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## A Lawyer’s View on Russia

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*This special supplement celebrates the 70<sup>th</sup> birthday this year of the SCRSS President, Bill Bowring. Professor Bowring has taught international law, human rights, and Soviet and Russian law at Birkbeck College, University of London, since 2006; he is a Barrister, taking cases to the Strasbourg Court; and a fluent Russian speaker and regular visitor to Russia.*

### Introduction

By Professor Bill Bowring

I am not the first lawyer to serve as President of the SCRSS (and its predecessor the SCR) since the Society was founded in 1924. Indeed, I am the fourth. I have been President since 19 May 2007 and was also Chair from 1989 to 1997. DN Pritt QC was Chair of the SCR for eighteen years from 1937 to 1955; a year later he became President, in which capacity he served for sixteen years until his death in 1972 at the age of 84. John Platts-Mills QC became President in July 1989 and served until his death in 2001, followed by the

solicitor Jack Gaster who died on 12 March 2007 at the age of 99.



Bill Bowring

All four lawyers have been proud members of the Haldane Society of Socialist Lawyers, founded in 1929 and named after Viscount Richard Haldane. As a Liberal, Haldane had been Asquith’s Lord Chancellor from 1912 to 1915. He was hounded out of office by the Daily Mail, moved leftwards politically and was Labour’s first Lord Chancellor in the short-lived government of 1924. By 1929, when Labour was elected again, Haldane himself was dead. A small group of barristers formed the Haldane Club to provide legal expertise to the government, trade unions and the co-operative movement. Ever since, the Haldane Society has been a legal thorn in the side of every government, lobbying for law reforms, civil liberties and access to justice for all; supporting national liberation movements against colonialism; providing unstinting support to the trade union movement; and campaigning against racism and all forms of discrimination.

I became involved in the SCR (Society for Cultural Relations with the USSR) as a result of serving as an elected Lambeth Labour

Councillor from 1978 to 1986, first for Herne Hill Ward, then for Angell. In 1986, together with my comrades on the Council, I was surcharged £120,000 and banned from holding public office for five years for “wilful misconduct”, namely protesting against Thatcher’s cuts. I joined the Haldane Society in 1986, served as its Chair in 1991–92, and am now its International Secretary. I am President of the European Lawyers for Democracy and Human Rights, of which Haldane was a founder member in 1992.

My first visit to the USSR was in 1983 as part of the long-standing (since 1946) town-twinning relationship between Lambeth and the former Moskvoretsky District in Moscow. I started learning Russian in 1985 through the SCR, and joined the SCR Council in 1987.

The articles that follow are edited versions of some of my contributions to the *SCRSS Digest* between 2012 and 2019.

## Law, Rights and Ideology in Russia

*SCRSS Digest*, Spring 2012

The usual response, if the words ‘Russia’ and ‘ideology’ are put together, is to think of Marxism-Leninism or Scientific Communism. And my book *Law, Rights and Ideology in Russia* (Routledge 2013) explores, as I show below, the relationship of the ideology of the USSR to law and rights.

In fact, ideology, as the system of ideas legitimating Russia’s statehood and development, has much deeper roots and has taken a wide variety of forms. The ideology of the Putin regime and the ideas of ‘sovereignty’ and ‘sovereign democracy’ developed by the regime’s chief ideologist, Vladislav Surkov, have, as I explore below, surprising foundations.

A constant thread in Russian ideology is that of ‘messianism’, the idea that Russia has a special or sacred task of saving the world. With the fall of Constantinople in 1453, there was a growing tendency to refer to Moscow as the ‘Third Rome’. In 1510, during the reign of Henry VIII of England, the Russian Orthodox monk Filofey composed a panegyric letter to Vasily III (1479–33) in which he warned: “And

now I say unto Thee, take care and take heed, pious Tsar: all the empires of Christendom are united in Thine. For two Romes have fallen, and the Third exists and there will not be a fourth. Thy Christian Empire, according to the great theologian, will not pass away [...]” Moscow thus became, symbolically, the ‘Third Rome’ and the ‘Second Jerusalem’, inheritor of both the Roman Empire and the Christian Church.

The double-headed eagle was the symbol of the late Byzantine Empire, and symbolised the unity between the Orthodox Church and the Empire. It was adopted by Ivan III when he married the Byzantine princess Sophia Paleologue, whose uncle Constantine was the last Byzantine Emperor. It is the state symbol of Russia today.

One of the factors that precipitated the Crimean War was the Russian Empire’s claim to lead and protect the Christians of the Ottoman Empire, to reclaim Hagia Sophia in Istanbul as the ‘Mother Church’, and to re-establish Constantinople as the capital of Orthodoxy connecting Moscow to Jerusalem. Part of the reason for the downfall of Nicholas II in World War I was his ambition, egged on by Rasputin, to reclaim Constantinople for Orthodox Christendom.

Soviet ideology, too, had more than a trace of messianism: Soviet leadership of the Third International was intended – at least at first – to save the world from capitalism.

In the twentieth century the project of ‘Eurasianism’, first mooted by Count Trubetskoy in the White emigration after 1917, has become an important source of the ideology of the Putin regime. Aleksandr Dugin (born 1962), started as a propagandist of ‘Russian fascism’ and was deeply engaged in occultism. He summed up his ‘Eurasianism’ in 1997 as follows: “In principle, Eurasia and our space, the heartland Russia, remain the staging area of a new anti-bourgeois, anti-American revolution [...] The new Eurasian empire will be constructed on the fundamental principle of the common enemy: the rejection of Atlanticism [...] and the refusal to allow liberal values to dominate us.” Eurasianism is intended to unite the traditional religions of Russia – Orthodoxy, Islam, Judaism and

Buddhism – in common opposition to Western materialism and consumerism.

So, it is no surprise that many of the leading legal philosophers of Russia have been motivated by religious concerns. One of the most influential to this day is Vladimir Solovyov (1853–1900). His objective was the unification of all Christians, followed by a messianic Kingdom of God on earth, with political motivation under the Russian Tsar.

There are two other important sources of ideology affecting law and rights in Russia. First, the first full professor of law in Russia was Semyon Desnitsky (1740–89). He was sent to study at the University of Glasgow from 1760 to 1767 at the time of the Scottish Enlightenment, attended lectures by Adam Smith, successfully defended his doctorate on civil and church law, and was Professor of Law at Moscow University from 1767 to 1787. He was the first to teach in Russian rather than German. He translated William Blackstone's *Commentaries on the Laws of England* into Russian. As a result of his inspiration, the academic discipline of law in Russia has remained strong to the present day.

Second, Marx and Engels both exerted great influence. Marx mastered the Russian language in his later years and entered into correspondence with the Russian Narodniks, including Vera Zasulich. In his letter to her of March 1881 he took very seriously the role of the Russian peasant and the 'rural commune'. Marx wrote: "Theoretically speaking, then, the Russian 'rural commune' can preserve itself by developing its basis, the common ownership of land, and by eliminating the principle of private property which it also implies [...] It can gain possession of the fruits with which capitalist production has enriched mankind, without passing through the capitalist regime [...]."

Engels was the primary influence in relation to law. The article he wrote with Karl Kautsky in 1887, 'Juridical Socialism', was the touchstone for the Russian social democrats. Engels emphasised that the world view of the bourgeoisie was the 'juridical world view'. He endorsed the dominant theory of legal positivism and saw law as an instrument of class domination. This view was taken up by

Georgy Plekhanov and other social democrats and, after the 1905 Revolution, provoked a spirited response by the Russian ex-Marxist, liberal and religious legal theorists in the famous collection *Vekhi* (*Landmarks*, republished in paperback in 2011), in which writers such as Peter Struve and Bogdan Kistyakovsky argued for liberal values. Lenin denounced *Vekhi* as "an encyclopaedia of liberal renegacy". In the early Soviet period there was a strenuous theoretical battle between Yevgeny Pashukanis, who held that law, like the state, must wither away under socialism, and Peter Stuchka, for whom the USSR must develop specifically socialist law. This became the USSR's position, although the legal codes of the USSR were, in fact, based on German models.

Vladislav Surkov (born 1964) has emerged as the pre-eminent ideologist of the Putin regime. He was responsible for the doctrines of 'sovereignty' and 'sovereign democracy'. In 2006 a collection entitled *Sovereignty* appeared, edited by the 'young conservative' Nikita Garadzha, with essays by Putin, Medvedev, Surkov and others. The key essay in this collection is 'Sovereignty as a Political Choice' by Aleksandr Filippov, the chief Russian translator and exponent of the Nazi legal theorist Carl Schmitt. Indeed, the whole collection is infused with Schmitt's ideas. Surkov and his circle have strongly influenced senior figures in the judiciary, especially Valery Zorkin, the chairman of the Constitutional Court of the Russian Federation. Zorkin's speeches and articles make frequent reference to 'sovereignty' in the special sense given to it by the Putin regime. Their main targets are liberalism and what is seen as the Western conception of human rights.

## **The New Russian FBI – President Putin's Bloodhound**

*SCRSS Digest*, Spring 2013

The fight against crime and, especially, corruption is a top priority for the Russian state. In the past two years Russia has taken steps to create its own FBI (Federal Bureau of Investigation in the USA). This is the Investigative Committee of the Russian Federation (ICRF) and, since September 2010, it has been completely independent of

its former parent, the Office of the General Prosecutor of the Russian Federation (the *Prokuratura*).

The history of the ICRF is as follows. In 1990, the last year of the USSR, 90 per cent of criminal investigations were carried out by investigators of the Ministry of the Interior (the police) and 9.1 per cent by investigators of the *Prokuratura*. The remainder were carried out by the KGB.

Since 1960 (Khrushchev's 'Thaw') there had been a campaign to detach investigation from the police and in April 1990 the first attempt was made to legislate for a separate Investigative Committee. In 1993 a draft law was presented to the Supreme Soviet of the Russian Federation, but the abrogation of the Supreme Soviet meant that the law was never enacted.

Only in June and July 2007, in President Putin's second term, was it possible to enact two new laws that effectively took away the investigative function from the *Prokuratura*.

However, this legislation created an 'Investigative Committee attached to the *Prokuratura*', headed by the First Deputy General Prosecutor of the Russian Federation, Aleksandr Bastrykin, whose investigators were still part of the *Prokuratura*. A complicating factor was that, despite the apparent subordination of the Investigative Committee to the *Prokuratura*, both the Chairman of the Investigative Committee and the General Prosecutor were appointed by the Federation Council (the upper house of parliament) on the nomination of the President, and thus had equal status.

Mr Bastrykin is one of President Putin's Leningrad protégés. He was born in 1953 and started work in the Soviet police. He was the senior member of the group in which Vladimir Putin studied law at Leningrad State University. They graduated together in 1975.

Mr Bastrykin made a brilliant career in the Leningrad State University Young Communist League (*Komsomol*). He then rose up through the ranks of the *Prokuratura*. The close relations he formed with President Putin at university have continued ever since. He worked in Leningrad / St Petersburg from

1975 to 2006, was an appointee and long-standing friend of Mr Putin, was close to Mr Putin's colleague Igor Sechin, and on 7 September 2007 was appointed by President Putin as Chairman of the new Investigative Committee 'attached to' the *Prokuratura*. Mr Bastrykin has the rank of Colonel-General of Justice.

The ICRF immediately came into conflict with its 'parent', the *Prokuratura*, headed by Yuri Chaika. In May 2008 Mr Bastrykin initiated a criminal case against the First Deputy General Prosecutor, Aleksandr Buksman (Mr Chaika's closest deputy and colleague). Mr Chaika countermanded Mr Bastrykin's order, and relations between them became very bad indeed. The conflict was resolved only in the Supreme Court, which in March 2009 ruled that Mr Bastrykin must rigorously obey any order given by Mr Chaika. However, even though he lost in court, Mr Bastrykin soon achieved independence from the *Prokuratura*.

On 15 January 2011 a new law established the Committee as an independent agency outside the *Prokuratura*, with a view to 'raising the objectivity of investigation'. In fact, many commentators would say that investigation has been brought under closer control by the regime.

The conflict burst out again in spring 2011 when the ICRF launched criminal investigations into a number of senior Moscow and Moscow oblast' prosecutors, accusing them of providing *krysha* (paid protection), for a massive underground illegal gambling business. One of the prosecutors named was Mr Chaika's son. Intense mass media interest in the conflict continued, and on 14 June 2012 Mr Bastrykin felt obliged to tell journalists that there was no such conflict between him and Mr Chaika. However, the fact that both are appointed by the President and have clearly overlapping competences makes conflict inevitable.

Another major scandal broke in June 2012. This concerned alleged threats made by Mr Bastrykin to a journalist of the critical and independent weekly newspaper *Novaya Gazeta*, owned by Aleksandr Lebedev, a former KGB agent based for five years in London who now owns the London *Evening Standard* and *The Independent*. In an open

letter published on 13 June in the newspaper and on its website, the Chief Editor of *Novaya Gazeta*, Dmitri Muratov, accused Mr Bastrykin of threatening the senior editor, Sergei Sokolov.

In an interview in *Izvestiya* on 14 June Mr Bastrykin denied the allegation. However, on the same day he met Mr Muratov and apologised.

In 2012 Mr Bastrykin was playing the leading role in the regime's reaction to Mr Navalny, whose renaming of Putin's United Russia party as the 'Party of Thieves and Rogues' (*Partiya Vorov i Zhulikov*) entered the popular discourse. On 18 December 2012 it was announced on the Investigative Committee's website that Mr Navalny was to face yet another criminal investigation.

Interviewed on the independent radio station *Ekho Moskvy*, Mr Navalny was asked whether he now had to choose between prison and emigration. He answered: "Of course, it will serve the interests of the regime much better if I am a political émigré, rather than a political prisoner. Because they will always be able to say – he fled. I do not intend to flee anywhere. Because I am absolutely innocent and I spit on what the investigators Markin, Bastrykin, Putin and 'their own' court have to say. I know that if all ordinary and normal people look at these documents and case materials, they will say that Navalny is innocent, naturally. And the opinions of those people are more valuable to me."

## Gay Rights in Russia

*SCRSS Digest*, No 2, Summer 2015

Homosexuality is not a criminal offence in Russia – since 1993. In 1999 it ceased to be regarded as a mental illness.

Indeed, Russian history has many famous homosexuals – the poet Alexei Apukhtin; Sergei Diaghilev, the founder of the Ballets Russes; and, of course, the composer Pyotr Ilyich Tchaikovsky. The younger brother of Tsar Alexander III, Grand Duke Sergei Alexandrovich Romanov, was famous for his homosexual exploits while serving as Governor of Moscow from 1891 to 1905.

Homosexuality was legalised following the Bolshevik Revolution in 1917. But in 1933, under Stalin, Article 121 of the Criminal Code made male homosexuality a crime punishable by up to five years of imprisonment with hard labour. This anti-gay law, like the prohibition of abortion at the same time, was strongly supported by the Russian Orthodox Church (ROC), which began to revive following the enactment of the 1936 USSR Constitution, Article 124 of which declared freedom of religion. The Church was fully rehabilitated by Stalin in 1943 to play a decisive role in the Great Patriotic War. The ROC is to this day a fierce opponent of gay rights.

In 2006 gay activists attempted to organise the first Gay Pride march in Moscow, but this was banned by the Moscow city authorities and marchers were forcibly dispersed. Applications to hold a Gay Pride march in Moscow have been rejected every year since. On 21 May 2015 the city once again rejected an application to hold a march on 30 May 2015. RIA Novosti news agency quoted the Mayor's spokesman Alexey Mayorov as having said "[w]e have warned the organisers that the demonstration will not be authorised" and told them of the risks, should they ignore the ban. No reasons for the ban were given.

The gay rights activist Peter Tatchell was present with other foreign observers in 2006 and said: "We were immediately set upon by about 100 fascist thugs and religious fanatics who began pushing, punching and kicking us." In 2007 Tatchell and the German parliamentarian Volker Beck were punched in the face by anti-gay protesters.

In 2007, 2008 and 2009 the leading Russian gay activist Nikolay Alekseyev applied to the European Court of Human Rights, complaining of a violation of his right to peaceful assembly on account of the repeated ban on public events he had organised in 2006, 2007 and 2008. He also complained that he had not had an effective remedy against the alleged violation of his freedom of assembly and that the Moscow authorities' treatment of his applications to hold the events had been discriminatory.

He argued that his right under Article 30 of the Constitution of the Russian Federation, which provides that everyone has the right to

freedom of association and peaceful assembly, had been violated. Article 55 (3) provides that rights and freedoms may be restricted by federal laws for the protection of constitutional principles, public morals, health, and the rights and lawful interests of others, and to ensure the defence and security of the State. The 2004 Federal Law *On Assemblies, Meetings, Demonstrations, Marches and Picketing* should, if applied properly, permit Gay Pride marches where application has been made beforehand.

On 21 October 2010 the Strasbourg Court unanimously – including the great Russian judge Anatoly Kovler – concluded that the ban on the events organised by Mr Alekseyev did not correspond to a pressing social need and was thus not necessary in a democratic society. Furthermore, he had been denied an effective legal remedy, and he had suffered discrimination.

This resounding judgment did not lead to a change in the policy of the Moscow authorities. Many more complaints to the European Court of Human Rights are pending. It is highly likely that the Court will adopt a ‘pilot judgment’ against Russia, setting out detailed instructions designed to resolve what is clearly a systemic issue.

On 13 December 2010 the Federal Law *On Protection of Children from Information Leading to Harm to their Health and Development*, promoted by Yelena Mizulina, came into force, and has been amended – and made more severe – by amendments in 2012 and 2013. The 2013 amendment added "propaganda" promoting "non-traditional sexual relationships" as a class of harmful content under the Law. The Code of Administrative Misdemeanours (KOAP) provides by Article 6.17 for punishment of violation of the Law by large fines. Yelena Mizulina is the chairperson of the Russian Duma's Committee on Family, Women and Children. She is the Russian Mary Whitehouse, a champion of high moral standards who promotes legislative initiatives to improve the morality of Russian society.

Nevertheless, there were few prosecutions. Here are two examples. In December 2013 Mr Alexeyev and Yaroslav Yevtushenko picketed outside a children's library in Arkhangelsk

holding banners that read: "Gays aren't made, they're born!" The two were fined 4,000 roubles and their appeal was rejected. The activist Dmitry Isakov protested the law in Kazan. Several months later, he was summoned to court after a teenager in Arkhangelsk had seen photos of his protest online and filed a complaint. Isakov was fined 4,000 roubles (about £50) in January 2014.

Every year 17 May is the International Day Against Homophobia, Transphobia and Biphobia. That date was chosen to commemorate the decision to remove homosexuality from the International Classification of Diseases of the World Health Organization (WHO) in 1990.

On 17 May 2015 various events devoted to the International Day took place all over the world. In Russia applications to hold LGBT pickets or demonstrations are highly likely to be rejected by the local authorities. Activists therefore organised ‘rainbow flash mobs’, and these and other events took place in sixteen Russian cities. Most rallies took place without serious incidents.

## **Russian Prisons: From GULAG to FSIN**

*SCRSS Digest*, No 1, Spring 2017

On 8 December 2016 President Putin met his Council for Civil Society and Human Rights, which includes several leading Russian human rights activists and prison reformers. Some of them have been active in the independent prison Public Monitoring Commission (ONK), created in 2008 during Mr Medvedev's presidency. The ONK, inspired by the British system of Prison Visitors, has rights to visit all places of detention, interview prisoners and report on conditions.

One of the members of the Council, the veteran human rights defender Ludmila Alekseeva (founder of the Moscow Helsinki Group), raised the issue of controversial recent elections to the new fourth composition of the ONK by the Civic Chamber of the Russian Federation. President Putin replied that he agreed with her on every point. She was followed by the journalist and former ONK member Elena Masyuk who made a forceful presentation about the fate of the ONK, and the attempted legal proceedings by her and

others to overturn the Civic Chamber's decision. She had written that the Civic Chamber was replacing all experts on the penitentiary system and human rights activists with unknowns from the penitentiary system itself, as well as former criminals. President Putin also agreed with her.

On 3 January 2017 President Putin published a list of orders (*porucheni*) arising from the meeting of 8 December. One of these ordered the General Prosecutor of the Russian Federation Yuri Chaika to check the compliance of the Federal Penitentiary Service (FSIN) with public control of guarantees for human rights in prisons. He also ordered the Civic Chamber, together with the Council for Civil Society and Human Rights and the Federal Ombudsman for Human Rights, to analyse the effectiveness of the mechanism for appointing members of the ONK by the end of March.

What is the background to this? In part, it is the legacy of the GULAG (Chief Directorate of Camps), the USSR's system of correctional labour camps whose population reached 100,000 in the 1920s, and in which it is estimated that 14 million people spent time between 1929 and 1953. The Russian Federation still has a prison population of more than 633,000, the third highest in the world after the USA with 2,217,947 and China with 1,649,804. In terms of its incarceration rate (the number of prisoners per 100,000 of population), Russia is now eighth in the world, having previously held the highest ranking: its rate is 439, compared with the USA's 693, and 145 in England and Wales (the highest in Western Europe).

Indeed, Russia has experienced a dramatic fall in prison numbers – from more than 1,000,000 in 2000 (a rate of 729). Russia's membership of the Council of Europe since 1996 has been one of the main drivers of reform. A condition of membership was transfer of the penitentiary system from the Ministry of the Interior (police and internal armed forces) to the Ministry of Justice, and Russia complied. In 2002 a new Criminal Procedural Code came into force (I was one of the Council of Europe experts working with senior Russian officials on the drafts), requiring judges rather than prosecutors to rule on bail or custody pre-trial. And there is a

post-Soviet Criminal Code that has been amended many times. However, most prison officers are former servicemen and the service is highly militarised.

Convicted persons serve their sentences in 717 Correctional Colonies (IK), with compulsory paid work (much less well paid, relatively, than in the USSR). In many cases these are former GULAG camp establishments, in remote parts of Russia. Nearly eight per cent of prisoners are women, and 0.2 per cent are juveniles (under 18 years). The age of criminal responsibility in Russia is 14 years. According to a report published in January 2017, ten per cent of prisoners have HIV and four per cent drug-resistant tuberculosis. Narcotic abuse is rife in Russian prisons. Russia is presently suffering from what is described by officials as an HIV and AIDs epidemic. A major contributor to this crisis is the number of addicts and infected persons released from prison.

Russia's greatest problem is the system of 217 pre-trial detention prisons called Investigative Isolators (SIZOs), which account for 17 per cent of prisoners. The most famous and notorious are SIZO No 1 (Matrosskaya Tishina), dating from the 1940s and where Mikhail Khodorkovsky was held during his trials, and SIZO No 2 (Butyrka), dating from the eighteenth century. I have visited both. SIZOs, which are obliged to accept every person sent to them by the courts, suffer from chronic and extreme overcrowding.

Since the case of *Kalashnikov v Russia* in 2002, the European Court of Human Rights had by 2012 ruled against Russia more than eighty times for violations of the right, under Article 3 of the European Convention on Human Rights, not to be subjected by reason of overcrowding to inhuman and degrading treatment. Cells with fifteen beds were at times holding forty-five prisoners, who were obliged to sleep in shifts, with an open toilet in the corner (horrifying conditions described in 1994 by Professor Nigel Rodley, then UN Special Rapporteur on Torture, as comparable only to Dante's circles of hell or Hieronymus Bosch's depiction of the sufferings of the damned). In 2012 the Strasbourg Court issued a 'pilot judgment' in *Ananyev v Russia*, ordering Russia to submit an Action Plan for reform of the SIZOs within six months. Russia

submitted a Plan in time, but implementation is hampered by shortage of funds and corruption. The head of FSIN from 2009 to 2012, Colonel-General Aleksandr Reimer, was arrested in March 2015 and charged with embezzlement from FSIN on a grand scale. He is still in custody awaiting trial. He was appointed by Mr Medvedev, following the scandal of the death of the anti-corruption lawyer Sergei Magnitsky in custody in November 2009. FSIN is now led by a former intelligence officer.

On 8 January 2017, an article in the daily newspaper *Vedomosti* compared the responses to a survey on the Russian penitentiary system from 2000 and 2016. In 2000, 82 per cent of respondents said that they knew about problems in the penitentiary system, while 18 per cent did not know. By the end of 2016, 68 per cent said they knew nothing, while 32 per cent knew. This is due not only to the dramatic fall in the number of prisoners, but also to the fact that – with very few exceptions – the mass media in Russia are state-controlled, with news of prison conditions ‘filtered’.

That is why the future of the ONK is so controversial and at the top of the list of President Putin’s recent orders.

## **The First Soviet Constitutions, Self-Determination and the Right to Secession**

*SCRSS Digest*, No 3, Autumn 2017 (1917 Russian Revolution Centenary Issue)

This article examines the central core of the first constitutions of Soviet Russia and of the USSR, and its continued relevance. Its predecessor, the Tsarist Russian Empire, was a multi-national, multi-ethnic empire whose components had varying degrees of autonomy. It included, among many others, Finland, a Grand Duchy with its own parliament, laws and Lutheran religion; Poland, incorporated into the empire as a result of the nineteenth-century Partitions; the Baltic territories, conquered from Sweden in the Great Northern War; the former Khanates of Kazan and Astrakhan, conquered by Ivan the Terrible in the sixteenth century; and the

Khanate of Crimea, annexed by Catherine II in 1783.

Lenin had campaigned from before the outbreak of World War I for the destruction of the Tsarist (and other) empires, and for the principle of the right of nations to self-determination, on which he wrote a substantial book. He drew on the writings of Marx and Engels from the second half of the nineteenth century, as they fought for the right to self-determination of Ireland, Poland, Algeria, India and many others. Lenin’s opponents included Rosa Luxemburg, the Austro-Marxists Otto Bauer and Karl Renner, and the revolutionary Jewish Bund, all of whom rejected the break-up of their respective empires and regarded the right of nations to self-determination as a surrender to bourgeois nationalism. Their aim was to achieve socialism over the whole existing territories of the Russian and Austro-Hungarian Empires.

The first constitutional document of Soviet power, following victory in the October Revolution, was the *Declaration of Rights of the Working and Exploited People*<sup>1</sup>, drafted by Lenin on 16 January 1918 and published in *Izvestiya* on 17 January (*note: this article uses New Style dates throughout*). On 25 January it was approved by the Third All-Russia Congress of Soviets and subsequently formed the basis of the Soviet Russian Constitution of 1918. According to Chapter 1, Article 1: “Russia is hereby proclaimed a Republic of Soviets of Workers’, Soldiers’ and Peasants’ Deputies. All power, centrally and locally, is vested in these Soviets.” This was immediately followed by Article 2: “The Russian Soviet Republic is established on the principle of a free union of free nations, as a federation of Soviet national republics.”

The phrase “free nations” was crucial. Thus, Chapter 3 welcomed the proclamation of “the complete independence of Finland, commencing the evacuation of troops from Persia, and proclaiming freedom of self-determination for Armenia”.

These principles were put into practice immediately following the Revolution. On 19 December 1917 the Finnish Diet adopted a declaration of Finland’s independence; on 31 December 1917 the Council of People’s Commissars issued a *Decree on the State*



*Independence of Finland.* At that meeting Lenin personally handed the text of the decree to Finnish Prime Minister Pehr Evind Svinhufvud. Following the signing of the armistice between Soviet Russia and the Central Powers (Germany, Austria-Hungary, Turkey and Bulgaria) at Brest-Litovsk on 15 December 1917, Soviet Russia and Persia worked out a common plan for the withdrawal of Russian troops from Persia. And on 11 January 1918 the Soviet Russian government issued the *Decree on Turkish Armenia*.

The next step was the *Constitution of the Russian Socialist Federated Soviet Republic (RSFSR)*, which was adopted by the Fifth All-Russian Congress of Soviets on 10 July 1918.<sup>2</sup> The Declaration, together with the Constitution, constituted a single fundamental law of the RSFSR. Altogether, they contained 90 articles, covering all constitutional aspects of the new socialist republic.

The following provision was of particular importance: "11. The soviets of those regions which differentiate themselves by a special form of existence and national character may unite in autonomous regional unions, ruled by the local congress of the soviets and their executive organs. These autonomous regional unions participate in the RSFSR upon a Federal basis."

These were principles as to which Lenin was uncompromising. In 1919 the three Baltic republics of Estonia, Latvia and Lithuania became independent, despite their bourgeois governments, as did Poland, despite the war between it and Soviet Russia. In 1922, towards the end of his life, Lenin came into sharp conflict with Stalin as to whether Georgia should have the right to independence, albeit under a Menshevik government. On 31 December 1922 Lenin wrote in his *Testament*<sup>3</sup>: "It is quite natural that in such circumstances [*i.e. Stalin's actions in Georgia*] the 'freedom to secede from the union' by which we justify ourselves will be a mere scrap of paper, unable to defend the non-Russians from the onslaught of that really Russian man, the Great-Russian chauvinist, in substance a rascal and a tyrant, such as the typical Russian bureaucrat is... Stalin's haste and his infatuation with pure administration, together with his spite against the notorious 'nationalist-socialism' played a

fatal role here."<sup>4</sup> Lenin died on 21 January 1924.

On 31 January 1924 the *Constitution of the USSR* was approved by the Second Congress of Soviets of the USSR.<sup>5</sup> This formalised the December 1922 *Treaty on the Creation of the USSR* between the Russian SFSR, the Ukrainian SSR, the Byelorussian SSR and the Transcaucasian SFSR to form the Union of Soviet Socialist Republics.

It started with a Declaration, which included: "It is only in the camp of the Soviets, only under the conditions of the dictatorship of the proletariat that has grouped around itself the majority of the people, that it has been possible to eliminate the oppression of nationalities... The will of the peoples of the Soviet Republics recently assembled in Congress, where they decided unanimously to form the USSR, is a sure guarantee that this Union is a free federation of peoples equal in rights, that the right to freely withdraw from the Union is assured to each Republic..."

It was on this that Lenin had insisted in 1922. Article 4 proclaimed: "Each one of the member Republics retains the right to freely withdraw from the Union." Article 6 stated: "The territory of the member Republics cannot be modified without their consent; also, any limitation or modification or suppression of [Article] 4 must have the approval of all the member Republics of the Union."

Lenin's principled position remains highly controversial in Russia.

As early as 1991, the year of the collapse of the USSR, Vladimir Putin denounced Lenin. A YouTube clip contains a number of such statements by him over the years.<sup>6</sup> On 25 January 2016 Mr Putin accused Lenin of placing an 'atomic bomb' under Russia. In Mr Putin's opinion, Lenin was responsible both for destroying the great Russian Empire, but also preparing the destruction of the great USSR. Thus, Mr Putin was particularly critical of Lenin's concept of a federative state with its entities having the right to secede, saying it had heavily contributed to the 1991 breakup of the Soviet Union. He added that Lenin was wrong in his dispute with Stalin, who, in Mr Putin's words, advocated a unitary state model. Mr Putin also said that Lenin's

government had whimsically drawn borders between parts of the USSR, placing Donbass under the Ukrainian jurisdiction in order to increase the percentage of proletariat, in a move Mr Putin called “delirious”.<sup>7</sup>

When the USSR collapsed in late 1991, the fifteen union republics, all of which had the right to secede under the 1978 Constitution of the USSR, duly became independent states, to the horror of Mr Putin and his fellow-thinkers. In 1990–91 many federative components of the RSFSR sought to gain the status of union republics, so as to have the right to secede. Several, including the republics of Chechnya, Tatarstan and Bashkortostan, declared sovereignty. Chechnya suffered two bloody wars from 1994 to 1997, and from 1999 to 2009; Tatarstan was granted special treaty status by President Yeltsin which it has only recently lost. Under the 1993 Russian Constitution there are twenty-one ethnic republics in the Russian Federation with, until recently, their own presidents, state languages (in addition to Russian) and other privileges, although no right to secede. Mr Putin is working hard to reverse Lenin’s policy of federative constitutionalism.

## Footnotes

1 Marxists Internet Archive, URL: <https://www.marxists.org/archive/lenin/works/1918/jan/03.htm>

2 Ibid, URL: <https://www.marxists.org/history/ussr/government/constitution/1918/>

3 Ibid, URL: <https://www.marxists.org/archive/lenin/works/1922/dec/testamnt/autonomy.htm>

4 In 2010 *Azbuka Klassika* (St Petersburg) published this and other texts by Vladimir Lenin in a paperback edition of 5,000 copies under the title *O natsionalnoy gordosti velikorossov* (On the National Pride of Great Russians).

5 The Handwritten Constitution of the Russian Federation website, URL: <http://constitution.sokolniki.com/eng/History/RussianConstitutions/10266.aspx>

6 YouTube, URL: <https://www.youtube.com/watch?v=lloEwESh320> (accessed 25 June 2019)

7 *The Guardian* website, URL: <https://www.theguardian.com/world/2016/jan/25/vladimir-putin-accuses-lenin-of-placing-a-time-bomb-under-russia>

## Russia’s Criminal Justice System: From Tsar Alexander II to President Putin

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A typical recent criticism of Russia reads as follows: “Although the equality of arms and the right to adversarial trial are guarantees of the Russian Constitution, many cases show deep flaws within the criminal justice system and gross misconduct of the judiciary and prosecution. This includes using fabricated evidence, forced confessions and impunity for perpetrators of crimes.”<sup>1</sup> There is truth in this, especially in politically high-profile cases. But is it the whole story?

I start in the early nineteenth century. In March 1814 the Russian Army entered Paris, having defeated Napoleon – and returned to Russia having achieved its objectives. Russia appeared to be invincible. Ten years later, the Decembrist revolt of 26 December 1825, led by progressive aristocrats who wanted to prevent the accession of Nicholas I, to abolish serfdom and to establish a constitutional order in Russia, was crushed. Nicholas, a political conservative, ruled from 1825 to 1855.

Criminal justice under Nicholas I was aptly summed up as follows: “The secret inquisitional procedure, with its soulless records, with its formal evidence evaluated in advance and prescribing to the judge his decision, could be nothing else but a source of cruelty and inequity. The judge was deprived of liberty of decision, and bound by the rule of formal evidence. He could not acquit or condemn according to his conviction, but only act in conformity with the scale of value of evidence set forth by law. His sentence, though formally correct, was very often nothing but a flagrant injustice.”<sup>2</sup> And “the best evidence in the whole world” was considered by the law to be the confession of the accused.

However, the Russian Empire lost the Crimean War, which lasted from October 1853

to February 1856, to an alliance of the Ottoman Empire, France, Britain and Sardinia. Nicholas I died on 2 March 1855, succeeded by his eldest son, Alexander II. Alexander was not a liberal, but could see that survival of the empire and of tsarism depended on radical reform. On 3 March 1861, in the Emancipation Manifesto, serfdom was abolished. Abolition of slavery in the USA came a few years later. Abraham Lincoln issued the Emancipation Proclamation on 1 January 1863, and the passage of the Thirteenth Amendment (ratified in December 1865) abolished slavery in the United States. Russia had led the way.

Abolition of serfdom was followed by the Great Legal Reforms of Alexander II. On 20 November 1864 he signed the decree that enforced four Regulations, including Regulations of Criminal Proceedings, and Regulations of Punishments Imposed by Justices of the Peace (in Russian *Муровѣ судѣ*, a direct translation from the English institution established by Edward II in 1361).

Alexander established a unified judicial system, and fundamental innovations in criminal trials. These included the principle of equality of the parties, the introduction of public hearings, trial by jury (again modelled on English practice) and a professional Bar. Previously there had been no legal representation in criminal cases. The powers of the procurator were substantially reduced, and mainly concerned prosecution in the criminal courts.

The most famous case of jury trial was the acquittal in 1878 of the social revolutionary Vera Zasulich (1851–1919). Her comrade, Alexei Bogolyubov, refused to remove his cap in the presence of Colonel Trepov, the notorious governor of St Petersburg. Trepov ordered him to be flogged. A group of six revolutionaries decided to assassinate Trepov. On 24 January 1878 Zasulich shot, and seriously wounded, Trepov in front of witnesses. She was tried by jury, with Anatoly Koni, the well-known reforming judge, presiding. The sympathetic jury found Zasulich not guilty. She went on to become a Marxist and, famously, corresponded with Karl Marx as to whether Russia could achieve socialism through the peasant commune. Judge Koni was a great legal reformer until

the 1917 Revolution, became a leading law lecturer in Soviet Russia, and died in 1927.

The Bolsheviks abolished trial by jury and justices of the peace, but the Bar continued during the Soviet period as an independent profession, remunerated by fees, and defending the accused in cases of economic and political crimes. Fearless advocates in the Soviet period, often Jewish, included my colleagues Yuri Schmidt (1937–2013) in Leningrad and Semyon Ariya (1922–2013) in Moscow.<sup>3</sup> However, the public prosecutors regained their full Tsarist powers and, as Vladimir Terebilov – Minister of Justice and Chairman of the USSR Supreme Court – wrote in his book *The Soviet Court*, published in Russian and English in 1973 and 1986, a prime function of the Soviet court was to educate the public in intolerance of crimes, respect for the law, and the rules of socialist community life.

The collapse of the USSR in 1991 has meant the restoration of many of the great reforms of Alexander II. An experiment in trial by jury in nine regions started in 1993, and covered the whole of Russia from 2003. Justice of the Peace courts were restored from 1998.

This restoration of the 1864 reforms took place against the backdrop of a revolutionary transformation in Russia's attitude to international law. In the USSR there were two key principles of international law: state sovereignty, and non-interference in the internal affairs of states. Therefore, the USSR ratified UN human rights treaties but did not permit external scrutiny of domestic legality.

Under the first president of the Russian Federation, Boris Yeltsin, Russia adopted a new Constitution in 1993, with guarantees for the whole range of human rights and civil liberties, and a provision establishing the supremacy in the Russian legal system of international law. This has been explained by the Supreme Court in Resolutions of 2003 and 2013.

In 1996 the Russian Federation joined the Council of Europe (CoE) and in 1998 ratified the European Convention on Human Rights (ECHR), which immediately became part of Russian law. For the first time every person under Russian jurisdiction could complain of

violations of the ECHR to the European Court of Human Rights, and thousands have done so. As a result, legal textbooks and court judgments are now full of references to European human rights, and there have been substantial changes to Russian law and procedure.

In 2000 I had the honour of being nominated by the CoE to serve as one of three CoE experts working with Dmitry Kozak (now Deputy Prime Minister), Yelena Mizulina of the State Duma, Judge Radchenko of the Supreme Court, and Vladimir Shults, Deputy Director of the Federal Security Service (FSB). We drafted the new Criminal Procedural Code, which introduced the principle of adversariality into the Russian criminal process, transferred the power to remand on bail or in custody pre-trial, with a presumption for bail, from prosecutors to judges, and many other changes. These reforms have been strengthened by judgments of the Constitutional Court of the Russian Federation, referring to Strasbourg principles and judicial decisions.

Indeed, in the period from 2000 to 2003, President Putin encouraged these and other reforms, spoke often of the 'dictatorship of law', cited Judge Koni, and referred to himself as following in the footsteps of Alexander II. The arrest of Mikhail Khodorkovsky in late 2003, the expropriation of his oil company Yukos, his two criminal trials, and imprisonment in Chita (where Decembrists had been sent to serve their sentences after 1825), marked the end of this reform period.

Today, less than one per cent of criminal trials in Courts of General Jurisdiction end in acquittals (15–20 per cent in jury trials), lower than the acquittal rate in the USSR; and the judges are not, as in the UK, former advocates, but are drawn almost entirely from law enforcement and court administration. Members of the Russian Bar fight hard for their clients, but judges frequently read out the indictment prepared by the prosecutor by way of a judgment. All too often criminal proceedings are abused for the purpose of 'criminal corporate raiding', illegal takeovers and political vendettas. The further reform of criminal justice in Russia will require a new generation of genuinely independent judges.

## Footnotes

1 S Lemke, 'Who Holds Russia's Judges and Public Prosecutors to Account? How the International Community Fails to Effectively Address Judicial Harassment of Human Rights Defenders in the Russian Federation' in *Völkerrechtsblog*, 29 January 2018, URL: <https://voelkerrechtsblog.org/who-holds-russias-judges-and-public-prosecutors-to-account/>

2 S Kutscheroff, 'Administration of Justice Under Nicholas I of Russia', *The American Slavic and East European Review*, Vol 7, No 2, April 1948, pp 125–138 (at p 138)

3 After 1991 Yuri Schmidt and Semyon Ariya continued, with their colleagues, to represent defendants persecuted by the post-Soviet regime.

*Note: The opinions expressed in these articles are those of the individual contributor and not necessarily those of the SCRSS.*

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