

INTERACTION OF EUROPEAN AND RUSSIAN LEGAL CONSCIOUSNESS

ALEXEY TYRTYSHNY,

Russian New University (Moscow, Russia),

STANISLOVAS TOMAS,

Russian New University (Moscow, Russia)

This article provides an overview of certain ideologemes of Western (European) and Russian legal consciousness – prominent works of Ivan Ilyin and Duncan Kennedy are taken as examples. The article analyzes the tabula rasa principle and its place in legal consciousness. We use legal scholarship, judicial practice and opinion polls to examine the relationship between legal consciousness and the lack of trust in Russian courts, as well as their inefficiency from the point of view of public opinion. There are a number of shocking cases of torture of innocent people by the Russian police. Why is this so? The answer lies in the legal consciousness of police officers and of judges. This is something that has been inherited from the Soviet period. It is completely different from the Western legal consciousness, one of the key features of which is denial of authority. The critical legal studies branch of American legal realism almost denies the very existence of law, and, perhaps for this reason, American culture is less open to abuses like torture. At the same time, there is no possibility to shift legal consciousness immediately, the tabula rasa principle does not work. The final objective of the article is to provide a perspective on the reform of higher legal education and its relation to legal consciousness and legal anthropology. We propose that a greater part of the university curriculum is devoted to legal anthropology.

Keywords: justice; legal culture; legal consciousness; theory of state and law; practice and jurisprudence; psychology of law; legal education.

Recommended citation: Alexey Tyrtysny & Stanislovas Tomas, *Interaction of European and Russian Legal Consciousness*, 2(2) BRICS LJ (2015).

Table of Contents

- 1. Introduction**
- 2. Russian and Western Legal Consciousness Narratives**
- 3. Public Trust in Justice Administration**
- 4. Anthropologization of Legal Education**
- 5. Conclusion: Towards a Reform of Russian Legal Education**

1. Introduction

The topic of legal consciousness is rather well developed in Russian scholarship in the framework of law and state theory, especially scholarship from the pre-Soviet and Soviet periods. In the pre-Soviet period, there were three branches of development of Russian legal consciousness theory:

- 1) Ivan Ilyin's ideas on 'healthy legal consciousness';¹
- 2) Leon Petrażycki's theory of psychological motivation in legal behavior²; and
- 3) Mikhail Reisner's avant-garde theory of socialist legal consciousness.³

The key ideas of the socialist legal consciousness theory were developed by Reisner during the pre-Soviet period, and were completed in the works of Isaak Farber,⁴ Valentin Sapun,⁵ Valery Zorkin,⁶ and others. Therefore, Russian scholarship and practice at the end of the 20th and beginning of the 21st century was based on a well-developed conception of legal consciousness, the key ideas of which were the dependence of the content of popular legal consciousness on the dominant socialist

¹ Ильин И.А. О сущности правосознания [Ilyin I.A. *O sushchnosti pravosoznaniya* [Ivan A. Ilyin, On the Essence of Legal Consciousness]] 147–158 (Rarog 1993).

² Петражицкий Л.И. Очерки философии права [Petrażycki L.I. *Ocherki filosofii prava* [Leon I. Petrażycki, Essays on the Philosophy of Law]] 234 (Tipografiya Yu.N. Ehrlich 1900).

³ Рейснер М.А. Общественное благо и абсолютное государство // Вестник права. 1902. Т. XXXII. № 9–10 [Reisner M.A. *Obshchestvennoe blago i absolютnoe gosudarstvo* // *Vestnik prava*. T. XXXII. Nos. 9–10 [Mikhail A. Reisner, *Public Good and Absolute State*, 32(9–10) *Law Review* (1902)]]].

⁴ Фарбер И.Е. Правосознание как форма общественного сознания [Farber I.E. *Pravosoznanie kak forma obshchestvennogo soznaniya* [Isaak E. Farber, *Legal Consciousness as a Form of Public Consciousness*]] 198–200 (Yuridicheskaya literatura 1963).

⁵ Сапун В.А. Современное правопонимание и инструментальные свойства права // Зарубежный опыт и отечественные традиции в российском праве [Sapun V.A. *Sovremennoe pravoponimanie i instrumental'nye svoystva prava* // *Zarubezhnyi opyt i otechestvennye traditsii v rossiiskom prave* [Valentin A. Sapun, *Contemporary Legal Consciousness and Instrumental Features of Law*, in *Foreign Experience and Homeland Traditions in Russian Law*]] 56 (St. Petersburg State University Press 2004).

⁶ Зорькин В.Д. Кризис международного права: современный контекст // Российская газета. 2014. 20 июня [Zorkin V.D. *Krizis mezhdunarodnogo prava: sovremennyi kontekst* // *Rossiiskaya gazeta*. 2014. 20 iyunya [Valery D. Zorkin, *Crisis of International Law: Contemporary Context*, *Russian Gazette*, Jun. 20, 2014]].

ideology, the domination of public interest over the personal interests of citizens, and the citizens' predominantly secular (atheist) perception of the world, etc.

The legal consciousness of the post-Soviet period could be characterized as an eclectic mixture of pre-Soviet, Soviet and post-Soviet ideologemes. The works of Alfred Zhalinsky,⁷ Nikolay Sokolov, Igor Sorokotyagin⁸ and others are dedicated to the research of legal consciousness theory and practice in contemporary Russia. The leading ideologemes in today's Russia are faithfulness to traditions of Soviet times (*i.e.* collectivism, secularism, and a positive attitude towards ideology), reestablishment of pre-Soviet traditions (*i.e.* spirituality, religiosity, and psychology), and the import of Western ideologemes (*i.e.* the primacy of human rights, democratic values, and humaneness).

This paper is dedicated to the analysis of the current post-Soviet developments in legal consciousness theory that still has to overcome the ideological limits of the socialist understanding of legal consciousness through critical reassessment of Russian and foreign experience.

The issues of time and space are essential for determining the place and character of regulation of complex social processes. As far as one of the key themes of the contemporary theory of law and state is concerned, *i.e.* the problem of legal consciousness, space and time patterns play the role of methodological keys that allow analysis of approaches developed in Russian and Western legal scholarship, as well as finding adequate solutions to the challenges of the time.

The objective of this article is to present tendencies within European and Russian legal consciousness from our perspective and to perceive them within a broader vision of education strategy in Russia.

2. Russian and Western Legal Consciousness Narratives

In April 2014, when talking about the Russian state and legal reality and its reflection in legal consciousness, Valery Zorkin, the Chairman of the Constitutional

⁷ Жалинский А.Э. Уголовная политика: актуальные задачи, субъекты и механизмы реализации // Современная уголовная политика: поиск оптимальной модели: Материалы VII Российского конгресса уголовного права (31 мая – 1 июня 2012 года) [Zhalinsky A.E. *Ugolovnaya politika: aktual'nye zadachi, sub'ekty i mekhanizmy realizatsii // Sovremennaya ugolovnaya politika: poisk optimal'noi modeli: Materialy VII Rossiiskogo kongressa ugolovnogo prava (31 maya – 1 iyunya 2012 goda)* [Alfred E. Zhalinsky, *Criminal Policy: Actual Objectives, Subjects and Implementation Mechanisms*, in Contemporary Criminal Policy: Searching for an Optimal Model: Materials of the 7th Russian Congress of Criminal Law (May 31 – June 1, 2012)] 67 (Vladimir S. Komissarov, ed.) (Prospekt 2012).

⁸ Сорокотягин И.Н. Психологическое содержание уголовно-правовых понятий УК РФ // Российский юридический журнал. 2004. № 1 [Sorokotyagin I.N. *Psikhologicheskoe sodержanie ugolovno-pravovykh ponyatii UK RF // Rossiiskii yuridicheskii zhurnal*. 2004. No. 1 [Igor N. Sorokotyagin, *Psychological Content of Criminal Law Concepts from the Criminal Code of the Russian Federation*, 2004(1) Russian Juridical Journal]].

Court of the Russian Federation, described that reflection as the ‘current absence of rights,’ and further notes:⁹

And then when we return to the construction of law as one of genuine foundations of human existence, we will have to ask ourselves – don’t we find the *tabula rasa* principle in the foundations of the current absence of rights; isn’t there, in its foundation, some kind of terrible theoretical mistake producing the degeneration of contemporary Western civilization? Or, at least, a mistake supporting this degeneration? Perhaps von Leibniz was profoundly right in saying that there is that natural idea denying the use of *tabula rasa* in any of the spheres of our life: in anthropology, in culture, in analysis of the state, the law and politics.

In other words, the attempt by Western leaders, scholars and ideologists of contemporary Western civilization to present human and societal development as moving under the principle of *tabula rasa* (blank slate) is a ‘terrible theoretical mistake.’ Furthermore, Zorkin provides an extended argument for overcoming this mistake, however, we will not present this argument in full here as we are going to focus on a single and essential point. The Chairman of the Russian Constitutional Court denies the idea that human consciousness is a blank slate and agrees with Leibniz that the human understanding develops via the interdependence of experience and the mind. He calls for an in-depth examination of the purpose of the state, and legal and political opportunities on the basis of this statement of Leibniz, especially in relation to the fact that ‘starting from scratch means neglecting everything that came before.’

This is the key idea criticized by Zorkin. In the quoted article, he reduces the negative consequences of treating human consciousness as a ‘blank slate’ (empty cabinet, blank sheet of paper, etc.) to the area of deformation of international law, limiting the sovereignty of Russia in the choice of state structure and governance by imposing those non-retrograde values cumulatively defined by Zorkin as ‘Westernizing liberalism.’ In renouncing the idea of *tabula rasa* as being key to human consciousness, Professor Zorkin proposes to agree with von Leibniz on the existence of a certain natural idea responsible for determining the development of anthropology, culture, statehood, jurisprudence and politics.

Following the narrative proposed by Zorkin, in the framework of which he placed anthropology and jurisprudence together, it is worth summarizing the responses of contemporary legal doctrines on how to overcome one of the distinguishing features of the Russian reality – the ‘current absence of rights.’

⁹ Зорькин В.Д. Цивилизация права // Российская газета. 2014. 13 марта [Zorkin V.D. *Tsivilizatsiya prava* // *Rossiiskaya gazeta*. 2014. 13 marta [Valery D. Zorkin, *Civilization of Law*, Russian Gazette, Mar. 13, 2014]] [hereinafter Zorkin, *Civilization of Law*].

It is interesting to note that the question of overcoming the terrible theoretical mistake producing, according to Zorkin, the degradation of nothing less than contemporary Western civilization is raised against the backdrop of analysis of the international context of state and law life, especially the relations between Russia and the West after Crimea was returned to Russia on March 18, 2014. However, in light of globalization processes and the universality of certain theoretical legal ideas, we propose using this approach to examine the Russian state and legal reality. In other words, to consider the reasons for the 'current absence of rights' and 'civilizational regeneration,' according to Zorkin, in the context of legal anthropology and legal consciousness.

Please note that the discussion of the peculiarities of the Russian legal consciousness and the way it differs from the Western and Oriental legal consciousness has already been going on for many centuries.

Over 50 years ago, the legal theorist Ivan Ilyin presented a formula in his work 'Our Tasks' for a comparison of the European and Russian legal consciousness: the Russian one is formless, good-natured and fair. A European who is up brought in Rome secretly holds other peoples (other Europeans, too) in contempt and desires to dominate them, and, for that reason, requires formal 'freedom' within his state as well as formal 'democracy.'

Furthermore, on the basis of a space continuum of Russian legal consciousness, Ilyin continues:

The Russian always took pleasure in the freedom of his space, liberty of private life and separation from the state, and the pretence of his internal individualization; he always wondered at other peoples, genially lived with them and hated only enslaving invaders; he appreciated *the freedom of spirit* higher than *formal legal freedom* – and if other nations and little peoples didn't trouble him, did not disturb in his enjoyment of life, he would never take up arms and seek authority over them.¹⁰

These words of the Russian scholar reflect realities of European and Russian legal consciousness in the middle of the 20th century. This is an example of a deep analysis of Russian legal consciousness, of its determination, not only by political and ideological factors, but by predominantly time and space factors. Ilyin concludes that '[a]ll this evolved into a deep difference between Western and Eastern Russian cultures. *All our culture is different – everything is our own . . . [D]ifferent medicine, different courts, a different attitude towards crime, a different perception of classes, a different relationship with our heroes, geniuses and tsars.*'¹¹

¹⁰ Ильин И.А. Против России // Ильин И.А. Наши задачи. Статьи 1948–1954 гг. Т. 1 [Ilyin I.A. *Protiv Rossii* // Ilyin I.A. *Nashi zadachi. Stat'i 1948–1954 gg. T. 1* [Ivan A. Ilyin, *Against Russia*, in Ivan A. Ilyin, *1 Our Tasks. Articles of 1948–54*] 86, 87–88 (Airis-press 2008).

¹¹ *Id.* at 88.

Given the difficulty in finding an exit from the contemporary international crisis, the methodology of analysis of differences and similarities of Western and Russian legal consciousness remains important and necessary on a practical level.

In the 21st century, according to a number of Western ideologemes, liberal values and traditions are generally believed to be signs of unequivocal legal progress, and the Russian reversion to conservative ideas is seen as a degradation as regards the development of state and law. Such a perception of the value of law in time and space does not eliminate the contradictions existing in the consciousness of Europeans and Russians. Moreover, these are particularly the differences in choices in relation to the scale of values, especially in the current crisis in the relationship between Europe and Russia, which are both searching for methodological keys for the preparation of new doctrinal ideas and approaches.

In contemporary Russia, the role of psychological legal motivators is played by ideas that are revolutionary in modern times but eternal for philosophical anthropology, such as the abolition of death penalty, liberalization of the grounds of private life, the humanization of the penal legal sphere – all of this is expressed by many authors in relation to the global humanization of positive law of the 21st century.

Moreover, the following tendencies can be observed, and, in our opinion, serve as common ideologemes of legal consciousness at the end of the 20th and beginning of the 21st century:

- 1) global humanization of positive law;
- 2) cross-cultural (multicultural) discourse in the anthropology of law;
- 3) strengthening of ethno-psychological and religious aspects of influence on the mechanism of legal regulation and stability of legal systems;
- 4) the increase of the part played by human rights in the framework of the functioning of the legal regulative mechanism (particularly the sharp expression of the rights of those of a non-traditional sexual orientation, sexual upbringing, and bioethical rights), which is considered as a sign of legal progress and social value;
- 5) a lowering of the influence of patriotism, traditional family values, general and legal culture on forming the legal consciousness of citizens, *etc.*

In many of those tendencies, one may see an influence of what could be conditionally called Western legal culture. There is the law of equity or human rights – certain grounds common for all human beings, which are obligatory despite state law and that allow one not to follow the state law, and even to use violence against the state in the name of that higher equity.

This idea is so important for the Western legal culture that even the text on a US\$100 banknote says that in spite of the state law, everyone has the right to equality, life, liberty, the pursuit of happiness and an armed revolt against the Government. The French national anthem calls for the defence of human rights and equality with the words: 'Arise, children of the Fatherland, the day of glory has arrived!' which is followed by '[t]o arms, citizens, form your battalions.'

This element of Western legal culture produces such phenomena as the violence in Ferguson in November 2014, the student protests in Paris in 2006 (when 230,000 rioted in the city, breaking windows and attacking policemen), and revolts in Greece in 2008 and 2014. The French President Nicolas Sarkozy was attacked four times with cake being thrown at him from a very short distance.

However, this particular element is, according to our view, a key factor in the contemporary functioning in the West of the 'state under the rule of law.' The refusal of the population to believe in hypocrisy and absoluteness of state law, and absence of respect *vis-à-vis* authorities, lead to a more efficient control by the authorities.

Contemporary legal anthropology as a study of the phenomenon of humans existing in a system of regulatory relations still analyzes the crisis in the legal consciousness of postindustrial society using hypertrophy of law, legal formalism, the vulnerability of the human before legal experiences, bureaucracy of law, and imposing alien moral ideals and values through law.

3. Public Trust in Justice Administration

Today, together with the economic and political difficulties suffered by Russia in relation to the Ukraine crisis, sociologists have noted a substantial increase in patriotism, the spiritual unity of Russian society, and huge trust in the Russian President.

However, this particular trust raises doubts in Western society as to the state of democracy and rule of law in Russia. In the United States, the difference between the popularity of the two main political parties is just several percent, and, in Europe, an electoral gain of 15 percent of the vote is considered an unbelievable success. We leave open the question of whether the level of the Russians' trust in their national political elite could be possible in a society based on freedom of speech and choice.

It is too early to talk about overcoming the crisis of legal consciousness, it is also too early from a strategic perspective. It is mistaken, as Zorkin writes, 'mistaken in terms of civilization and tragedy.'¹² The intensification of the crisis phenomena in the legal consciousness of contemporary society strengthens the civilizational, state and legal risks in the development of both Europe and Russia. We need conceptual responses to conceptual questions of the present:

- 1) what is the influence of the crisis in legal consciousness on serious deformities in the legislature, the application of law and law enforcement;
- 2) how is it possible to maintain a balance between the continuous globalization of law and establishment of Russian national sovereign jurisdiction;
- 3) how is it possible to keep the best traditions of the national higher legal education in the conditions of modernization of higher education (Bologna process, etc.);

¹² Zorkin, *Civilization of Law*, *supra* n. 9.

4) what shall become of the methodological ground for the content of contemporary legal theory and practice;

5) what ideologemes (pre-Soviet, Soviet, post-Soviet) will play the role of psychological drivers that might lead us out of the crisis of legal consciousness?

It is necessary to note that one of the key challenges to the Russian state's legal reality is a fall in the confidence of citizens, and what is particularly important is the fall in confidence of lawyers in institutions such as, for instance, legal proceedings in Russia. The opinion polls of attorneys-at-law made by researchers of the National Research University – Higher School of Economics show that a substantial proportion of professional lawyers (attorneys-at-law) distrust the law enforcement and judicial systems in Russia. They noted that the activity of law enforcement and judicial institutions is of a repressive nature, and that the officers of those institutions themselves take no serious steps to reestablish breached rights or to provide access to justice in order to defend those rights. Moreover, 28 percent of attorneys-at-law remarked that the officers of prosecution often breach the rights of their clients, 50 percent made claims against investigators, and about 60 percent against police officers.¹³

Such an attitude towards law-enforcement institutions might be easily explained. The European Court of Human Rights periodically receives applications regarding torture by Russian law-enforcement institutions.

For instance, two suspects were arrested in the *Mikheyev v. Russia* case. The first one immediately pleaded guilty to having raped and murdered a young lady with his friend, and indicated the place where the dead body had been hidden. However, his friend refused to plead guilty. The investigator connected electric cable to the ears of the latter, and began administering electric shocks. When the investigator threatened to connect the cable to the man's penis, Alexey Mikheyev made a sincere self-accusatory declaration. After the cables were removed, he jumped from the window in order to commit suicide. He failed to die but broke his vertebral column and became paralyzed for life. After the jump from the window, the family of the young lady called and informed the police that she was safe and in good health, having just come back home. She had been staying at the flat of some friends of hers for nine nights. However, two men had already pleaded guilty to having raped and killed her.¹⁴

In another case, *Maslova and Nalbandov v. Russia*, a 19-year-old young woman was invited as a witness to a police station. The investigator suggested she plead guilty. She refused. Then she was handcuffed and three officers raped her five times.

¹³ Что показал опрос адвокатов [Chto pokazal opros advokatov [What Did the Opinion Poll of Attorneys-at-Law Show]], Institut analiza predpriyatii i rynkov Vyshchei shkoly ekonomiki (May 20, 2014), <<http://iims.hse.ru/news/123530206.html>> (accessed Feb. 4, 2016).

¹⁴ *Mikheyev v. Russia*, no. 77617/01 (Eur. Ct. H.R., Jan. 26, 2006).

She was electrocuted through her ears and her mouth and nose were blocked with a gas-mask.¹⁵

The Russian judicial system ignored both Mr. Mikheyev and Ms. Maslova. In the case of the latter, none of the police officers was convicted under criminal law. Neither Mr. Mikheyev, nor Ms. Maslova received even a cent for damages from the Russian legal system.

Fortunately, they took their cases to the Strasbourg Court. However, the very fact that it is impossible to win such a case on Russian territory not only reduces the confidence of people in the internal judicial system, but also represents an example of very deep and serious problems at the level of legal consciousness of Russian judges and prosecutors. This is not the legal culture society wants.

In response to the question of the reasons behind charges in Russian court judgments, 72 percent of those interviewed answered that the courts do not have real independence. About 38 percent relate that tendency to a historically developed tradition.¹⁶

This opinion is shared by Kirill Belsky, partner at *Koblev & Partners* Law Firm:

The reason for the charging tendency of the Russian courts is the inquisitional nature of its work inherited from the Soviet system. The judges continue to see themselves as a continuation of the punitive function of law-enforcement bodies, and not as independent arbiters. Unfortunately, too many of the judicial staff have an educational and experience background in structures of the Ministry of Interior, the Investigative Committee and prosecution, and not in the private law business or the Bar as in countries with a serious legal history.¹⁷

Another problem in revealing deformations of legal consciousness while applying law is the necessity of critical assessment of a series of legislative initiatives undertaken in the interest of making criminal law more humane, but which actually resulted in making it possible to directly breach the rights of persons under criminal prosecution. Sergey Mironov, leader of the political party 'A Just Russia,' discusses this problem. He proposes annulling the prejudicial meanings of statements given by convicted persons who agreed to special proceedings and concluded an agreement with prosecution. In other words, the Investigative Committee has to verify and re-verify those statements. The authors of this initiative anticipate: 'As a result, the

¹⁵ *Maslova and Nalbandov v. Russia*, no. 839/02 (Eur. Ct. H.R., Jan. 24, 2008).

¹⁶ See *supra* n. 13.

¹⁷ Терехова А. Три четверти адвокатов не видят независимого суда в РФ [Terekhova A. *Tri chetverti advokатов ne vidyat nezavisimogo suda v RF* [Alina Terekhova, *Three Quarters of Attorneys-at-Law Do Not Consider Russian Courts Independent*]], *Nezavisimaya gazeta* (Apr. 22, 2014), <www.ng.ru/economics/2014-04-22/4_advocates.html> (accessed Feb. 4, 2016).

conviction in the main case may be pronounced, in fact, merely on the basis of a statement by the convict in the isolated case. They insist that this is contrary to the fundamental provision of criminal proceedings, according to which no evidence has a pre-established power (Art. 17(2) of the Russian Code of Criminal Procedure). Moreover, Art. 77(2) of the same Code provides that a conviction may not be based on statements of the accused that are not supported by other evidence.¹⁸

It is for this reason that the authors of the initiative propose annulling the prejudicial status of the verdicts entered following this special order. The authors of the initiative believe that the main principle of justice is impartiality guaranteed by the blindness of Themis who is indifferent regarding whom she sees before her, *i.e.* what matters is balancing evidence. Today there is often nothing to balance. Neither qualifications, nor experience, nor independence are essential for making judgments, since, as in Soviet times, confessions have become the key form of evidence.

Another problem that reflects the crisis of confidence in the Russia judicial system is that the way it works (*modus operandi*) is peculiar to the criminal justice system developed in contemporary Russia. This manner to act is a reflection of legal consciousness of Russian judges, or at least of an important part of the judiciary. This is a conclusion made by the authors of the investigation, Kirill Titaev and Mariya Shklyaruk, from the National Research University – Higher School of Economics, whose data was published in the *Vedomosti* newspaper on November 13, 2014.¹⁹

As a poll by the Institute for the Rule of Law showed after interviewing over 2,000 judges, the average Russian judge spends half as much time studying case data as in judicial hearings. Every fourth judge spends as much or more time working with data than in hearings. According to the authors of the survey, the reasons for Russian society's and the judicial community's attitude to justice are myths and delusions about the role of a judicial hearing in criminal cases:

It seems that the key decisions are made precisely in the courtroom. This feeling is largely created and affirmed by TV shows about judicial proceedings. In reality, however, the main ground for a judge making a decision is not the course of the judicial hearing taking place in the courtroom, but the criminal case, *i.e.* previously gathered, prepared and even pre-interpreted evidence, and facts that are described and documented in a strictly defined manner.²⁰

¹⁸ Самарина А. Сделка с правосудием – палка о двух концах [Samarina A. *Sdelka s pravosudiem – palka o dvukh kontsakh* [Aleksandra Samarina, *A Deal with the Justice System – a Double-Edged Sword*]], *Nezavisimaya gazeta* (Apr. 11, 2014), <www.ng.ru/politics/2014-04-11/3_kartblansh.html> (accessed Feb. 4, 2016).

¹⁹ Титаев К., Шклярчук М. Судебный процесс как работа с бумагами [Titaev K., Shklyaruk M. *Sudebnyi protsess kak rabota s bumagami* [Kirill Titaev & Mariya Shklyaruk, *Judicial Proceedings as Paperwork*]], *Vedomosti* (Nov. 13, 2014), <www.vedomosti.ru/opinion/articles/2014/11/13/bumazhnye-dela> (accessed Feb. 4, 2016).

²⁰ *Id.*

The prevailing manner of thinking and acting by Russian judges is shown by the following poll data according to which judges put more trust in statements by participants in proceedings that were made during the pre-trial investigation. Among the judges considering criminal cases, over 52 percent are more likely to trust the victims' pre-trial statements, and 56.4 percent prefer data provided by witnesses during the pre-trial investigation over what they say in court.

Those accused, in their turn, are usually considered liars. 70.6 percent of judges prefer to base their decisions on what the person charged said to the investigator, and to the court. Russian judges pay much more attention to evidence, which is more difficult to obtain in court. In general, the judge does not assess the presentations by the attorney-at-law and the prosecutor. Only 4 to 9.2 percent of judges indicated that this is one of three preferable sources of information.²¹

Therefore, for a judge, a criminal case is not generally a consideration of a hypothetical situation that may have happened at a certain stage, but in the most pragmatic sense it is a package of documents gathered by the investigator and approved by the prosecutor. It is for this reason that Russian judges often interrupt witnesses, deny motions of attorneys, *etc.* – everything necessary for entering the judgment is already on file.

Experts recognize this problem and have come up with a number of different models for reforming the judicial system. The keyword for supporters of rebirth of the role of the court as an independent branch of power is *deformalization*. However, this point of view is not the only one held by legal professionals and, even more so, in the judicial community. Some jurists propose getting rid of oral hearings and to pass to written judicial consideration. Russian society does not participate in the discussion. In order to participate in this discussion, citizens would have to understand how this mechanism works today. According to the opinion of the authors of the survey, and we fully agree with them, the main objective of the current public and professional debate is to ensure this understanding, and demythologize the judicial hearing space.

However, the implementation of this task, as we have said previously, is impeded by a series of methodological and worldview problems.

4. Anthropologization of Legal Education

In our opinion, the Russian legal doctrine is still dominated by a profoundly developed Soviet normative / positivist approach. Some attempts, nevertheless, to establish certain doctrinal ideas of natural rights have been observed. In this context, the conception of integrative law where legal anthropology has, in principle, an important role, is the least demanded. The experience of the development of post-Soviet law shows that the reorientation of constitutional sources and foundations of the legal system towards the human being (his interests and needs), has, until now, been unsuccessful.

²¹ Titaev & Shklyaruk, *supra* n. 19.

At the same time, it is quite difficult to talk about a school of legal thought that dominates in the US and Europe. There are many approaches to legal research and perceptions of law. It would be more correct to talk about impressions concerning certain tendencies. In this respect, the school of American legal realism or French legal postmodernism which has a rather sceptical attitude towards the very existence of law are quite strong. The decrease in faith in judicial decisions could be quite a positive tendency in Western legal culture. It is quite difficult to preview judicial decisions on the basis of professional qualification. The research of Professor Stanislovas Tomas distinguishes 100 techniques of interpretation, which are used in the practice of the European Courts. A technique of interpretation is an intellectual structure that is used in order to take a step from point A to point B. The problem consists in the fact that one technique leads to point B, another leads to point C, and a thirty-third technique will lead to point Z. Nonetheless, this road is always presented in an intellectually dishonest manner as independent from the judge. All 100 techniques are presented as objectively interacting, with the final result being the only possible one.²²

The main ideas that took root during the Soviet period of the doctrine of socialist (revolutionary) law and legal consciousness were those of Mikhail Reisner, author of avant-garde jurisprudence. For Reisner, as for any true avant-garde modernist, the positions of those theorists who tried to find compromise between new and old was unacceptable. He was against any synthesis of proletariat ideas with bourgeois ideas in categorical terms, thinking that the dictatorship of proletariat should not be dressed in, as he put it, 'rusty armour of old bourgeois law'. Strongly expressed secularism is a characteristic of all forms of legal modernism. In contrast with thinkers in traditional societies who support the functioning of the legal system in close alliance with religious church institutions, modernist legal scholars seek to separate religion and the church from participation in disciplinary regulation of social relations and in the establishment of new forms of social order.

At the same time, legal postmodernists and realists go even further – they compare law to religion, and they call it shamanism. Professor Duncan Kennedy from Harvard has become a founder of legal atheism. In the past, Jean-Jacques Rousseau wrote that if people lost their belief in God, then they would start to murder each other at every single street corner. According to the Western liberal approach, people lost belief in God but the human rights situation improved as a result. The idea of American legal realism, and particularly of its radical branch – Critical Legal Studies – consists in a belief that the lost faith in state law also leads to positive change.²³

²² Stanislovas Tomas, *Le raisonnement judiciaire de la Cour européenne de justice et de la Cour européenne des droits de l'Homme dans la perspective chamannique proposée par les études critiques du droit* 851 (Université Paris 1 Panthéon-Sorbonne 2010).

²³ Duncan Kennedy, *American Constitutionalism as Civil Religion: Notes of an Atheist*, 19 *Nova L. Rev.* 909 (1995), available at <<http://duncankennedy.net/documents/Photo%20articles/American%20Constitutionalism%20as%20a%20Civil%20Religion.pdf>> (accessed Feb. 4, 2016).

Key questions in the light of searching for answers to the methodological and law application problems considered above are what to consider as a sufficient or developmental level of legal consciousness, how to measure that level, and what standard should become the starting point: a 'healthy' standard as suggested by Ilyin, a 'socialist (revolutionary)' standard as proposed by Reisner or the 'global humanity' one as according to certain contemporary, primary Western, authors.

The following is a Soviet definition:

Legal consciousness is a sphere of public or individual consciousness that includes certain legal knowledge, attitudes *vis-à-vis* law and activity of applying law. In its turn, law and the practice of its application have an impact on the content of public and individual legal consciousness. The decisive role in the development of individual and group legal consciousness is played by political, social and economic conditions of the life of the society. Individual legal consciousness is formed under the influence of education, upbringing, traditions and the moral climate of the environment where the person finds himself.

In this 'canonical' definition for official Soviet ideology and for the frameworks of social sciences, the role of human personality is reduced to a subject to influence from the side lines of the 'correct' environment.

5. Conclusion: Towards a Reform of Russian Legal Education

In this respect, one of the basic theses of critical legal studies (one of the Western traditions) is an affirmation that contemporary legal education at university level is designed to reproduce social hierarchy. Teaching law as we might teach shamanism or magic liberates the intellectual potential of a student, switches on her creative thinking, demolishes her fear of authorities and destroys social hierarchy.²⁴ Certain people think that this approach is far from practice, but in fact it is the most practical one. Criminal law, civil law, financial law, human rights, and constitutional law may be taught as forms of shamanism – we can research their spirits, their rituals, and their magic formulae that sometimes work, and sometimes do not.²⁵

Analysis of the implementation of programme papers in the sphere of overcoming the crisis in Russian legal education shows that the practical steps of the state

²⁴ Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic against the System* (AFAR 1983).

²⁵ Stanislovas Tomas, *Theory of Judicial Shamanism*, in *Logic, Argumentation and Interpretation / Logica, Argumentacion e Interpretacion: 5 Proceedings of the 22nd IVR World Congress Granada 2005* (= 110 ARSP Beiheft) 125 (Josep Aguiló-Regla, ed.) (Steiner Verlag; Nomos 2007).

institutions and education community are hardly coordinated on a conceptual level, and often have a contradictory character. Such programme decisions are dominated by economic and political reasons for improving legal education, and not particularly by educational, psychological and anthropological ones. For instance, the following requirements for qualifying with a Bachelor of Laws are indicated in the Federal State Education Standard:²⁶

1) to be aware of the importance of one's future profession, to have a sufficient level of professional legal consciousness (OK-1);

2) to have the ability to perform professional activity on the basis of developed legal consciousness, legal thinking and legal culture (PK-2).

Obviously, such characteristics of lawyers' legal consciousness as *developed* and *sufficient level* are mentioned in the content of the competences, but the normative and methodological dispositions of the standard under consideration do not disclose how to ensure the achievement of the high objectives declared at a conceptual and technical level. It seems that we need a serious methodological reworking of all the complex of measures for overcoming the crisis of legal consciousness of contemporary lawyers in order to achieve the results of education required by the Federal State Education Standard.

An approximate educational programme in law at LL.B. and LL.M. levels leads us to use the following techniques for achieving the educational result: a matrix of competences, calendar plans, traineeship programmes, IT and methodological provision, interactive technologies, and a competent approach. These measures are justified and arranged in a formal manner, giving them a normative character.

At the same time, it is particularly the issues of the methodology of contemporary legal education that are the least developed and require more attention in the current context of state and law development in Russia. Such methodological calculations have a character, in our opinion, of legal theoretical and state practical risk management. In other words, legal theoretical risks in the sphere of research on legal consciousness manifest themselves in the presence of contradictory vectors (differences in attitudes *vis-à-vis* the *tabula rasa* principle as a methodological ground for legal consciousness – as explained by Zorkin) of such conceptions: from the ideas of traditionalism to revolutionary avant-garde and modern integration approaches.

²⁶ Приказ Минобрнауки России от 4 мая 2010 г. «Об утверждении и введении в действие Федерального государственного образовательного стандарта высшего профессионального образования по направлению 030900 Юриспруденция (квалификация (степень) «Бакалавр»)» [*Prikaz Minobrnauki Rossii ot 4 maya 2010 g. 'Ob utverzhdenii i vvedenii v deistvie Federal'nogo gosudarstvennogo obrazovatel'nogo standarta vyshchego professional'nogo obrazovaniya po napravleniyu 030900 Yurisprudentsiya (kvalifikatsiya (stepen) "Bakalavr")*] [Order of the Ministry of Education and Science of the Russian Federation No. 464 of May 4, 2010, 'On the Approval and Entry into Force of the Federal State Education Standard in Higher Professional Education in the Field of Law 030900 (qualification (degree) of Bachelor of Laws)'], at <минобрнауки.рф/документы/1879> (accessed Feb. 4, 2016).

Pursuing the aims of forming the legal consciousness of lawyers as provided by the Federal State Education Standards may be, in our point of view, orienting research and teaching of jurisprudence according to anthropological imperatives. A particular place in the anthropologization of legal education, according to our opinion, is occupied by disciplines of legal theory: philosophy of law, history and methodology of legal science, theory of state and law, deontology, legal psychology, anthropology of law, etc.

A key methodological problem in the implementation of the ideas of the anthropologization of legal education is the absence of a unique conception of contemporary pedagogical legal anthropology. Please note that, from a historical (time) perspective, such a conception existed at a certain time in the Russian theory of state and law. For instance, among the main particularities of pedagogical anthropology of Ilyin, one may distinguish the following educational principles:

1) traditionalism: upbringing is aimed at harmonious integration with the social and cultural tradition;

2) solidarity: upbringing shall not be based on individualist principles, but, on the contrary, it should affirm the ideas of healthy collectivism and nationalism;

3) hierarchism (idea of classes) and authoritarianism;

4) ethical values, *i.e.* the domination of spiritual and moral values in the motivational complex of personal self-realization.

However, from the point of view of the need to recognize contemporary reality, this conception needs updating in order to take into account both historic experience (the time factor), and foreign experience (the space factor). A certain experience of introducing the anthropological approach in the Department of Law of our University shows that it is reasonable to apply a complex approach as a method of creating the sense of anthropology in legal education. For this purpose, the programme of the course 'Theory of State and Law' now includes two topics: *The Social, Psychological and Moral Foundations of Creation of the State and the Law* in the *Methodology of Theory of State and Law* chapter, and *Anthropology of the State and Law* in the *Legal System and Legal Life* chapter.

The *Deontology* course includes topics dedicated to the social nature of the lawyer's profession and ethical problems of the lawyer's professional activity as a socioeconomic profession. The *Legal Psychology* course programme implements an anthropological approach to topics related to the legal socialization of personality, analysis of reasons of criminal behavior and criminal personality, psychology of communicative activity of the investigator and the court, ethics and psychological problems of lawyers' professionalization. The programme of the elective course, *Anthropology of Law*, is developed for LL.M. students, and its content is mainly focused on defining the place of the human in the system of traditional law and European positive law, contemporary family law, human rights in the context of bioethics, morality and religion.

The anthropological imperative in analyzing the codependence and interaction of European and Russian legal consciousness plays the role of a contemporary academic basis for research of issues concerning integration and differentiation of Europe and Russia, and their legal systems.

References

Kennedy, Duncan. *American Constitutionalism as Civil Religion: Notes of an Atheist*, 19 Nova L. Rev. 909 (1995), available at <<http://duncankennedy.net/documents/Photo%20articles/American%20Constitutionalism%20as%20a%20Civil%20Religion.pdf>> (accessed Feb. 4, 2016).

Kennedy, Duncan. *Legal Education and the Reproduction of Hierarchy: A Polemic against the System* (AFAR 1983).

Tomas, Stanislovas. *Le raisonnement judiciaire de la Cour européenne de justice et de la Cour européenne des droits de l'Homme dans la perspective chamanique proposée par les études critiques du droit* 851 (Université Paris 1 Panthéon-Sorbonne 2010).

Tomas, Stanislovas. *Theory of Judicial Shamanism*, in *Logic, Argumentation and Interpretation / Logica, Argumentacion e Interpretacion: 5 Proceedings of the 22nd IVR World Congress Granada 2005* (= 110 ARSP Beiheft) 125 (Josep Aguiló-Regla, ed.) (Steiner Verlag; Nomos 2007).

Зорькин В.Д. Кризис международного права: современный контекст // Российская газета. 2014. 20 июня [Zorkin V.D. *Krizis mezhdunarodnogo prava: sovremennyy kontekst* // *Rossiiskaya gazeta*. 2014. 20 iyunya [Valery D. Zorkin, *Crisis of International Law: Contemporary Context*, Russian Gazette, Jun. 20, 2014]].

Зорькин В.Д. Цивилизация права // Российская газета. 2014. 13 марта [Zorkin V.D. *Tsivilizatsiya prava* // *Rossiiskaya gazeta*. 2014. 13 marta [Valery D. Zorkin, *Civilization of Law*, Russian Gazette, Mar. 13, 2014]].

Ильин И.А. Против России // Ильин И.А. Наши задачи. Статьи 1948–1954 гг. Т. 1 [Ilyin I.A. *Protiv Rossii* // Ilyin I.A. *Nashi zadachi. Stat'i 1948–1954 gg. T. 1* [Ivan A. Ilyin, *Against Russia*, in Ivan A. Ilyin, 1 Our Tasks. Articles of 1948–54]] 86, 87–88 (Airis-press 2008).

Information about the authors

Alexey Tyrtysny (Moscow, Russia) – Ph.D. in Psychology, Associate Professor of Law (Russia), Professor and Dean of the Department of Law, Russian New University (22 Radio str., Moscow, 105005, Russia; e-mail: atyrt@mail.ru).

Stanislovas Tomas (Moscow, Russia) – Ph.D. in Law (Sorbonne), Attorney-at-Law (Principality of Andorra), Professor of Law at Russian New University (22 Radio str., Moscow, 105005, Russia; e-mail: stanislovas.tomas@gmail.com).