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## Usual and Written Law in the Russian State of the Early Modern Era: The Problem of Correlation

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### Abstract

The article deals with the problems associated with the peculiarities of Russian state legal system development during the early modern era. The authors focused on the correlation of oral legal tradition, which forms the basis of customary law, and written, codified law. The Russian historical and legal literature devoted to the legal system development and the development of law in the Russian state at the end of the 15th and 16th centuries, noted long ago that the Code of Laws by Ivan III and Ivan IV, considered as all-Russian legal codes, had very limited circulation in practice, apparently, despite all their significance as the monuments of the Grand Duke's right. Having ascertained the fact of limited application of grand prince's judiciary rules, both lawyers and a historian refused to explain this incident. The main attention was paid to the study of the judiciary significance in the context of the legal and judicial system of the centralized Russian state development, but there are no issues related to the specific application of judiciary rules.

Proceeding from the thesis put forward by G. Koenigsberger on the "composite nature" of early modern states, the authors of the article explain this legal phenomenon by the fact that the supreme power was compelled to reckon with the interests of local elites and preserve their traditional privileges, including the ones in the legal sphere, in exchange for their loyalty, on the one hand. Hence the limitation of law rules application developed and sanctioned by the supreme authority. On the other hand, the authors proceed from the premise that the "law" in the period under consideration did not have that binding force yet, as it has today, and judicial cases were considered primarily from the point of view of "truth," "justice," and "case specifics". Finally, the authors of the article attribute the "gap" between written law and custom to the "non-written" nature of medieval Russian society in a certain degree and its deep traditionalism, which led to a long-term preservation of "cultural" status but not an own legal status for the written law.

**Keywords:** Early new time, Early-modern state, Legal system, Customary law, Written law, Russian state.

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## Introduction

In the article authors' opinion, the limited circulation of the judiciaries and the existence of a certain "gap" between legal theory and judicial practice is conditioned by the peculiarities of early-modern state development, including the Russian state of the second half of the 15th-17th centuries.

On June 30, 1503, the Judge Semyon Borisovich (usually identified with S.B. Brucho Tuchkov Morozov) considered the case of Suzdal Spaso-Evfimiev Monastery brotherhood complaint which claimed that the peasants Mikhalk Zhuk and Kopus Chernakov burned the monastic property, the village and the harvested crop and the damage made 15 rubles [1, p. 542-543]. At the trial, Mikhalko Zhuk confessed that he committed a claimed criminal offense and, therefore, was found guilty of committing an arson.

According to the article 9 of Ivan III Code of Laws, adopted in September 1497, according to the preamble to this legal monument, the perpetrator, who committed the arson, was subject to the death penalty [2, p. 347]. Consequently, Mikhalka Zhuk and his accomplice (in the case of the latter capture, for Mikhalko stated at the trial that Kopus Chernakov, who had summoned him to this deed, is on the run) had to end their lives on the executioner's block. However, this did not happen. The judge, after reviewing the case, issued the decision that contradicted the relevant article of the Code. Semyon Borisovich ordered to charge fifteen rubles from the defendant for the monastery property that was lost in fire. It was the sum of damage suffered by the monastery as the result of the unlawful actions from two peasants. When it became clear that Mikhalko Zhuk was insolvent and no one vouched for him and was not ready to pay the amount of the claim, the judge sentenced the peasant to give the peasant to the monastery's elders "until the debt is paid", i.e. until he pays the cost of the burnt monastery property by his work [1, p. 543].

The actions of the judge (the person who was certainly literate and far from the last - no later than 1501 he was already an okolnichy at the Boyar Duma [3, p. 240]) clearly contradict the instructions of the Code of Laws and could not but cause controversy in Russian historical literature, the participants of which tried to decide why the judge made such a decision, which clearly violated the Grand Duke's will - according to the Typographic Chronicle, the Grand Duke "ordered the court to judge the boyars by the Code" [4, p. 213], especially if we take into account the severe character of Ivan III and the disgrace that he imposed on the brothers Semyon, Ivan and Vasily in 1483-1485. Thus, Yu.G. Alekseev suggested (after a number of other researchers) that in this case the judge did not sentence Mikhalko Zhuk to death as the peasant was not a criminal-recidivist and committed the crime for the first time [5, p. 221]. On the contrary, A.G. Polyak, proceeding from the class essence of the Code, considered Mikhalka as "a led brigand" (i.e., a person with a negative reputation), but justified the judge's decision by the desire of the monastery not to be deprived of a worker and compensation in case of the perpetrator's execution [2, pp. 383-384]. K.V. Petrov, treating the incident with Mikhalko Zhuk differently than Yu.G. Alekseev and A.G. Polyak, nevertheless, came to the conclusion that the death penalty was applied against repeat offenders, otherwise the criminal was imposed either a fine or a trading punishment (whipping at the square) [6, pp. 169-171].

In short, there are various explanations for the "incident of 1503" (by the way, it was not the only judicial decision that differed from the provisions of the Code of Law of 1497), and all of them consider this case from one aspect, thus, the proposed explanations of the judges' actions can not be recognized as completely satisfactory (except of K.V. Petrov's opinion, which, in our opinion, looks more convincing than all the others).

## Discussion and Results

Analyzing this incident and offering an own interpretation of events, we proceeded from several preliminary considerations. First of all, it was obvious to us that during the period under review the

supreme power in the Russian state did not have a proper influence, authority and resources in order to replace the traditional institutions, including the legal ones, with new ones and, most importantly, to keep the situation under control reliably. We considered and consider the Russian state of the early modern age as a "composite state" (according to the concept proposed by G. Koenigsberger and developed by J. Elliott [7, pp. 48-71, 8, pp. 191-217]). The most valuable thing in this concept is the thesis of a multi-level structure of power in such states where the supreme authority "builds up" its level over the traditional political, administrative and legal structures and institutions through which it seeks to control and influence a situation development on the ground.

At the same time, we agree with N. Kollmann's opinion, for example, who, following a number of other authors, proceeds from the premise that it is not necessary to exaggerate the power and role of the supreme power in the early modern states. Analyzing the features of Russian state political and legal system development in the period under review, she noted that «even more than its European and Ottoman counterparts, early modern Russia exhibited a striking tension between claims of centralization and the challenges of governance». In practice, this led to the fact that, for example, «in the criminal law, the center's power to enforce the law as written was informally limited by the local situation». Thus, striving to achieve the loyalty of population and local elites, the supreme power in Russia **«united formalized law and institutions with flexible practice and popular concepts of justice** (emphasized by the **Auth.**)...» [9, pp. 4-5]. This was related to the fact that, according to N. Kollmann, in the early modern states «legitimacy was grounded not only in the measured deployment of state-sanctioned violence, but also in the state's fulfillment, to a greater or lesser degree, of expectations that the ruler would respond to his people, respect tradition and provide security» [9, p. 416].

So, the supreme power had to correspond to the ideas of an ideal ruler prevailing in society if it wanted to achieve its goals. Could the ruler, even such a powerful one as Ivan III, attempt the image of justice? Obviously not. And here we are faced with the issue of image nature and the role the written law played in this system of views. Answering these questions, we used a number of provisions set forth in the works of such historians and culturologists as E. Kogan, S. Franklin and V. Zhivov.

E. Kogan expressed a curious thesis in one of his studies, the essence of which is that the dissemination of written law was associated not only and not so much with the growth of the supreme power authority, but rather with population literacy increase and a gradual expansion of writing application scope to new areas of society activity. At that, written law had played the role of a literary monument rather than the document actually used in everyday practice for a long time [10, pp. 8-11]. In a certain sense, the observations made by S. Franklin in the process of medieval Russian literature development study coincide with E. Kogan's idea. He noted in particular that for a long time Russia had the situation when «writing flourished at the extremes: on the one hand in the most solemn and formal rituals of Faith; and on the other hand in humdrum and informal urban financial or even domestic dealings» [11, p. 278]. Legal norms just fell into this "dark" area, and, taking into account the theses by G. Koenigsberger, J. Elliott and N. Kollmann, in our opinion, one should agree with S. Franklin's point of view, who pointed out that the society "opposed" the spread of writing beyond the spheres in which it developed initially and where it was seen as a necessary functional attribute of activity [11, pp. 278-279].

Another thesis expressed by S. Franklin is no less curious and worthy of use to us. In our opinion, he played the role in the history of the "incident of 1503" and similar events. The researcher pointed to the slowness of bureaucratic procedure development in medieval Russian society, linking this slowness with **«the resilience of traditional social relations, to a perceived functional adequacy of traditional non-written modes**, to a self-sufficiency and resistance to the kinds of structural changes which the 'logical' (or Byzantine-style) institutional uses of the technology might have required». And, developing the thought further, he noted that «traditional belief-systems and practices should perhaps be regarded in

the same light as **traditional modes of dispute-resolution and the exercise of power, as institutions resistant to technological intrusion** (emphasized by the **Auth.**)...» [11, p. 277]. The traditional forms of social relation regulation were quite adequate without the participation of written law - this is an important note for the incident of 1503 understanding!

And concluding to characterize the methodological basis of our work, let's also note the theses by V.M. Zhivov, similar to the ideas that E. Kogan and S. Franklin expressed. Describing the ratio of the canonical law, borrowed in Byzantium, and the ordinary law, he put forward a paradoxical thesis at first glance, that canon law was inoperative. "If it was applied," the researcher continued, "one would expect a conscious adaptation of the Byzantine legal tradition to the conditions of the Russian legal life." Meanwhile, there is no such means or, in any case, it has not survived, which indicates indirectly the underdevelopment of such a tradition at least [12, p. 217]. Thus, V.M. Zhivov concludes that the uniqueness of the legal situation in medieval Russia was that "the law does not work in the sphere of culture, and the acting law lies outside the sphere of culture" [12, p. 235].

### **Spirit of the Legal Codes of the 16th Century**

Let us return to the incident of 1503. What were the motives behind the adoption of the decision by Semyon Borisovich, which clearly contradicted the provisions of the Code of Law of 1497? It is rather difficult to answer this question, which is evidenced by the history of the Code and its content study, as well as by the history of the notorious incident study - at least for such simple reason that the text of this legislative monument has been preserved only in one list, dated by the first half of the 16th century (if not at by the middle of this century - that is, much later than it was approved). Thus, Yu.G. Alekseev noted the following in this regard: "it is impossible to determine what was the development of the monument text, what were (if there were) its edited versions, etc." [5, p. 157]. Besides, the structure of the monument itself and its division into chapters and articles cause controversy. Hence the questions arising during the interpretation of the Code certain provisions. In our case, much in the sense of the Article 9 of the code depends on a comma location or a hyphen instead of it. In the latter case, the meaning of the article becomes more clear and unambiguous, otherwise it allows different interpretations of an accused responsibility degree depending on his reputation.

However, is this problem fundamental in our case? We believe that it is not. Regardless of the certain Code article content interpretation ways (and similar later legal acts), there is no doubt concerning the conclusion drawn from the analysis of law enforcement practice in the Russian state at the turn of the 15th/16th centuries by A.A. Kalashnikova. She noted, in particular, that "it can hardly be said that the judge was directly guided by the norms of the Code of Laws". To do this, he had to have its copy in his hands, the researcher continued [13, p. 293], and the fact that we have only one copy of it at our disposal, moreover, issued clearly after its approval, indirectly confirms his interpretation as primarily "cultural" (or "literary", according to E. Kogan's interpretation), but not a legal monument. Moreover, judging by the results of law enforcement practice, such an approach has been observed already in times bordering on the moment of the Code of Laws approval - A.A. Kalashnikova cites data according to which only dozens (i.e., less than 20%) of 163 acts of the late 15 - early 16 centuries preserved to the present days demonstrate the references to articles of the Code.

What does this mean? In our opinion, it clearly shows first of all that the provisions contained in the Code had limited circulation, reflecting the peculiarities of the Russian "centralized" state development as a "composite" state. We have already noted above that a characteristic feature of such a state, its political system was a kind of "cooperation" between the supreme power and its local representatives, local communities and their elites, also in the legal sphere. It is worth paying attention to the standard

expression in the letters, which were given on behalf of the Grand Duke sent to the provincial governors. These letters clearly and unambiguously ordered local residents to "honor and listen" to the governor sent from the center, and the latter was ordered to exercise control, incl. legal proceedings, at the place of destination in strict accordance with local "antiquities", i.e. local legal customs. The "custodians" and "translators" of this custom were local "best" people of the local elite representative, whom the governor was obliged to involve in the procedure of legal proceedings [see, for example: 14, p. 195].

Naturally, in this situation, the judge, having consulted with the elected representatives of local "best" people (in our case with some Vasily Aksakov and Sukhman Toporkov), passed a verdict that corresponded to local legal customs in the first place. This is what the local community expected from the governor, personifying the person of the sovereign - justice in the sense of fairness establishment. The latter consisted not only in a criminal punishment but also in order restoration and in proper compensation for the damage inflicted by the actions of a criminal (in this respect, the attitude of Russian peasants towards murderers seems to be curious - the tradition allowed reconciliation of victims with a perpetrator and various payments to victim families or relatives in the presence of mutual goodwill [15, p. 156]). And in this case, the actions by Semen Borisovich are quite logical and justified. In fact, if he would order to execute Mikhalka Zhuk following the letter of the law (but not the spirit of the custom), the loss to the monastery would be unpaid, and the monastic brotherhood could be content only with moral satisfaction from the criminal punishment.

Nevertheless, everything is not as bad as it might seem at first glance. Be that as it may, but 20% of the references to the articles of the Code testify that this legal code has been used rarely and irregularly. In our opinion, this was due to the trend towards "standardization" of judicial procedures first of all (which can be regarded in two ways, on the one hand, as an element of novelty, as the aspiration of the supreme power to expand its competence sphere gradually, and, on the other hand, as the observation of "old times", as A.Ya. Gurevich noted. In the context of customary law, one of the most important functions of the court was to organize a court procedure and supervise that the participants of the proceedings strictly follow and the "game" rules [16, p. 261]).

## Conclusion

Summarizing the abovementioned, let's note that the decision made by the Judge Semyon Borisovich on the case of the criminal Mikhalko Zhuk looks illogical and contradicts the letter of the Code of 1497 only from a modern point of view. It is necessary to agree with the opinion by K.V. Petrov, who pointed out that in that situation "the judge in his decision was guided by "justice" - **formally not defined by the general principle of law** (highlighted by us - the authors) ..." otherwise the interest of the injured party would be ignored and the verdict would become "incorrect" and violating "justice" [6, pp. 172-173]. But, once again, in this case, a kind of "social contract" was violated between the Grand Duke, who was represented by the viceroy judge, and the local community, and the legitimacy of the supreme authority, as well as the loyalty of the local community towards it, were eroded. This was unacceptable from all points of view. Therefore, faced with the choice of following the letter of law and the spirit of tradition, the judge, whose legal consciousness and thinking did not differ from the legal consciousness and thinking of other participants in the proceedings, did not hesitate to choose the spirit of tradition. For him and for others participants of the process, the law, expressed in the norm of the Code of Law, did not have a dominant meaning in relation to custom at all.

## Footnotes

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