfect society or transform human nature, but that liberal democratic ideals, such as the rule of law, are indeed absolute ends, based ultimately on the idea of personhood.

resolve it? (17–18) With that question, he turns to the second element of the state: law.

The modern state, Kotliarevskii observes, reveals a profound change in the character of power. First, state power has generally come to be viewed as a means of fulfilling social functions and as an instrument of public policy. In terms of content, it is defined positively and invested with great social and national tasks (19–20). Second, state power has increasingly assumed a lawful form. There is, he explains, an undoubted link between the state's new social content and its legal form, which is that in both respects, state power has undergone a process of rationalization. But there is a certain antagonism as well. The antagonism between form and content arises precisely because the state's ever increasing activity in the social sphere requires that its legal character be defined negatively rather than positively.[37] Lawful form is, however, compatible with diverse and broad content; the issue is not what the state does but how it does it.

Defining the form and limits of state power negatively rather than positively, on the basis of prohibition rather than prescription, is Kotliarevskii's first criterion of the lawful state. "The concept of the lawful state," he writes, "at least initially meets the requirement of such a negative definition." The lawful state does not at all deny the principle of power, intrinsic as it is to human nature, but it does strive to balance this with other sides of human nature, first of all by preserving "a certain sphere of legal autonomy" (20). At the end of his study, he notes that the lawful state may have its origins in the "instinct" of limiting the feeling of personal dependence, the source of power and subordination, but his point is that the sphere of independence that law carves out is testimony to law's real, transforming force, for that sphere is the condition of all higher development (411).

The state is not the only organization where power and submission need to be limited by law. They also need to be limited in the family, the church, political parties, and "any union where there are people with their passions, with despotism and the temptation of subjection to another's will" (21).[38] But, Kotliarevskii continues, the main limitation on power in these groups is made by the state itself, which protects its members from being treated in ways contrary to their status as subjects and citizens. Since in the absence of a world government there is no organization higher than the state, it is essential that its power be lawfully limited so that it can serve as the model, institutional embodiment, and guarantor of the rule of law. "In contemporary circumstances," Kotliarevskii writes,

37 As Kotliarevskii puts it later in his study, "the expansion of state activity with positive tasks extraordinarily increases the government's force and, consequently, makes corresponding legal guarantees all the more necessary" (349n).

38 The importance that Russian liberals attached to dismantling the "interconnected structures of domestic patriarchy, *soslovie* society, and arbitrary autocratic and state power (*proizvol*)" has been masterfully demonstrated by William G. Wagner, *Marriage, Property, and Law in Late Imperial Russia* (Oxford: Oxford University Press, 1994) and Wagner, "Family Law, the Rule of Law, and Liberalism in Late Imperial Russia," *Jahrbücher für Geschichte Osteuropas* 43, no. 4 (1995): 519–35, here at 521.

"the lawful character imparted to state power is the necessary condition for the supremacy of law in all other social relations" (21).

This formulation—"the supremacy of law in all social relations"—nicely captures the main principle underlying Kotliarevskii's whole philosophy of law. The lawful state is the necessary condition for the rule of law elsewhere in society, and the rule of law is the necessary condition, in turn, for human self-realization and higher spiritual development. Law makes possible the fuller development of human potential by, in a sense, freeing people from the state of nature and reducing the element of power, force, and violence in human affairs. It makes people equal in a way that they are not in the state of nature or in unlawful societies, where the strong brutalize the weak—and brutalize themselves in the process. By equalizing human relations, law enables people to develop as persons. Law, in short, is an essential spiritualizing force. In this, Kotliarevskii's conception of law was classically liberal: law safeguards the scope of negative liberty necessary for self-realization by limiting arbitrary state power and the power of one person over another.

The striving for the supremacy of law over power is the defining, abiding feature of the lawful state. The institutions and practices of the lawful state, the various ways it seeks to realize the supremacy of law in practice, are all relative and subject to change, a matter of "political technics," but the ideal itself—"like the human spirit creating it"—is permanent (22). For this reason Kotliarevskii describes the concept of the lawful state as essentially "metajuridical";[39] its core principles are absolute ends that always transcend the specific juridical or political means used to approximate them in historical reality (22). In this connection, he specifies another basic premise of the lawful state: the relative mutual independence of law and the state (23). Clearly, this is a key formulation. We know that, for Kotliarevskii, the state's basic nature is power. Law by its nature and origins is different. It is extrinsic to the state but can be worked into it, limiting the arbitrary exercise of its power, making it lawful, and transforming its nature. To the question that inevitably arises—"What is the source of law?"—Kotliarevskii's answer is unambiguous, and he defends it throughout his treatise: the ultimate source of law is the striving of the human spirit, an autonomous ideal force capable of transforming external reality. This position is, of course, perfectly consistent with his overall philosophical idealism.

One of the basic claims of legal positivism is that the state is the source of law, a claim that Kotliarevskii is therefore obliged to refute. He focuses on the positivist approach to the problem of the legal self-limitation of state power. By "legal self-limitation," Kotliarevskii is not suggesting that state power is somehow self-limiting—although precisely this is the positivist position. He is interested more generally in why state officials, at a certain stage in the state's development, come to respect laws that also apply to the state's other subjects and that thus limit

39 Cf. Hayek's use of the term "meta-legal," quoted above.

their own power. Why, in other words, do state officials come to see themselves as under the rule of law and as equal to other subjects or citizens?[40] (32, 36–37)

The German legal theorist Rudolf von Jhering (1818–92) gave one answer to the problem: the state submits to its own laws because it is in its own best interests to do so.[41] Law is only an intelligent politics of state power, as Kotliarevskii puts it (34–35). He compares Jhering's theory to utilitarianism, which tries to explain morality as rational egoism. One of the dangers of Jhering's approach, he points out, is that the state is personified and depicted as a thinking and acting being. Kotliarevskii's main criticism, however, is that rational self-interest alone cannot explain the state's self-limitation. Jhering himself was eventually compelled to admit that moral factors are at work, without, however, recognizing that "this moral force is not contained within the bounds of even the most rational egoism; it rests on consciousness of responsibility and duty" (37). Kotliarevskii's overall conclusion is that Jhering's positivist approach prevents him from clearly appreciating that moral consciousness is the main factor in the legal self-limitation of state power; positivism must disguise this factor as "rational egoism."[42]

Kotliarevskii also considers the views of another prominent German legal theorist, Georg Jellinek (1851–1911),[43] who compares the state's legal self-limitation with the self-limitation of the human person submitting to the autonomous moral law. Although Kotliarevskii generally admired Jellinek, he rejects this comparison. First, Kotliarevskii is again wary of any psychological comparison of state and person. Second, as we know, he does not think it is correct to speak of law as an autonomous principle inherent in the state. A human being,

40 "The ideal of the rule of law requires that the state either enforce the law upon others—and that this be its only monopoly—or act under the same law and therefore be limited in the same manner as any private person. It is this fact that all rules apply equally to all, including those who govern, which makes it improbable that any oppressive rules will be adopted." Hayek, *The Constitution of Liberty*, 210.

41 For the Russian reception of Jhering's views, see Walicki, *Legal Philosophies of Russian Liberalism*, 143–44, 156, 185, 215, 227–30, 241, 261, 279, 302–04.

42 Kotliarevskii's treatment of Jhering is a good example of the "contraband" critique of positivism advanced by Russian neo-idealists. They believed that ethical, religious, and metaphysical suppositions were inevitable in human thought and needed to be acknowledged and justified. "Contraband" refers to the unconscious smuggling of these suppositions into areas of thought claimed by positivism as its own, and to the resulting intellectual distortion and muddling of concepts. The contraband critique of positivism was widely used in *Problems of Idealism*. See the editor's introduction to *Problems of Idealism: Essays in Russian Social Philosophy*, ed. and trans. Randall A. Poole (New Haven: Yale University Press, 2003), 1–78, esp. 35–42. Kotliarevskii helped to pioneer the contraband critique in his review of *Ocherki realisticheskogo mirovozzreniia* (1904), the leading positivist response to *Problems of Idealism*: see Kotliarevskii, "Ob istinnom i mnimom realizme," *Voprosy filosofii i psikhologii* 15, no. 5, kn. 75 (1904): 624–44. Walicki shows that Stanislaw Brzozowski, the Polish fin-de-siècle thinker, also used the contraband critique of positivism. See Walicki, *Stanislaw Brzozowski and the Polish Beginnings of 'Western Marxism'* (Oxford: Oxford University Press, 1989), 91.

43 For the Russian reception of Jellinek's views, see Walicki, *Legal Philosophies of Russian Liberalism*, 201, 314–15, 368–70.

in submitting to the moral law, follows the inner voice of conscience. The state, by contrast, takes law not from itself but from the "surrounding social sphere," in Kotliarevskii's phrase. "Law is a secondary element of state organization, and state recognition is not the primary source of its binding nature. For the original element of power, from which the state is created, law is heteronomous; it comes from outside." Power and law, he stresses, have different sources, and one or another combination of these elements determines the basic character of the state order (43–44). The lawful state cannot eliminate the element of power intrinsic to the state as such, but it can strive toward an ever fuller realization of the principle of law, "which is inseparable in the final account from religious-moral foundations" (45).

The religious roots of legal consciousness

One of the most important themes in *Power and Law* is that the very idea of the lawful state is not peculiar to modern constitutionalism but belongs to the "cultural inventory of humanity" (44). "It runs through the ages as the search for law, as the striving of the human spirit—silenced, rising again, never dying; only those political and social forms in which it has been embodied ... die and are doomed to die" (233). In the third chapter of his study ("Historical Embodiments"), Kotliarevskii follows this perennial search for the ever more lawful state and its relative, historical approximations. His thesis is that the lawful state presupposes a certain legal consciousness. He is especially interested in how religious ideas and institutions have affected the development of this consciousness and its core moral conviction, that power ought to be limited by law.[44]

Kotliarevskii locates the ancient roots of the lawful state in the biblical theocracies. At first glance, this lineage might seem highly problematic; surely theocracy and the lawful state could be paired only as polar opposites. Kotliarevskii himself could not have been more critical of theocratic currents in modern social thought, beginning with Vladimir Soloviev's "free theocracy."[45] It is necessary, however, to distinguish among various senses of the term "theocracy" and to appreciate the historical context. What is retrograde in a more recent historical period might well have been progressive in an earlier one. Kotliarevskii argues that there is a

44 In addition to the religious roots of legal consciousness, Kotliarevskii also explores the "secular" Greek and Roman contributions to the idea of the lawful state (135–75).

45 Kotliarevskii and other Moscow Psychological Society philosophers, including Boris Chicherin, Evgenii Trubetskoi, and Pavel Novgorodtsev, were highly critical of Soloviev's theocratic utopianism, seeing in it the mirror-image of the subordination of church to state characteristic of modern Russian history. They argued that both systems were illiberal in the same way: they violated freedom of conscience and infringed the necessary autonomy of church and state. See Randall A. Poole, "Utopianism, Idealism, Liberalism: Russian Confrontations with Vladimir Solov'ev," *Modern Greek Studies Yearbook: Mediterranean, Slavic and Eastern Orthodox Studies* (University of Minnesota) 16/17 (2000/2001): 43–87 (on Kotliarevskii, see 66–67).

sense in which theocracy can refer to the limitation of secular power by the will of God and his earthly representatives. In this conception, religious sanction is given to secular power only conditionally and can be withdrawn, in which event it turns into a sanction for the overthrow of the offending government. "Here, under the defense of religious norms, the relative security of citizens can be preserved, as in other epochs and circumstances it is preserved under legal norms" (123–24).

The best example of this type of theocracy can be found among the ancient Hebrews. Kotliarevskii distinguishes between two types of theocratic ideals in the Hebrew tradition: priestly and prophetic. Both contributed to the development of legal consciousness, although Kotliarevskii believed that the prophetic-messianic tradition was the more significant, especially in its religious universalism, its fervent faith in a moral world-order, and its appeal to personal and social righteousness. The divinely inspired authoritative voice of the prophets acted as a restraining force against arbitrary power (127–28). The Israelite kings were not to rule despotically but according to God's will and law; "this is not so much monarchical power, as monarchical service" (132). Thus theocracy, as depicted in the Hebrew Bible, "itself provided a certain legal order, although by extra-legal norms: the will of the earthly ruler was concretely limited by a higher divine will" (131). Most important was the belief that divine dictates are not something external to human nature but are confirmed by conscience.

> Thus theocracy, limiting state power in its name, limits it by a norm flowing from human nature itself—from its natural law, it might be said. And it would be wrong to think that this nature was ascribed to only one selected nationality. The messianic ideal, transcending national exclusiveness, reveals a new world, where the wolf will graze with the lamb (Isaiah 65:25), where people from all nations and all ends of the earth will be saved (Isaiah 45:20, 22; Zechariah 2:11).
>
> (133–34)

Kotliarevskii attached great significance to the legal consciousness of ancient Israel as it developed alongside the Judaic monotheistic religious ideal. "Much of this spiritual wealth," he writes, "was inherited and reworked by future ages: much of it has left a clear mark on the history of the European state and its affirmation of legal principles" (134).[46]

Kotliarevskii contended that Christianity also made great and distinctive contributions to the idea of the lawful state. The first of these was religious freedom, a demand made by early Christian apologists against pagan Rome. They defended this demand as consistent with the legal principles recognized by Rome itself, principles that did not permit Christians to be denied their freedom without

46 Compare the view of one respected present-day historian: "It is not too much to say that, if the heart of political liberalism is the belief that power must be used within a moral framework independent of it, then its taproot is the teaching of the prophets." J. M. Roberts, *The Penguin History of the World* (New York, NY: Penguin Books, 1990), 110.

cause. The Christian apologists appealed to Rome to respect its own legal principles, and in doing so Kotliarevskii thinks they helped to deepen its legal consciousness. At the same time, the church itself became more authoritarian, hierarchical, and repressive—psychological traits "that did not remain without great influence on the relation of Christians to power and the state" (177–78). Externally, the church won an important victory in 313, when the Edict of Milan granted religious freedom to all Roman citizens. "But," Kotliarevskii adds cryptically, "another period soon begins," when the church will use its new power and privileges to suppress the religious freedom it had earlier championed. Here are the roots of medieval intolerance, yet the church's very power could also limit that of the state, as famously symbolized by Ambrose of Milan's excommunication of Emperor Theodosius in 390 (178).

The countervailing power of church and state produced the "medieval dualism" that, according to Kotliarevskii, so distinguished the Catholic West from the Orthodox East and excluded "state omnipotence" (179–80).[47] The church's power ran the risk, however, of compromising its spiritual vocation and distinctiveness as it assumed secular responsibilities in the highly decentralized feudal world.[48] The church recognized the dangers of internal secularization and tried to counteract them by several means: monasticism (especially with the Cluniac reform and founding of the mendicant orders); the reforms of Pope Gregory VII (1073–85), which asserted papal supremacy and condemned lay investiture, simony, and clerical marriage; and the systematization of cannon law. These far-reaching measures enabled the church to preserve its unity and independence (197–200).[49]

Through its monastic, clerical, and legal reforms, the medieval church tried to combine asceticism and theocracy. Following St. Augustine, it held that spiritual power over the world was justified only by ascetic rejection of the world.[50] Kotliarevskii believed this was a distinctive combination that had far-reaching implications for the later development of the lawful state. The church began to hold power as a function, not as property—***ministerium***, not ***dominium***, in Bernard of Clairvaux's expression (199). This sharply distinguished spiritual

47 "The very presence of the Catholic church," Kotliarevskii concludes, "limited state power" (207).

48 With regard to feudalism itself, Kotliarevskii argued that historians have exaggerated the extent and significance of its contributions to the rule of law (180–97).

49 Recall that the mendicant orders were the subject of Kotliarevskii's first master's thesis, ***Frantsiskanskii orden i rimskaia kuriia v XIII i XIV vv.*** (1901). On the Gregorian "Papal Revolution," see the Introduction to the present volume.

50 E. N. Trubetskoi's studies in the intellectual history of medieval theocracy develop this point at length. See Trubetskoi, ***Religiozno-obshchestvennyi ideal zapadnogo khristianstva v V veke: Mirosozertsanie bl. Avgustina*** (Moscow: Tipografiia E. Lissnera i Iu. Romana, 1892), 70–79, 257–70; and Trubetskoi, ***Religiozno-obshchestvennyi ideal zapadnogo khristianstva v XI veke: Ideia bozheskogo tsarstva v tvoreniiakh Grigoriia VII-go i ego publitsistov-sovremennikov*** (Kiev: Tipografiia S. V. Kul'zhenko, 1897), 304, 318, 349–63. It is curious that Kotliarevskii cites neither of these works in this connection.

power from secular power, which was still "patrimonial," but which would later also come to be conceived as a function serving higher (state) purposes.[51]

Kotliarevskii further points to the late medieval conciliar movement which, although it ultimately failed within the church, became a crucial source of constitutional ideas in early modern political thought (200–01).[52] Other seminal Catholic contributions to the idea of the lawful state were natural law and contract theory (204).[53] Most important, the church preserved the autonomy of the religious sphere, both by its own spiritual/ascetic reforms and by its institutional power against the state. As a whole, the medieval West managed to avoid what Kotliarevskii calls "Byzantine caesaropapism" despite certain efforts in that direction by the Holy Roman Empire. He notes that historians have often recognized that the dualism of church and state was "highly favorable for European freedom," and he clearly agrees with them (205–06).[54] It is true that both church and state stood on theocratic ground, and that the state surpassed the church in persecution of heresy. But within the church's sphere there were limits to state power, and within this sanctuary Kotliarevskii sees the beginnings of freedom of conscience—with which, he says, all other freedoms are connected (206–07).

Problems of modern constitutionalism

From ancient and medieval "embodiments" of the idea of the lawful state, Kotliarevskii turns to the early modern and modern periods, to the progression from feudalism to absolutism and finally constitutionalism. A critical juncture in this progression was the transition from a patrimonial to a functional conception of power—the roots of which, as we have seen, he traced to medieval ascetic theocracy. Louis XIV's famous pronouncement, "L'état c'est moi," was made already at a time when "the power of the monarch was becoming separated from its patrimonial basis and turning into a state function demanded by the general

51 Cf. Ernst Kantorowicz's distinction between the immortal body politic and the mortal body of the king in Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton, NJ: Princeton University Press, 1957).

52 Quentin Skinner's classic study, *The Foundations of Modern Political Thought*, vol. 2, *The Age of Reformation* (Cambridge: Cambridge University Press, 1978), emphasizes conciliarism and other Catholic sources of constitutionalism. More recently, see Francis Oakley, *The Conciliarist Tradition: Constitutionalism in the Catholic Church 1300–1870* (Oxford: Oxford University Press, 2003), and Paul Valliere, *Conciliarism: A History of Decision-Making in the Church* (Cambridge: Cambridge University Press, 2012).

53 Although Kotliarevskii does not cite him, E. N. Trubetskoi also refers to the church's use of ideas of popular sovereignty and contract theory against state absolutism. See Trubetskoi, *Religiozno-obshchestvennyi ideal zapadnogo khristianstva v XI veke*, 310–14.

54 He put it even more strongly in his 1907 book on constitutionalism: "The great service of Catholicism in the history of humanity . . . is that it defended a certain sphere of people's spiritual life from state intrusion." Kotliarevskii, *Konstitutsionnoe gosudarstvo: Opyt politiko-morfologicheskogo obzora* (St. Petersburg: Izdanie G. F. L'vovicha, 1907), 80–81.

good, and the monarch himself—into a state organ," his power no longer personal but derived from and thus (in theory) limited by the state (226).

This incisive formulation captures the distinctiveness of the modern lawful state and specifies a crucial threshold in its practical realization. Kotliarevskii's meaning is that the state turned from being (at least in part) the property or instrument of monarchical power into being the source itself of power, which would seem to transform the nature of state power and make it qualitatively more lawful than in previous embodiments of the lawful state. The state, once it is recognized as the only legitimate source of power in the public sphere, becomes the institutional embodiment of the rule of law, to which even (or especially) executive power is subordinate. As Kotliarevskii writes, "recognition of lawful supremacy presupposes only that the monarch be an organ of the state, and not stand above it" (244). The principle of the modern lawful state, he continues, excludes any patrimonial conception of power, for the monarch's (or any official's) power is not his own property but rather his competence; the "only subject" (or source) of power in the state is the state itself (246–47). In other words, there is no legitimate private (patrimonial) source of power in the modern lawful state; in the public sphere, all power is public and derives from the state. The modern form of the lawful state, so conceived, is the constitutional state, sustained by a relatively highly developed legal consciousness, which is also ultimately its very source.

In his consideration of the modern constitutional state,[55] Kotliarevskii emphasizes that it and the lawful state must not be equated. The lawful state is a metajuridical concept that transcends any of its historical embodiments; in the modern era, its necessary form is indeed the constitutional state, but this is a historical form that may be superseded in the future (118, 234). Juridically, Kotliarevskii defines the constitutional state as one where only an act issued with the consent of popular representation can be recognized as a formal law (*zakon*) (234, 297). This definition indicates how the constitutional state provides for the supremacy of law over other acts of state power, and how law thus becomes the general norm for the state. The supremacy of law must also entail its universality, since this alone provides for equality before the law. The supremacy of law, so defined, is the main criterion of the constitutional state; other features, such as ministerial responsibility before parliament or whether the state is a monarchy or republic, are secondary (235–36).

By its very nature, the modern lawful state must give primary importance to the courts. They were, Kotliarevskii writes, the first branch of government to forcefully advance the principle of the legal self-limitation of the state. Long before the separation of the legislative and executive branches, the judiciary acquired its

55 This is the subject of his fourth chapter, "The Constitutional State as Embodiment of the Lawful State," most of which is devoted to contemporary constitutional politics and practices in Europe and elsewhere. The subject is also discussed at some length in his second chapter, a review of German, French, British, and Russian scholarship on the lawful state. He also devoted a separate book to the subject: Kotliarevskii, *Konstitutsionnoe gosudarstvo* (see note 54).

independence, a pivotal moment in the modern history of the rule of law. The Russian Judicial Reform of 1864, he observes, so successfully embodied the idea of an independent judiciary that the reformed courts were recognized (by friend and foe) as incompatible with autocracy. He opposed the retention of the *volost'* (township) courts because they operated according to unwritten customary law rather than ordinary civil law; therefore, he thought they impeded the final legal equality of the peasantry with other estates. In pointed references to Russia in his own day, he warned that any violation of established judicial procedure (such as trial by jury) was an infringement of the principle of law requiring not simple reference to state necessity but very weighty justification. This diminishment of law was even graver with any expansion of the jurisdiction of military courts, which had to be limited to absolute necessity (328–30).

Kotliarevskii was, of course, fully cognizant of the Russian context within which he was writing, and he no doubt hoped, as a civic-minded legal philosopher and historian, that his study of the development of the lawful state might reveal a "usable past" for Russia (albeit a largely foreign, Western one) as the country tried to build its own liberal future, one tied more closely to the West. He believed that the October Manifesto of 1905 signified Russia's transition to a constitutional order because it guaranteed that "no law can go into force without approval of the State Duma," which was his definition of the constitutional state (112–13, 236). In retrospect, this assessment was far too optimistic (and ironically for him, too juridical), but it gave greater practical relevance to recent Russian scholarship on the lawful state, including his own. In a succinct literature review, he highlights those Russian theorists who recognized that the legal limitation of state power was to be sought in the "normative consciousness" of citizens (N. I. Palienko) and that personhood was the ultimate metajuridical foundation of the lawful state (A. I. Elistratov) (113–18).[56]

The absolute worth of the human person was the basis, we know, for Kotliarevskii's negative definition of the modern lawful state. According to this definition, the state must recognize and guarantee the legal bounds surrounding individual persons and their various associations (119). "The necessity of a certain sphere of personal freedom" (including personal inviolability and freedom of conscience, expression, and association) has become "axiomatic" in modern legal consciousness and is today the "necessary premise" of any state under the rule of law (342).[57] But outside this sphere of negative liberty there

56 Kotliarevskii also considers the works of two other jurists, A. S. Alekseev and V. M. Gessen. Oda, "The Emergence of *Pravovoe Gosudarstvo (Rechtsstaat)* in Russia," refers to all these thinkers.

57 There is a succinct presentation of "The State and the Rights of the Citizen" in *Konstitutsionnoe gosudarstvo*, 80–101. David Wartenweiler, in his analysis of the idea of civil society in Russian liberal thought, highlights Kotliarevskii's contribution, quoting him from this source: "As Kotliarevskii remarked, the recognition and guarantee of individual rights 'proves to be fully effective only when the entire nation is imbued with consciousness of the importance of these individual rights, with consciousness of the great danger that comes

is broad scope for the positive activity of the state. In fact, what is distinctive to modern constitutionalism is its combination of negative legal form with positive social content and a broad commitment to welfare policies. Kotliarevskii strongly endorsed the social and cultural policies of the contemporary constitutional state, believing that they were not only compatible with but increasingly mandated by respect for the dignity of the human person. He wished to counter the view that the only tasks of the lawful state were to uphold law and order and to limit (to the extent possible) the state's interference in the life of citizens (119, 335–41). He even suggested that there is no necessary contradiction between socialism and the lawful state (339–41).[58] Like Vladimir Soloviev and Pavel Novgorodtsev, he championed a positive conception of the "right to a dignified existence" as the next step in the practical development of the constitutional state (346–50).

From personhood as the metajuridical foundation of the lawful state, Kotliarevskii drew other policy conclusions for modern constitutionalism. First, the idea of personhood utterly precluded capital punishment. This was a matter of great concern for him. "We can be sure," he wrote pleadingly, "that the growth of legal and moral feeling will lead to the state's complete renunciation of the death penalty, to the recognition of an impassable barrier, the absence of which in Christian Europe is one of the gravest indictments against contemporary civilization." Kant and Hegel's defense of the death penalty was, he added, a "sad aberration of great minds" (344).[59] The principle of personal dignity also prescribed equality of rights for every member of the state. Class or national inequality was thus a glaring violation of the rule of law. Here Kotliarevskii points to the egregious example of the legal position of Jews in Russia (344).[60] He

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from their violation by state power, and with the readiness to defend them.'" David Wartenweiler, *Civil Society and Academic Debate in Russia, 1905–1914* (Oxford: Clarendon Press, 1999), 125, quoting Kotliarevskii, *Konstitutsionnoe gosudarstvo*, 99–100, translation slightly emended. Anastasiya Tumanova also quotes this passage, which makes clear, in her words, that "Kotliarevskii was a true exponent of the position of the 'revived natural law' school, which considered legal consciousness to be the source for the development of law and statehood." See Tumanova, "The Liberal Doctrine of Civil Rights in Late Imperial Russia: A History of the Struggle for the Rule of Law," *Cahiers du monde russe* 57, no. 4 (2016): 791–818, here at 808.

58 He refers here to Bogdan Kistiakovskii's essay, "Gosudarstvo pravovoe i sotsialisticheskoe," *Voprosy filosofii i psikhologii* 17, no. 5, kn. 85 (1906): 469–507, on which see Walicki, *Legal Philosophies of Russian Liberalism*, 369–74. Kotliarevskii's (like Kistiakovskii's) use of the term "socialist" is rather general; he affirmed the inviolability of property and condemned the 1905–06 agrarian programs of the extreme left-wing parties in Russia (340–41).

59 Kotliarevskii's opposition to the death penalty (which he repeats at 395 and 400) was another way in which he was a disciple of Vladimir Soloviev. For Soloviev's devastating critique of capital punishment, see *Politics, Law, and Morality: Essays by V. S. Soloviev*, ed. and trans. Vladimir Wozniuk (New Haven: Yale University Press, 2000), 111–23, 171–84.

60 But then he equivocates in his defense of this principle, writing, "This, however, does not entail national equality in the sense that individual national groups ought to have the same position in the state: to proclaim such equality among groups that are unequal in terms of population or culture would be a useless cause" (344).

also advocated for the rights of women, writing that the "humiliating and rightless position of women is not only a great moral evil, but also a cultural danger for any society that permits it. This is one of the main illnesses of the Muslim East, preventing its renaissance, and at the same time one of main advantages of Western civilization" (280).[61] The status of foreigners was another issue facing the constitutional state (346).[62] The resolution of all these problems would follow naturally from application of the basic principles of the lawful state: respect for human dignity, freedom, and equality. Kotliarevskii, ever the optimist, was hopeful about the future potential of the lawful state, even as it developed beyond its current constitutional embodiment. This was because "the lawful state relates to the world of ideas, but of ideas that are unfailingly realized and that transform facts"—the fact, first of all, of unequal power in human relations (350).

Justice, charity, and dignity

In his final chapter, "Metajuridical Foundations," Kotliarevskii presents his concluding philosophical justification of the lawful state. He introduces a new formulation of the position he has defended throughout his treatise. Behind the changing historical forms of the lawful state there remains a constant aspiration, which he now identifies as justice. "The state ought to be lawful," he writes, "because it ought to be just." The premise of justice is the dignity of the human person, the absolute value in the name of which state power ought to be limited and transformed (392, 394–95). Law, to the extent it does this, is just. Hence the idea of natural law, which Kotliarevskii simply defines as the juridical form of justice, writing that its "pragmatic task is to connect the legal order with its moral foundations" (396). At lower levels, justice is formal and deals with general norms (hence its affinity with law), but in limiting power and equalizing human relations, it makes possible progression to the higher morality of compassion, forgiveness, charity, and love (397–400).

In the Christian tradition, the most excellent virtue is charity (agape or love of God). In the *Summa theologica* (II-II, q. 23), St. Thomas Aquinas wrote that "charity is the friendship of man for God," an idea that suggests (and was certainly a source of) Soloviev's concept of divine humanity. According to Aquinas,

61 Since at least 1905, Kotliarevskii had supported women's suffrage in Russia. See K. F. Shatsillo, *Russkii liberalizm nakanune revoliutsii 1905–1907 gg.* (Moscow: "Nauka," 1985), 259–60.

62 Kotliarevskii cites V. M. Gessen, *Poddanstvo: Ego ustanovlenie i prekrashchenie*, vol. 1 (St. Petersburg: Pravo, 1909), which argued that growing recognition of the rights of foreigners was evidence of progress in international law. See Eric Lohr, "The Ideal Citizen and Real Subject in Late Imperial Russia," *Kritika: Explorations in Russian and Eurasian History* 7, no. 2 (2006): 173–94. Contrary to Gessen's and Kotliarevskii's optimism, violence against foreigners and "enemy" minorities (expropriations, looting, riots, purges, deportations) was a major dimension of Russia's wartime experience. See Eric Lohr, *Nationalizing the Russian Empire: The Campaign against Enemy Aliens during World War I* (Cambridge, MA: Harvard University Press, 2003).

no true virtue is possible without charity. Soloviev agreed. In *The Justification of the Good*, he wrote that if "justice demands charity and mercy ... it clearly cannot be a virtue by itself, distinct from charity."[63] In the ordinary philanthropic sense of the term, charity begins privately, develops organizationally and institutionally in civil society (of which charitable associations are a major component), and may infuse the state itself with its spirit (401–03).[64] This last ideal, Kotliarevskii notes, was what Vladimir Soloviev meant when he called the state "collectively organized pity" and charged it with the duty of meeting every person's right to a dignified existence.[65] Kotliarevskii's ideas were deeply indebted to Soloviev:

> Power ought to be limited by law in the name of justice, and justice ought to be fulfilled by active charity, which in a certain sense is a higher justice, flowing from the dignity of the human person and from consciousness of cosmic and moral unity. The higher level gives true meaning to the lower, encompassing it. But it is impossible for society to ascend directly to the higher level, and here is the basic justification of the lawful state. Not only is there no contradiction between it and higher moral-cultural forms, but the path to them lies through it. The lawful state is, so to speak, a *threshold*. (403–04)

The lawful state is a step on the path toward the realization of divine humanity. Kotliarevskii's idea of the lawful state fitted perfectly into Soloviev's concept of the "justification of the good."

Kotliarevskii left no doubt that his philosophy of law required a theistic metaphysics. "The dignity of the human person," he wrote, "cannot be substantiated from a limited scientific-empirical worldview." Its source is transcendent and can be fully apprehended only in religious consciousness and experience (395, 411–12).[66] In this connection, he returned to the question of theocracy, recalling that it was the first form of the lawful limitation of power, at a stage when law was not clearly differentiated from morality and religion. But theocracy has long since outlived its historical justification and has become incompatible with modern legal consciousness in two main respects. First, "it imposes on the state tasks alien to its nature, tasks that it thus can realize only through constant extreme coercion, and moreover in spheres of the human spirit that most demand freedom and intimacy." Hence, the importance of separation of church and state

63 Vladimir Solovyov, *The Justification of the Good: An Essay on Moral Philosophy*, trans. Nathalie A. Duddington, ed. Boris Jakim (Grand Rapids, MI: William B. Eerdmans, 2005), 86. See also Walicki, *Legal Philosophies of Russian Liberalism*, 204.

64 See Adele Lindenmeyr, *Poverty Is Not a Vice: Charity, Society, and the State in Imperial Russia* (Princeton, NJ: Princeton University Press, 1996).

65 For the formulation of the state as collectively organized pity or compassion, see Solovyov, *The Justification of the Good*, 385.

66 Here he refers to the "great significance" of William James, especially his *Varieties of Religious Experience* (412n).

and freedom of conscience, without which the full development of religious consciousness and thus also the deepest type of respect for human dignity are impossible (412–13).[67] Second, theocracy debases the religious ideal by identifying it too closely with the temporal and relative. A proper balance must be sought between this type of conflation ("religious materialism"), on one hand, and absolute separation of the two worlds ("religious spiritualism"), on the other. "Above one-sided religious materialism and religious spiritualism, there rises faith in the drawing in of the world and humanity toward the divine" (414). This "drawing in" is nothing other than the process of divine humanity. For Kotliarevskii, the lawful state was an integral part (if only a part) of this process. "Its realization," he concludes, "is a necessary link in the creative work that raises humanity from captivity to its physical elements to spiritual freedom" (411).

67 Pointing to the central importance of the concept of human dignity in the American and French declarations of rights, Kotliarevskii notes that the revolutionary political philosophy behind them was closely tied to the religious movements of the seventeenth century, especially to the struggle for freedom of conscience (394n). He refers here to Georg Jellinek's classic work, *Die Erklärung der Menschen- und Bürgerrechte: Ein Beitrag zur modernen Verfassungsgeschichte* (Leipzig: Duncker and Humblot, 1895), which advanced the argument and was well known among Russian legal scholars. In *Konstitutsionnoe gosudarstvo*, Kotliarevskii writes, "Religious freedom was apparently the progenitor of all 'natural rights'—a fact that ought to be borne in mind by adepts of the exclusively economic interpretation of history" (81–82).