

CUSTOM AND LAW IN MARRIAGE AND FAMILY RELATIONS AMONG RUSSIAN PEASANTS DURING THE SECOND HALF OF THE NINETEENTH CENTURY

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Recent research in the sphere of law has increasingly stepped over the boundaries of narrow legal problems and become connected with sociology, psychology and economics. Legal sciences and history tend to merge when they are looking at different legal systems and their functioning in the past. Ethnological research in the field of law is important not only from the scientific viewpoint in order to study law on the basis of custom but, as practice demonstrates, it lays the foundation for analyzing modern processes of law formation in the society.

This paper proposes to describe the norms of marriage and family relations among Russian peasants during the second half of the nineteenth century. The phenomena under analysis have already become either extinct or transformed beyond recognition. Nevertheless, the proposed material, despite being limited geographically and chronologically, may be used to make comparisons and concentrate attention on a number of disputed issues related to the notion of 'folk law'. Such issues may include the ambiguity of the term itself, the possible ways in which legal custom may evolve, from being opposed to written law to merging with it, the limits of the operation of folk law, and the practicality of attempts to revive folk law.

Dual interpretation of the term 'folk law' term can be encountered in Russian historical and legal studies. On the one hand, a general definition of folk law as legal practices based on custom and not sanctioned by official legislation, dates as far back as the nineteenth century and was confirmed in studies of the twentieth century. On the other hand, some lawyers define the term thus: "when a custom is sanctioned

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by State authorities (and not merely by opinion or tradition), it becomes a norm of folk law” (Isaev 1993: 13). In the first definition the term ‘folk law’ has a wider interpretation, being distinguished from written law. To avoid misinterpretation, the title of the present paper refers to ‘custom and law’, although only customs with social control functions will be considered.

The whole complex of laws operating in Russian peasant society represented a dynamic combination of custom and written church and official law. Written law could originate from custom and, conversely, custom could be influenced by written law. For example, before 1830 the Church set the minimum age of marriage at thirteen years for girls and fifteen for boys. Those limits probably originated from customary peasant views of the age of consent and from marriage practices. Later church and official law raised the minimum age limits to sixteen and eighteen years respectively. In consequence the custom of early marriage previously recognized by official law came into conflict with new legislation and gradually gave way as legal practices developed. Such a situation raises the issue of the limitations and potential of custom in regulating social relations. The problem can be resolved only through in-depth analysis of specific, historically limited space, and only within the limits of that space. That is why the present paper covers only the second half of the nineteenth century.

That period of Russian history is noted for heated discussions concerning the ‘discovery’ of Russian peasants’ folk law. In connection with the preparation of the 1861 reform banning serfdom, Russian peasantry was subjected to serious study of its many aspects. The research by lawyer historians revealed a mosaic of norms that regulated relations among peasants and that could be accurately described by a known saying that every village had its own laws. Unwritten norms permeated all aspects of peasant personal, family and social lives and regulated both horizontal and vertical levels of rural society. As a result, the norms of official civil family law applicable to the peasantry after the reform did not encompass the diversity of real situations, and sometimes did not even reflect the realities or experience of peasant justice. So contemporary lawyers actively discussed the possibility of using custom in official legal procedures. However, the objectivity and independence of peasant decision making were questioned. Thus, on the basis of carefully collected information on peasant law, V.V. Tenishev came to the following conclusion:

Only one thing cannot be doubted - and that is the fact that there are no solid, well-established practices and that it is next to impossible to point out widely spread well-rooted legal customs in the life of our peasants... Sometimes decisions are made on the basis of such local custom, the existence of which could not even have been suspected by peasants or their forefathers.... (State

Museum of Ethnography n.d: List 17, File 915: 12)

At the same time the realization of the discrepancy between official legislation and the needs of peasant life, as well as great importance of custom in peasant court procedures contributed to the legalization of the latter. Custom was initially recognized as a real source of law in matters of succession in peasant families (the 1861 Reform, Articles 21, 38 and 107), and subsequently the Law of July 12, 1889 established as obligatory the use of folk law in settling peasant cases in court.

This paper is based on materials from local court procedures, and the results of peasant polls during the second half of the nineteenth century and in the Russian village descriptions given by contemporaries. The sources used have allowed us to highlight three levels of legal practices: 1. The level of intra-family law - when issues were resolved within a family collective. 2. The level of community - when a victim could appeal to a peasant meeting representing every household. 3. The rural district court level, these courts having been established after the 1861 reform to resolve petty peasant litigation. District courts were elected at peasant meetings from among the peasants themselves and their decisions were usually based on custom.

The analysis of the above materials has revealed the presence of the following varieties of laws in the peasant legislation then in force: in some cases custom was the only source of law because official legislation did not contain applicable norms; in other cases custom essentially coincided with the requirements of written law; in still other cases custom did not quite coincide with the provisions of written law. We shall consider the interrelationship of law and custom using the example of basic legal structural blocks in the marital-familial relations:

1. Pre-marital relations.
2. Personal relations between spouses.
3. Property relations.

The regulation of pre-marital relations among peasants included a number of conditions for marriage, pre-marriage guidance and agreements. Church and state law prescribed the following obligatory marriage norms for all citizens irrespective of estate:

- limits on the age of marriage (the age of consent to marry was set for girls at 16 and for boys at 18; the maximum marriage age was set at 80);
- absence of blood relationship between the bride and groom (they should be at least four times removed);
- consent of parents for marriage;
- consent of bride and groom for marriage;

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- a ban on marrying the mentally disabled;
- a ban on marrying for the fourth time.

Generally adhering to the norms of official law, peasants were also guided by their own unwritten rules. Custom regulated practically the entire cycle of pre-marriage status and set out the following conditions:

- motivation for marriage (reflecting the importance of family in peasant mentality);
- orientation in the selection of the marriage partner (territorial and estate limitations in the choice of partner; economic, moral and ethical requirements);
- the appropriate time for marriage (mostly in autumn and winter);
- the traditional stages of a marriage (including for example match-making and betrothal).

Thus custom appeared to be wider in scale than written law. The mandatory nature of certain norms was quite rigid. Violation of those norms was not only recorded in community memory but also had very unpleasant consequences. According to the norms of official law, the basic forms of preventive punishment used in peasant communities included birching (up to 20 strokes), public works (up to 6 days), fine (up to three rubles) and detention (up to 7 days). There was a wider choice of punishment in the customary system. In folk law, apart from the sanctions listed above, public reprimand, deprivation of parental blessing, and requirement of repentance, for example, were possible. Some practical examples of their use are illustrative.

One of the main demands on a bride was her unblemished reputation: loss of virginity was a disgrace. In view of the important role of public opinion among peasants, it was necessary to provide certain protection for the victim. In some communities of Orel province a particular method was used to protect the honor of a girl. If a girl was slandered, the procedure of the so-called 'public inspection' took place. The community appointed three women to inspect the victim of the slander. The results of the inspection were announced at a meeting, after which the elder of the community ordered one of his associates to notify all households "that the so-and-so girl was pure". The person guilty of slander could be fined (the fine being from one to six rubles), or be sent to a district center for birching (Tenishev 1907: 172).

Custom also prescribed punishment for violating marriage agreements. Among peasants one of the key elements of pre-marital relations was betrothal. The betrothal was a preliminary agreement between the families of the potential bride and groom and concerned the time and conditions of the marriage, the marriage ceremony costs, and the dowry. Betrothal was never regulated by written law. Nevertheless, it played an important role in the peasant world because it was considered a legal act

formalizing a marriage agreement and its violation carried direct consequences: refusals to marry after betrothal could lead to litigations in court.

For example, on February 13, 1872 Alexander Zhalybin, a peasant from Sarai village in the Sapozhkovsry District of Ryazan Province went to court with the following complaint against Ivan Golovnin, a peasant from the same village: he claimed that,

he had proposed his son as a husband to Golovnin's daughter Tatiana and in the process used 1.25 buckets of wine, 24 kilos of beef, two chickens and 1.6 kilos of bread at a total cost of 10 rubles. But Tatiana refused to marry his son Vasily and claimed that she did not want to marry at all, while at the same time she gave consent to marry a peasant from Krivskoye village. (Ryazan Oblast State Archives n.d: List 1. File 2: 19-20)

As a rule the court exacted damages from defendants in favor of victims and made the former pay the court costs. But such litigation was not always based on economics. Sometimes it was enough to ask a victim for 'Christian forgiveness', which might restore the honor of the offended family.

Custom significantly complemented written norms regulating personal relations in a family. Mutual rights and obligations of spouses, parents and children were grouped in the Russian Code of Laws:

- the husband must inform the wife of his public ranking, position and all rights associated with his position;
- the wife was to be titled according to the husband's ranking;
- the spouses must cohabit;
- the husband must love the wife, live in agreement with her, protect and respect her, be tolerant of her weaknesses, and provide her with food and support according to his abilities;
- the wife must obey her husband as head of the family, love, respect and oblige him and show him loyalty as mistress of the house;
- the wife must obey the will of the husband though she was not relieved of her duties towards her parents.

According to custom, the husband was also recognized as head of the family and master of the house, and those rules were in force among Russian peasants irrespective of the economic, natural and geographic features of a region. According to local press reports dating back to the second half of the nineteenth century, "men in day-to-day peasant life consider themselves superior to women and demand unconditional obedience and subordination from their wives", and "the husband has

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unlimited authority over the wife” (State Museum of Ethnography n.d: Listy 1. File 1024: 8, File 1462: 14, File 907: 14, File 1464: 37). Violations by spouses of their duties of cohabitation were punished by society. For example, on October 11, 1870 Boretsk regional authority of Ryazan province sentenced a Mrs. Avdotia Agafonova to five days of public works for being absent from home for three days without the consent of her husband (Ryazan Oblast State Archives n.d: List 1. File 2: 19-20).

Often peasants did not resort to the assistance of district courts, preferring to resolve conflicts through their ‘own court’. Literature and other sources dating back to the second half of the nineteenth century are full of information on wives physically abused by their husbands. According to certain reports, those wives who were rarely beaten by their husbands were considered happy. Usually, when wives complained to district courts of beatings by their husbands, their complaints were left without remedy. However, if a victim’s mother appealed to court, the result could be different and the culprit could be sentenced to 15-50 birch strokes. Here custom also introduced corrections: the authority of a woman superior in status (in this case his mother-in-law) overruled the right of the husband to mistreat his wife. But on the whole folk law traditions recognized the right of the husband to ‘assault and battery’, that is physically to abuse the wife though this was not sanctioned by official law.

State law regulated relations not only between spouses, but also between parents and children. Legislation set parental authority over children regardless of sex and age and allowed certain correctional measures in the process of upbringing: parents were allowed “to appeal to courts and imprison children for disobedience, leading a corrupt life and other apparent vices”. On the other hand, children could not complain of the parents and were supposed “to show them wholehearted respect, obedience, subordination and love” (Code of Civil Law 1903: X.4.1, Arts. 164, 165). Thus legal relations between parents and children can be reduced to two types: rights of parents and obligations of children.

According to the sources, peasants used official rights and complemented them with folk law methods of punishing children. For disobedience and wrongdoing parents could publicly birch their children and were often supported by rural and district authorities. In Orel province local traditions developed methods for child punishment that became more severe in case of a recurrence of wrongdoing. If a son insulted his parent, the latter called a meeting and complained of his son. The first punishment in such a case was a public reprimand. If the incident recurred, the son was publicly birched (5 strokes) and required to ask his parent for forgiveness also in public. If it happened for the third time, parents appealed to district court that sentenced the culprit to more severe physical punishment (15 to 20 birch strokes) (State Museum of Ethnography n.d: List 1. File 319: 8-9).

There are still recollections of one of the most fearful punishments for children - denial of parental blessing which, according to peasant views, equaled physical death and was used only in extreme cases. In practice, parental blessing was denied in the following manner:

an insulted parent sends someone for close relatives and announces to them that he wants to deny the parental blessing to his son, and the relatives, crying, ask the parent not to do so. Then they call the culprit and demand that he request forgiveness. If the parent refuses to give forgiveness, the alderman and several other persons come and try to convince the parent to reconcile. If the parent refuses to do so, then a candle is lit before the icons, the culprit is brought in and the father says: "For disrespect to me, his parent, I am denying him my blessing for eternity - no, no, no." Then he comes up to his son, spits three times in his direction and after that kisses the icon. (State Museum of Ethnography n.d: List 1. File 1109: 14)

The general norms of relations between parents and children differed according to the age and sex of the latter. Parents could complain to district courts even of children who lived separately. The reasons for complaints varied, and included disobedience, disrespect, insult and drinking.

Official legislation regulated the relations only between the closest relatives: between spouses and between parents and children. In addition to that, peasant practices developed norms regulating relationships inside complex (undivided) families, such as those between fathers- and daughters-in-law, between mothers- and sons-in-law, between brothers- and sisters-in-law, and between uncles and nephews. Such norms were most frequently used in settling property conflicts.

Property norms in a peasant family were the least influenced by written law and gave wide space for improvisation based on custom. Civil law was designed to meet the interests of urban classes rather than those of peasant families. According to written law, marriage did not unite the property of spouses - each of them could have and acquire separate property. The spouses were allowed to sell, mortgage or otherwise dispose of their property independently of each other. The same principle of separate property was observed with regard to parents and children who lived with the family: the parents could control the property of their underage children as guardians but could not dispose of it without the consent of actual owners.

Formally those norms applied also to the peasantry. But actually property relations among peasants were based on collective ownership. A peasant household was a unified economic complex with common family property which included land

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adjacent to the house and in the field, housing and auxiliary buildings and structures, tilling tools, animals, household utensils, some of the members' clothing, and money savings. Every son or brother was a co-owner and a potential heir to a part of the property in the event of his going to live separately or of a family division. At the same time, individual family members had private property acquired from different sources, such as dowry, a part of their personal earnings from overtime work, presents, and inherited property. In disposing of private property the rights of individual peasant family members were close to those of written law norms, but the extent of this property was so insignificant that the majority of conflicts concerning common family property were outside the limits of written law and were subject to settlement by custom. Custom regulated debt litigation, complaints about wasting common family property, complaints about providing for disabled family members, about distribution of property shares and about inheritance.

Traditionally division of common family property was based on the following principles:

- kinship;
- individual work contribution;
- equality of share distribution based on economic solvency of the parties to the conflict;
- the requirement to provide for disabled family members; and
- special circumstances, which might include unique personal qualifications of individual family members, when positive features of a plaintiff or his authority tilted the scales in his favor or, conversely, when an 'unsober way of life' negatively affected the decision of the court.

As a result, folk law norms of property relations were quite varied. Sometimes judges also abused their powers.

In deciding upon cases concerning the division of personal property either official or folk law could be used. Sometimes folk law norms violated the principles of written law. Thus, any property acquired by will could be left to any peasant person irrespective of kinship. A will if produced could not be annulled. But sometimes the community had the right to correct a will concerning private property. For example, on July 5, 1873 Sarai district court of Ryazan Province considered the complaint of a certain Mrs. Avdotia Buzynina. According to the will of her grandfather, she had inherited about a hectare of land. But that land was divided equally between her sister and cousin. Avdotia appealed to court, but her appeal was denied. So the court, in violation of the provisions of the will, recognized her relatives as co-equal heirs (Ryazan Oblast State Archives n.d: List 1. File 3: 20).

The variety of decisions in the field of property relations reflected the dynamics of the

formation of peasant law, and during the second half of the nineteenth century Russian lawyers started questioning the practicality of preserving peasant communities and their legal systems. Such discussions are widely reflected in literature (Aleksandrov 1984). Essentially, those discussions dealt with the problems of peasant communities and searched for the ways for them to develop in the changing environment of the eighteenth and early nineteenth centuries.

Analysis of peasant legal practices in the sphere of family relations demonstrated simultaneous operation of both written and folk law. But custom regulated a wider variety of issues than official law. Interrelation of custom and law was both mixed and parallel. That is why the points of their crossing may be interpreted as elements of historically accepted norms. They cannot be interpreted as purely customary, because folk law and official law norms organically merged, which complicated any attempt to distinguish between them. Such crossing points are many in marriage agreements and in regulating personal relations between spouses, transactions and relations that were the most conservative and the least subject to outside influence.

Conversely, there were very few crossing points between folk law and written law in the field of property relations. This can confirm both strong and weak points of folk law simultaneously. On the one hand, the strength of custom is in its proximity to the interests of individual peasants and peasant communities, in its attempts to reconcile individual and common interests. On the other hand, the mechanisms of folk law operation and its variety created conditions for numerous violations of norms in specific situations. Peasant judges might be bribed, and when aldermen and richer peasants were involved in decision making, that could influence the decisions very radically. At the same time, conflicts between individual and common interests in certain cases remained unresolved, which in turn led to the situations when peasants themselves rejected old folk law norms in family relations. As an example I shall quote excerpts from a peasant letter dating back to the early twentieth century where a person voices dissatisfaction with the old family practices and calls for their legal revision:

Appeal to the Constituent Assembly. Include in the legislation a provision under which a father shall be forbidden to arbitrarily offend his children and divide property at his discretion.... The old law was based on parental rights - parents could do anything they liked. (Russian Federation State Archives 1992: Fund 1781. List 1. File 42: 13)

That is why the positive and negative features of folk law, its strong and weak points, are still an open issue. It appears reasonable not to overidealize it when attempts are being made to revive it within the framework of present legal reforms in Russia.

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