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SERGEI KOTLIAREVSKII AND THE RULE OF LAW
IN RUSSIAN LIBERAL THEORY

ABSTRACT

This essay is an explication and analysis of the work of Sergei Kotliarevskii, a major Russian liberal theorist, focusing on his 1915 treatise Vlast' i pravo. Problema pravovogo gosudarstva (Power and Law: The Problem of the Lawful State). Although the "lawful state" has long been a subject of interest and controversy (even at the definitional level) among historians and political scientists, curiously Kotliarevskii has not received the attention he deserves. His study of the concept of the lawful state, which for him was integrally related to the ideal of the rule of law, is an important Russian contribution to the history and philosophy of law and the state. This essay explores the philosophical sources and contexts of his work; his understanding of the relationship among power, law, and the state; his thesis that religious ideas and institutions were most important in the historical development of legal consciousness; his consideration of the modern constitutional state; and his conviction that personhood—the absolute value and dignity of the human person—was the ultimate justification for the rule of law.

Key words: Russian liberalism; law; natural law; power; autocracy; lawful state; Rechtsstaat; constitutionalism; liberalism; civil society; personhood; human dignity; pragmatism; positivism; utopianism; human perfectibility; theocracy; Hebrews; capital punishment; justice; charity; Godmanhood; Pope Gregory VII; Vladimir, Solov'ev; Kant; William, James; Rudolph von Jhering; Georg, Jellinek; Friedrich, Hayek.

Friedrich Hayek, defining the idea of the rule of law, wrote that first of all "it constitutes a limitation on the powers of all government, including the powers of the legislature. It is a doctrine concerning what the law ought to be". Because its source is not the state itself but rather the "moral tradition of the community", it is, he continues, "a meta-legal doctrine or a political ideal". From its

1 F. A. Hayek, The Constitution of Liberty (The University of Chicago Press, 1960), pp. 205-206, italics added. There is a striking congruence, as we will see, between Hayek's and Kotliarevskii's approaches.
ancient and medieval roots in theories of divine and natural law, the rule of law began to take modern form in the English, American, and French revolutions, which advanced the principle that arbitrary state power, and the power of one person over another, ought to be limited by certain inviolable rights "de l'homme et du citoyen". In Germany the rule of law was the guiding idea behind the Rechtsstaat, a concept that was inspired by Kant and achieved currency in the 1820s as the main goal of the liberal constitutional movement. After the failure of the German Revolution of 1848, however, the meaning of Rechtsstaat was transformed from the rule of law to "rule by law", to adopt Harold Berman's distinction. In this new positivist conception, the state itself was seen as the highest source of law and the Rechtsstaat was reduced to a mere formal concept (formelle Rechtsstaat).

German works on the Rechtsstaat began to be translated into Russian in the 1860s and 1870s, and by the 1880s the term pravovoe gosudarstvo, which I will translate as "lawful state", was being used for the German word. Hiroshi Oda argues that for Russian jurists pravovoe gosudarstvo tended to reflect the pre-1848 meaning of Rechtsstaat, so that the Russian term zakonnost' (legality in the sense of conformity with statutory laws) better corresponded to the post-1848 positivist meaning. Article 47 of the Fundamental Laws of 1832 defined Russia as a lawful state in this latter sense: "The Russian Empire is governed on the firm basis of positive laws, establishments, and statutes, emanating from the autocratic power". In other words, the tsar's will had to be obeyed because it was law, a very debased sense of the concept.

By the beginning of the twentieth century, the Russian constitutional movement was trying to change this state of affairs and adopted as its goal a pravovoe gosudarstvo, in the sense of a state under the rule of law, the original mean-


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

5 Oda, pp. 373, 381–384.


7 Oda, pp. 385–386.
ing that Rechtsstaat had for German constitutionalists a century earlier. More generally, pravovoe gosudarstvo could designate, even for positivist jurists, an evolution from rule by law (as in the Polizeistaat) to the rule of law, or from the unlimited sovereignty of the state to the sovereignty of law. One way or another, Russian liberal theorists developed the idea of the lawful state in the direction of the rule of law. Those who were most concerned with justifying the sources of the supremacy of law were philosophical idealists such as Boris Chicherin, Vladimir Solov’yev, Pavel Novgorodtsev, Bogdan Kistiakovskii, and Sergei Kotliarevskii. The most systematic treatment of the specific topic of the lawful state is Kotliarevskii’s work Power and Law: The Problem of the Lawful State. It is a rich and rewarding study that merits close reading and explanation.

I. SERGEI KOTLIAREVSKII

Sergei Andreevich Kotliarevskii (1873–1939/41), a gentry landowner from Saratov province, was one of Russia’s leading social philosophers and a major figure in the politics of Russian liberalism. He held the distinction of defending four dissertations at Moscow University, the first two on church history and the second two on constitutional law. From 1905 he lectured in history as a Privatdozent. With his second doctorate in 1909, he became professor of state law at Moscow University. He also lectured at the Higher Women’s Courses in Moscow (1908–1917). In liberal politics, Kotliarevskii was a zemstvo constitutionalist (a district and province-level deputy from Saratov), one of the organiz-

8 Oda, pp. 392–403.
9 Although positivism maintains that any legal limitation of state power is ultimately a self-limitation, some positivist approaches contend that law may become practically autonomous of its state origins and provide effective limits on arbitrary state power, so that rule by law evolves toward rule of law.
10 The first four philosophers, together with Leon Petrazycki and Sergius Hessen, are the subject of Andrzej Walicki’s magisterial Legal Philosophies of Russian Liberalism (Oxford: Clarendon Press, 1987). Walicki succinctly identifies the thesis of Kotliarevskii’s book Vlast’ i pravo, but did not have space for a more detailed account (p. 366). He refers to Kotliarevskii in the course of his analysis of Kistiakovskii’s theory of the lawful state (pp. 364-374), which makes clear that the two thinkers had very similar ideas.
11 Vlast’ i pravo. Problema pravovogo gosudarstva (Moscow, 1915), 417 pp. Another important consideration of the lawful state is Pavel Novgorodtsev’s classic Krizis sovremennogo pravosoznaniiia (Moscow, 1909), which helped to shape Kotliarevskii’s ideas. On Novgorodtsev’s treatise, see Walicki, pp. 318–328.
12 The first set was in the Historical-Philological Faculty: Frantsiskanskii orden i rimskaiia kuria v XIII i XIV vv. (The Franciscan Order and the Roman Curia in the Thirteenth and Fourteenth Centuries) (1901), for the magister, and Lamenne i noveishii katolitsizm (Lamennais and Modern Catholicism) (1904), for the doctorate. The second set was in the Juridical Faculty: Konstitutsionnoe gosudarstvo: Opyt politiko-morfologicheskogo obzora (The Constitutional State: An Attempt at a Political-Morphological Survey) (1907), and Pravovoe gosudarstvo i vneshniaia politika (The Lawful State and Foreign Policy) (1909). All were published in the year indicated.
ers of the Russian Liberation Movement that culminated in the Revolution of 1905, a founder and Central Committee member of the Constitutional-Democratic (Kadet) party, and a deputy to the First State Duma. He collaborated with Petr Struve on the liberal journals Poliarnaiia zvezda (1905–1906) and Russkaia mys’ (1907–1918), and with G. N. and E. N. Trubetskoi on Moskovskii ezhenedel’nik (1906–1910). During this period he was also part of the “Riabushinskii circle” of Moscow industrialists and national-liberal intellectuals. In 1917 he helped Struve set up the League of Russian Culture, dedicated to the propagation of Russian national values. In the Provisional Government Kotliarevskii worked on the law commission planning the Constituent Assembly. In late July he was appointed deputy procurator of the Holy Synod, became associate minister in the new Ministry of Denominations (established 5 August), and was a member of the national council (sobor) of the Russian Orthodox Church when it opened on 15 August. In the Civil War he was active in the underground resistance to the Bolsheviks. Arrested in August 1919, he reconciled himself to Soviet power, and subsequently worked in the Commission of Justice and the Institute of Soviet Law.

Sergei Kotliarevskii was a philosophical idealist whose ideas were closest to those of fellow Russian neo-idealists Sergei Trubetskoi, Evgenii Trubetskoi, and especially Pavel Novgorodtsev. Deeply inspired by Vladimir Solov’ev, the philosophers were closely associated in the Moscow Psychological Society, a

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15 He contributed an essay to the two-volume work produced by the group: “Russkaia vneshniaia politika i natsional’nye zadachi”, Velikaia Rossiiia: Sbornik statei po voennym i obshchestvennym voprosam, ed. V. P. Riabushinskii, kn. II (Moscow [1911–1912]), pp. 43–66.

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

17 His appointment to the Holy Synod (in charge of foreign confessions) is noted in Time of Troubles. The Diary of Iurii Vladimirovich Got’e, translated, edited, and introduced by Terence Emmons (Princeton University Press, 1988), pp. 45–46. For his appointment as associate minister of denominations and active involvement in the sobor, see James W. Cunningham, The Gates of Hell: The Great Sobor of the Russian Orthodox Church, 1917–1918 (Minneapolis: Minnesota Mediterranean and East European Monographs, University of Minnesota, 2002), p. 29 and elsewhere (see the index for numerous citations).


19 Got’e reports his arrest, claiming he “wavered” and “compromised” himself, pp. 293, 296, 378. A brief biography of Kotliarevskii can be found in Filosofi Rossi XIX-XX stoletii: biografii, idei, trudy, ed. P. V. Alekseev (Moscow 1993), pp. 94–95.
learned society founded in 1885 at Moscow University. Despite its name, the Psychological Society became the main center of the growth of Russian philosophy during the “Silver Age” of Russian culture. Kotliarevskii published in its journal, Voprosy filosofii i psikhologii, and participated in its meetings. For him and his colleagues, the first principle of liberalism was personhood (lichnost’), the idea that human beings bear an absolute value and dignity because they are persons or, in Kant’s terminology, ends-in-themselves. The self, the philosophers insisted, was irreducible to naturalistic explanation. The primary evidence for this irreducibility or autonomy was moral experience: ethical ideals of “what ought to be” (das Sollen) do not derive from the empirical world of “what is” (das Sein). From ethics, Russian neo-idealists like Kotliarevskii went on to draw ontological or metaphysical conclusions about the nature of the self, grounding it in a transcendent sphere of being. In this way, their liberal defense of the self against reductive positivism and naturalism took the form of a modernized, theoretically explicit theism, in which it was the “image and likeness” of God in man that constituted personhood.

Kotliarevskii combined speculative philosophy with a broad cultural and historical approach to liberalism. An astute student of religion and society, he was convinced that liberalism grew from the demands of religious consciousness and that a liberal civic culture had its roots in a free and dynamic spiritual life.


21 The moral distinction between “what is” and “what ought to be” was a fundamental one for Russian neo-idealists in their critique of positivism and defense of personhood. It was one of the central concepts advanced in the 1902 symposium Problems of Idealism. Kotliarevskii was not a contributor, but he was part of the circle of philosophers which put the volume together. Problems of Idealism: Essays in Russian Social Philosophy, translated, edited, and introduced by Randall A. Poole, foreword by Caryl Emerson (New Haven: Yale University Press, 2003).

22 One of the places Kotliarevskii specifies his ontological conception of idealism is his contribution to Iz glubiny (1918). Distinguishing Russian philosophical culture, “which clearly gravitates toward ontology”, from German preoccupation with theory of knowledge, he links the Russian ontological direction to ethics: “There are two basic types of moral philosophy. The representatives of one separate the world of noumenal being from the world of phenomenal necessity, leaving man under the authority of an insoluble dualism. Such was the philosophy of Kant. The representatives of the other type find a higher synthesis between them, they affirm the ontological basis of moral norms. Such was the teaching of Plato. Only in this type can the human spirit find satisfaction.” S. A. Kotliarevskii, “Recovery”, Out of the Depths (De Profundis). A Collection of Articles on the Russian Revolution, trans. and ed. William F. Woehrlin (Irvine, California 1986), pp. 145–155; here, pp. 153–154. On the problem of Kant in the development of Russian neo-idealism, see Randall A. Poole, “The Neo-Idealist Reception of Kant in the Moscow Psychological Society”, Journal of the History of Ideas 60, no. 2 (April 1999), pp. 319–343.
His favorite example was American religious history, with its vitality, expanding tolerance, and diversity. He became very interested in pragmatism, and especially in William James, “a purely American genius” whom he greatly admired. Kotliarevskii valued pragmatism for its expansive idea of the possibilities of human experience, instead of the monistic constrictions and dogmatic reductions of one or another orthodox ideology. He believed that the pragmatist approach to the full range of human experience, including morality and religion, could promote the development of an integral, balanced and liberal worldview. For him, the searching openness of the pragmatic method was most clear in James’s use of it in exploring “the varieties of religious experience”.

II. POWER, LAW, SPIRIT

Pragmatism is the general philosophical framework within which Kotliarevskii conceives his project in Power and Law. The treatise opens with reflections on the nature of work—intellectual, moral, physical—and its value for personal, cultural, and even cosmic development. Work fashions both person and cosmos. It is a transforming and creative process by which the initially given realities of the natural and human worlds are remade in a higher human and ultimately divine image. Work is what brings the reality of “what is” closer to the ideal of “what ought to be”. It is, in short, a spiritualizing process, the self-realization of a higher potential inherent in not only humanity but also natural reality. Kotliarevskii relates these suggestions to the pragmatist approach to truth. His own conception was closest to the idea of the plasticity of reality, which the more speculative pragmatists used to convey the creative potential in our search for truth, a process in which reality to some extent realizes in itself our ideals and image. As James explained in Pragmatism, “in our cognitive as well as in our active life we are creative. We add, both to the sub-

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23 Kotliarevskii’s first essay in Voprosy filosofii i psikhologii was “Religiia v amerikanskom obshecheste”, Voprosy filosofii i psikhologii 15: 1, kn. 71 (1904), pp. 1–33, a review essay of Henry Bargy, La religion dans la société aux États-Unis (Paris, 1902). In Vlast’ i pravo, pp. 413–414, he refers to the rich religious life in the United States, citing Tocqueville’s Democracy in America.


26 Kotliarevskii, Vlast’ i pravo, p. 1.

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

28 Kotliarevskii, Vlast’ i pravo, pp. 1–2.

29 Kotliarevskii refers here only to the “instrumental character of truth”, but was familiar with the notion of the plasticity of reality (advanced by the British philosopher F. C. S. Schiller, 1864–1937), which he mentions, for example, in his essay “Pragmatizm i problema terpimosti”, Voprosy filosofii i psikhologii 21: 3, kn. 103 (1910), p. 378.
ject and to the predicate part of reality”. If so, pragmatism is no mere epistemological matter. “It concerns the structure of the universe itself”\(^\text{30}\). This was precisely Kotliarevskii’s idea of the cosmic-creative potential of work, including, of course, the work of discovering truth.\(^\text{31}\)

Kotliarevskii’s pragmatist-inspired conception of work seems at first to have little to do with his main problem, power and law. In fact, it forms the underlying theme of his treatise: law is the ideal that is worked into the basic reality of the state—power—and progressively transforms it, in turn enabling higher levels of development. Law is part of the work that humanizes and spiritualizes reality, first of all the reality of unequal power in human relations. Kotliarevskii’s approach was inspired not only by pragmatism, but also by a source closer to home: Vladimir Solov’ev’s idea of Godmanhood (bogocheholovchestvo), the ideal of the self-realization of humanity’s divine potential, our transformation in and union with God. It is the idea that man is created in the image and likeness of God and is called to return to divine reality. We must actively respond to this call by positively working for the realization of the Kingdom of God and universal transformation in all-unity (vseedinstvo). Law, for both Solov’ev and Kotliarevski, was integral to the work of spiritualization.\(^\text{32}\)

“Two Elements in the State” is the title of Kotliarevskii’s first chapter. Despite the age-old striving to make the state more lawful, law is not the first, basic element of the state. Power is. It is primary and intrinsic to the state; law, as a matter of origins, is secondary and extrinsic. Power is the natural element; law is the ideal element, one that must be gradually realized in the state through work. Power, submission, and dependence are human psychological realities, and they are basic to the nature of the state. No abstract dialectical or formal juridical approaches are necessary to understand this, nor can they long deny it.\(^\text{33}\) Here Kotliarevskii follows the prominent Russian legal theorist N. M. Korkunov, who traces the source of power to the common human experience of dependence. The state, according to Korkunov, derives its power not so much from coercion but from the consciousness, among its subjects, of dependence.


\(^{32}\)On Solov’ev’s philosophy of law and its broad influence on the development of Russian liberal theory, see Walicki, pp. 165–212.

\(^{33}\)Kotliarevskii, *Vlast’ i pravo*, pp. 5–6.
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and subordination. Kotliarevskii thinks this is paradoxical, as if to say to that power is almost unnecessary, or most present when it is least exercised, when people submit to it before its overt exercise. Power rests first on dependence and submission; it is the feeling of dependence in one person that gives power to another. Machiavelli, Hobbes, Carlyle, and Nietzsche all attest to the “will to power” as an undeniable human motivation, rooted in the instinct for self-assertion over (dependent) others. The experience of dependence and the desire to dominate are intrinsic to man; the result of their interaction is power.

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

Power is not distinctive to the state, of course, but pervades all types of human relationships and associations. “For a long time”, Kotliarevskii writes, “dependence on kin, commune, and landlord was much more palpable, and encompassed all moments in the life of the one under power and his whole field

34 Ibid., pp. 6–8, 11. On Korkunov’s analysis of the phenomenon of power, also see Walicki, p. 214.
35 Kotliarevskii, Vlast’ i pravo, pp. 14–17.
36 The philosophical critique of utopianism is a theme that runs through his works. See, for example, “Predposylik demokratii”, Voprosy filosofii i psikhologii 16: 2, kn. 77 (1905), pp. 104–127; “Politika i kul’tura”, Voprosy filosofii i psikhologii 17: 4, kn. 84 (1906), pp. 353–367; and “Filosofia kontsa”, Voprosy filosofii i psikhologii 24: 4, kn. 119 (1913), pp. 313–338.
37 Kotliarevskii, Vlast’ i pravo, p. 18.
38 Kotliarevskii’s overall approach was much influenced by Pavel Novgorodtsev’s book Krizis sovremennogo pravosoznania, which argues that the specific institutions and mechanisms of the liberal democratic state are relative means that could never produce a perfect society or transform human nature, but that liberal democratic ideals, such as the rule of law, are indeed absolute ends, based ultimately on the idea of personhood.
of consciousness, eclipsing the weak, dim power of the state”. But gradually the state triumphed over these groups, acquiring a monopoly over coercion. The power of the modern state, while vast, is abstract and impersonal, compared to what Kotliarevskii calls the “despotism of other unions”, which can seem much harsher precisely because it is direct, personal and arbitrary. Anarchists forget this, romanticizing earlier epochs of weak state power. There is no doubt, however, that in the modern era the state has become the main locus of power. The general problem of power, in its relation to personal and social freedom, thus now tends to focus on the specific problem of state power. How, Kotliarevskii asks, are we to resolve it? With that, he turns to the second element of the state, law.

The modern state, Kotliarevskii observes, reveals a profound change in the character of power. First, state power has generally come to be viewed as a means to fulfilling social functions and as an instrument of public policy. In terms of content, it is defined positively and invested with great social and national tasks. Second, state power has increasingly assumed a lawful form. There is, he explains, an undoubted link between the state’s new social content and its legal form, which is that in both respects state power has undergone a process of rationalization, but there is a certain antagonism as well. The antagonism between form and content arises precisely because the state’s ever increasing activity in the social sphere requires that its legal character be defined negatively rather than positively. Lawful form is, however, compatible with diverse and broad content; the issue is not what the state does but how it does it. Defining the form and limits of state power negatively rather than positively, prohibition rather than prescription, is Kotliarevskii’s first criterion of the lawful state. “The concept of the lawful state”, he writes, “at least initially meets the requirement of such a negative definition”. The lawful state does not at all deny the principle of power, intrinsic as it is to human nature, but it does strive to balance this with other sides of human nature, first of all by preserving “a certain sphere of legal autonomy”. At the end of his study he notes that the lawful state may have its origins in the “instinct” of limiting the feeling of personal dependence, the source of power and subordination, but his point is that the sphere of independence that law carves out is testimony to law’s real, transforming force, for that sphere is the condition of all higher development.

39 Kotliarevskii, Vlast’ i pravo, pp. 17-18.
40 Ibid., p. 18.
41 Ibid., pp. 19-20.
42 As he puts it later in his study, “the expansion of state activity with positive tasks extraordinarily increases the government’s force and, consequently, makes corresponding legal guarantees all the more necessary”. Kotliarevskii, Vlast’ i pravo, p. 349n.
43 Kotliarevskii, Vlast’ i pravo, p. 20.
44 Ibid., p. 411.
The state is not the only organization where power and submission need to be limited by law. They also need to be limited in the family, the church, political parties, "in any union where there are people with their passions, with despotism and the temptation of subjection to another's will". But, Kotliarevskii continues, the main limitation on power in these groups is made by the state itself, which protects its members from being treated in ways contrary to their status as subjects and citizens. Since, in the absence of a world government, there is no organization higher than the state, it is thus essential that its power be lawfully limited so that it can serve as the model, institutional embodiment, and guarantor of the rule of law. "In contemporary circumstances", Kotliarevskii writes, "the lawful character imparted to state power is the necessary condition for the supremacy of law in all other social relations".

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

The striving for the supremacy of law over power is the defining, abiding feature of the lawful state. The institutions and practices of the lawful state, the various ways it seeks to realize the supremacy of law in practice, are all relative and subject to change, a matter of "political technics", but the ideal itself—"like the human spirit creating it"—is permanent. For this reason Kotliarevskii describes the concept of the lawful state as essentially "metajuridical"; its core principles are absolute ends that always transcend the specific juridical or political means used to approximate them in historical reality. In this connection

45 Kotliarevskii, Vlast’ i pravo, p. 21. The importance Russian liberals attached to dismantling the "interconnected structures of domestic patriarchy, soslovie society, and arbitrary autocratic and state power (proizvol)" has been masterfully demonstrated by William G. Wagner, Marriage, Property, and Law in Late Imperial Russia (Oxford University Press, 1994) and idem, "Family Law, the Rule of Law, and Liberalism in Late Imperial Russia", Jahrbücher für Geschicht Osteuropas 43: 4 (1995), pp. 519–535, quotation at p. 521.
46 Kotliarevskii, Vlast’ i pravo, p. 21.
47 Ibid., p. 22.
48 Cf. Hayek’s use of the term “meta-legal”, quoted above.
49 Kotliarevskii, Vlast’ i pravo, p. 22.
he specifies another basic premise of the lawful state: the relative mutual independence of law and the state.\(^{50}\) Clearly this is a key formulation. We know that, for him, the state’s basic nature is power. Law by its nature and origins is different. It is extrinsic to the state, but can be worked into it, limiting the arbitrary exercise of its power, making it lawful, and transforming its nature. To the question that inevitably arises—“What is the source of law?”—Kotliarevskii’s answer is unambiguous, and he defends it throughout his treatise: the ultimate source of law is the striving of the human spirit, an autonomous ideal force capable of transforming external reality. This position is, of course, perfectly consistent with his overall philosophical idealism.

One of the basic claims of legal positivism is that the state is the source of law, a claim that Kotliarevskii is therefore obliged to refute. He focuses on the positivist approach to the problem of the legal self-limitation of state power. By “legal self-limitation”, Kotliarevskii is not himself suggesting that state power is somehow self-limiting—although precisely this is the positivist position. He is interested more generally in why state officials, at a certain stage in the state’s development, come to respect laws that also apply to the state’s other subjects and that thus limit their own power. Why, in other words, do state officials come to see themselves as under the rule of law and as equal to other subjects or citizens?\(^{51}\) The German legal theorist Rudolph von Jhering (1818–1892) gives one answer to the problem: the state submits to its own laws because it is in its own best interests to do so.\(^{52}\) Law is only an intelligent politics of state power, as Kotliarevskii puts it.\(^{53}\) He compares Jhering’s theory to utilitarianism, which tries to explain morality as rational egoism. One of the dangers of Jhering’s approach, he points out, is that the state is personified and depicted as a thinking and acting being. His main criticism, however, is that rational self-interest alone cannot explain the state’s self-limitation. Jhering himself is eventually compelled to admit that moral factors are at work, without, however, recognizing that “this moral force is not contained within the bounds of even the most rational egoism; it rests on consciousness of responsibility and duty”.\(^{54}\) Kotliarevskii’s overall conclusion is that Jhering’s positivist approach prevents him from clearly appreciating that moral consciousness is the main factor in the

\(^{50}\) Ibid., p. 23.

\(^{51}\) Ibid., pp. 32, 36–37. Cf. Hayek: “The ideal of the rule of law requires that the state either enforce the law upon others—and that this be its only monopoly—or act under the same law and therefore be limited in the same manner as any private person. It is this fact that all rules apply equally to all, including those who govern, which makes it improbable that any oppressive rules will be adopted.” \textit{The Constitution of Liberty}, p. 210.

\(^{52}\) For the Russian reception of Jhering’s views, see Walicki, pp. 143–144, 156, 185, 215, 227–230, 241, 261, 279, 302–304.

\(^{53}\) Kotliarevskii, \textit{Vlast’ i pravo}, pp. 34–35.

\(^{54}\) Ibid., p. 37.
legal self-limitation of state power; positivism must disguise this factor as “rational egoism”.

Kotliarevskii also considers the views of another prominent German legal theorist, Georg Jellinek (1851–1911), who compares the state’s legal self-limitation with the self-limitation of the human person submitting to the autonomous moral law. Although Kotliarevskii generally admired Jellinek, he rejects this comparison. First, he is again wary of any psychological comparison of state and person. Second, he does not think it is correct to speak of law as an autonomous principle inherent to the state. A human being, in submitting to the moral law, follows the inner voice of conscience, of his or her own true nature. The state, by contrast, takes law not from itself but from the “surrounding social sphere”, in Kotliarevskii’s phrase. “Law is a secondary element of the state organization, and state recognition is not the primary source of its binding nature. For the original element of power, from which the state is created, law is heteronomous; it comes from outside”. Power and law, he stresses, have different sources and one or another combination of these elements determines the basic character of the state order. The lawful state cannot eliminate the element of power intrinsic to the state as such, but it can strive toward an ever fuller realization of the principle of law, “which is inseparable in the final account from religious-moral foundations”.

III. THE RELIGIOUS ROOTS OF LEGAL CONSCIOUSNESS

One of the most important themes in Power and Law is that the idea itself of the lawful state is not peculiar to modern constitutionalism, but belongs to the “cultural inventory of humanity”. “It runs through the ages as the search for law, as the striving of the human spirit—silenced, rising again, never dying; only those political and social forms in which it has been embodied . . . die and

55 Kotliarevskii’s treatment of Jhering is a good example of the “contraband” critique of positivism advanced by Russian neo-idealists. They believed that ethical, religious, and metaphysical suppositions were inevitable in human thought and needed to be acknowledged and justified. “Contraband” refers to the unconscious smuggling of these suppositions into areas of thought claimed by positivism as its own, and to the resulting intellectual distortion and muddling of concepts. The contraband critique of positivism was widely used in Problems of Idealism (I discuss it in a section of my introduction to the volume, pp 35–42). Kotliarevskii helped to pioneer the contraband critique in his review of Ocherki realisticheskogo mirovozzrenia (1904), the leading positivist response to Problems of Idealism: “Ob istinnom i mnimom realizme”, Voprosy filosofii i psikhologii 15: 5, kn. 75 (1904), pp. 624–644. Walicki shows that Stanislaw Brzozowski, the Polish fin-de-siècle thinker, also used the concept: Stanisław Brzozowski and the Polish Beginnings of ‘Western Marxism’ (Oxford University Press, 1989), p. 91.

56 For the Russian reception of his views, see Walicki, pp. 201, 314–315, 368–370.

57 Kotliarevskii, Vlast’ i pravo, pp. 43–44.

58 Ibid., p. 45.

59 Ibid., p. 44.
are doomed to die".\(^{60}\) In the third chapter of his study ("Historical Embodiments"), Kotliarevskii follows this perennial search for the ever more lawful state and its relative, historical approximations. His thesis is that the lawful state presupposes a certain legal consciousness. He is especially interested in how religious ideas and institutions have affected the development of this consciousness and its core moral conviction, that power ought to be limited by law.\(^{61}\)

Kotliarevskii locates the ancient roots of the lawful state in the biblical theocracies. At first glance this lineage might seem highly problematic; surely theocracy and the lawful state could be paired only as polar opposites. Kotliarevskii himself could not have been more critical of theocratic currents in modern social thought, beginning with Vladimir Solov'ev's utopia of "free theocracy".\(^{62}\) It is necessary, however, to distinguish among various senses of the term "theocracy" and to appreciate the historical context. What is retrograde in a more recent historical period might well have been progressive in an earlier one. Kotliarevskii argues that there is a sense in which theocracy can refer to the limitation of secular power by the will of God and his earthly representatives. In this conception, religious sanction is given to secular power only conditionally and can be withdrawn, in which event it turns into a sanction for the overthrow of the offending government.\(^{63}\) "Here, under the defense of religious norms, the relative security of citizens can be preserved, as in other epochs and circumstances it is preserved under legal norms".\(^{64}\)

The best example of this type of theocracy can be found among the ancient Hebrews. Kotliarevskii distinguishes between two types of theocratic ideals in the Hebrew tradition: priestly and prophetic. Both contributed to the development of legal consciousness, although Kotliarevskii believes that the prophetic-messianic tradition was most significant, especially in its religious universalism, fervent faith in a moral world-order, and appeal to personal and social righteousness. The divinely-inspired authoritative voice of the prophets acted as a restraining force against arbitrary power.\(^{65}\) The Israelite kings were not to rule despotically, but according to God's will and law; "this is not so much monar-

\(^{60}\) Ibid., p. 233.

\(^{61}\) In addition to the religious roots of legal consciousness, he also explores the "secular" Greek and Roman contributions to the idea of the lawful state. Vlast' i pravo, pp. 135–175.

\(^{62}\) Kotliarevskii and other Psychological Society philosophers, including Boris Chicherin, Evgenii Trubetskoi, and Pavel Novgorodtsev, were highly critical of Solov'ev's theocratic utopianism, seeing in it the mirror-image of the subordination of church to state (caesaropapism) characteristic of modern Russian history. Theocracy and caesaropapism were illiberal in the same way: both violated freedom of conscience and infringed the necessary autonomy of church and state. See Randall A. Poole, "Utopianism, Idealism, Liberalism: Russian Confrontations with Vladimir Solov'ev", Modern Greek Studies Yearbook: Mediterranean, Slavic and Eastern Orthodox Studies (University of Minnesota), vol. 16/17 (2000/2001), pp. 43–87.

\(^{63}\) A broad parallel might also be made here with the Confucian idea of the mandate of heaven.

\(^{64}\) Kotliarevskii, Vlast' i pravo, pp. 123–124.

\(^{65}\) Ibid., pp. 127–128.
chical power, as monarchical service". Thus theocracy, as depicted in the Hebrew Bible, "itself provided a certain legal order, although by extra-legal norms: the will of the earthly ruler was concretely limited by a higher divine will". Most important was the belief that divine dictates are not something external to human nature, but are confirmed by conscience.

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

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

Not surprisingly, Kotliarevskii contends that Christianity also made great and distinctive contributions to the idea of the lawful state. The first of these was religious freedom, a demand made by early Christian apologists against pagan Rome. They defended this demand as consistent with the legal principles recognized by Rome itself, principles that did not permit Christians to be denied their freedom without cause. The Christian apologists appealed to Rome to respect its own legal principles, and in doing so Kotliarevskii thinks they helped to deepen its legal consciousness. At the same time the church itself became more authoritarian, hierarchical, and repressive, psychological traits "that did not remain without great influence on the relation of Christians to power and the state". Externally the church won an important victory in 313 when the Edict of Milan granted religious freedom to all Roman citizens. "But", Kotliarevskii adds cryptically, "another period soon begins", when the church will use its new power and privileges to suppress the religious freedom it had earlier championed. Here are the roots of medieval intolerance, yet the church's very power could also limit that of the state, as famously symbolized by Ambrose of Milan's excommunication of Emperor Theodosius in 390.

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66 Ibid., p. 132.
67 Ibid., p. 131.
68 Ibid., pp. 133-134.
69 Ibid., p. 134. Cf. J. M. Roberts, The Penguin History of the World (New York: Penguin Books, 1990), p. 110: "It is not too much to say that, if the heart of political liberalism is the belief that power must be used within a moral framework independent of it, then its taproot is the teaching of the [Hebrew] prophets".
70 Kotliarevskii, Vlast' i pravo, pp. 177-178.
71 Ibid., p. 178.
The countervailing power of church and state produced the “medieval dualism” that, according to Kotliarevskii, so distinguished the Christian West from the East and excluded “state omnipotence”. The church’s power ran the risk, however, of deeply compromising its spiritual vocation and distinctiveness as it assumed secular responsibilities in the highly decentralized feudal world. The church recognized the dangers of internal secularization and tried to meet them through monasticism (especially with the Cluniac reform and founding of the mendicant orders); the reforms of Pope Gregory VII (1073–1085), which asserted papal supremacy and condemned lay investiture, simony, and clerical marriage; and the systematization of canon law. These far-reaching measures enabled the church to preserve its unity and independence.

Through its monastic, clerical, and legal reforms, the medieval church tried to combine asceticism and theocracy; following St. Augustine it held that spiritual power over the world was justified only by ascetic rejection of the world. Kotliarevskii believes this was a distinctive combination that had far-reaching implications for the later development of the lawful state. The church began to hold power as a function, not as property—ministerium, not dominium, in Bernard of Clairvaux’s expression. This sharply distinguished spiritual power from secular power, which was still “patrimonial” but which would later also come to be conceived as a function serving higher (state) purposes.

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

IV. PROBLEMS OF MODERN CONSTITUTIONALISM

From ancient and medieval “embodiments” of the idea of the lawful state, Kotliarevskii turns to the early modern and modern periods, to the progression from feudalism to absolutism and finally constitutionalism. A critical juncture in this progression was the transition from a patrimonial to a functional conception of power—the roots of which, as we have seen, he traces to medieval ascetic theocracy. Louis XIV’s famous pronouncement that “l’état c’est moi” was made already at a time when “the power of the monarch was becoming separated from its patrimonial basis and turning into a state function demanded by the general good, and the monarch himself—into a state organ”, his power no longer personal but derived from and thus (in theory) limited by the state.

This incisive formulation captures the distinctiveness of the modern lawful state and specifies a crucial threshold in its practical realization. Kotliarevskii’s meaning is that the state turns from being (at least in part) the property or instrument of monarchical power into being the source itself of power, which would seem to transform the nature of state power and make it qualitatively more lawful than in previous embodiments of the lawful state. The state, once it is recognized as the only legitimate source of power in the public sphere, becomes the institutional embodiment of the rule of law, to which even (or especially) executive power is subordinate. As Kotliarevskii later writes, “recogni-

78 Kotliarevskii, Vlast’ i pravo, p. 204. Although Kotliarevskii does not cite him, E. N. Trubetskoi, Religiozno-obshchestvennyi ideal zapadnogo khristianstva v XI veke: Ideia bozheskogo tsarstva v tvoreniiakh Grigoriia VII-go i ego publitsistov—sovremennikov, pp. 310–314, also refers to the church’s use of ideas of popular sovereignty and contract theory against state absolutism.

79 Kotliarevskii, Vlast’ i pravo, pp. 205-206. He put it even more strongly in his 1907 book on constitutionalism: “The great service of Catholicism in the history of humanity . . . is that it defended a certain sphere of people’s spiritual life from state intrusion”. Kotliarevskii, Konstitutsionnoe gosudarstvo: Opyt politiko-morfologicheskogo obzora (St. Petersburg, 1907), pp. 80–81.

80 Kotliarevskii, Vlast’ i pravo, pp. 206–207.

81 Ibid., p. 226.
tion of lawful supremacy presupposes only that the monarch be an organ of the state, and not stand above it". The principle of the modern lawful state, he continues, excludes any patrimonial conception of power, for the monarch’s (or any official’s) power is not his own property but rather his competence; the “only subject” (or source) of power in the state is the state itself. In other words, there is no legitimate private (“patrimonial”) source of power in the modern lawful state; in the public sphere all power is, in short, public and derives from the state. The modern form of the lawful state, so conceived, is the constitutional state, sustained by a relatively highly developed legal consciousness, which is also ultimately its very source.

In his consideration of the modern constitutional state, Kotliarevskii emphasizes that it and the lawful state must not be equated. The lawful state is a metajuridical concept that transcends any of its historical embodiments; in the modern era its necessary form is indeed the constitutional state, but this is a historical form that may be superseded in the future. Juridically he defines the constitutional state as one where only an act issued with the consent of popular representation can be recognized as a formal law (zakon).

This definition indicates how the constitutional state provides for the supremacy of law over other acts of state power and how law thus becomes the general norm for the state. The supremacy of law must also entail its universality, since this alone provides for equality before the law. The supremacy of law, so defined, is the main criterion of the constitutional state; other features, such as ministerial responsibility before parliament or whether the state is a monarchy or republic, are secondary.

By its very nature, the modern lawful state must give primary importance to the courts. They were, Kotliarevskii writes, the first branch of government to forcefully advance the principle of the legal self-limitation of the state. Long before the separation of the legislative and executive branches, the judiciary acquired its independence, a pivotal moment in the modern history of the rule of law. The Russian judicial reform of 1864, he observes, so successfully embodied the idea of an independent judiciary that the reformed courts were recognized (by friend and foe) as incompatible with autocracy. He opposed the retention of the volost’ courts, writing that the final legal equality of the peasantry

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82 Ibid., p. 244.
83 Ibid., pp. 246–247.
84 It is the specific subject of his fourth chapter, “The Constitutional State as Embodiment of the Lawful State”, most of which is devoted to contemporary constitutional politics and practices in Europe and elsewhere. It is also discussed at some length in his second chapter, a review of German, French, British, and Russian scholarship on the lawful state. Several years earlier he devoted a separate book to the subject: Konstitutsionnoe gosudarstvo: Opyt politiko-morfologicheskogo obzora (St. Petersburg 1907).
85 Kotliarevskii, Vlast’ i pravo, pp. 118, 234.
86 Ibid., pp. 234, 297.
87 Ibid., pp. 235–236.
with other estates required their abolition. In pointed references to contempo-
morary Russia, he warns that any violation of established judicial procedure (such
as trial by jury) is an infringement of the principle of law requiring not simple
reference to state necessity but very weighty justification. This diminishment of
law is even graver with any expansion of the jurisdiction of military courts,
which must be limited to absolute necessity.88

Kotliarevskii was, of course, fully cognizant of the contemporary Russian
context within which he was writing and no doubt hoped, as a civic-minded
legal philosopher and historian, that his study of the development of the lawful
state might serve as a "usable past" (albeit a largely foreign, western one) for
Russia as it tried to build its own liberal future, one tied more closely to the
West. He believed that the October Manifesto of 1905 signified Russia's transi-
tion to a constitutional order, because it guaranteed that "no law can go into
force without approval of the State Duma",89 which was his definition of the
constitutional state. In retrospect, this assessment was far too optimistic (and
ironically for him too juridical), but it gave greater practical relevance to recent
Russian scholarship on the lawful state, including his own. In a succinct litera-
ture review, he highlights those Russian theorists who recognized that the legal
limitation of state power was to be sought in the "normative consciousness" of
citizens (N. I. Palienko) and that personhood was the ultimate metajuridical
foundation of the lawful state (A. I. Elistratov).90

The absolute value of the human person was the basis, we know, for Kot-
liarevskii's negative definition of the modern lawful state. According to this
definition, the state must recognize and guarantee the legal bounds surrounding
individual persons and their various associations.91 "The necessity of a certain
sphere of personal freedom" (including personal inviolability and freedom of
conscience, expression and association) has become "axiomatic" in modern
legal consciousness and is today the "necessary premise" of any state under the

88 Ibid., pp. 328–330. He devotes the fifth chapter of his study ("The Limits of Legal Self-
Limitation") to the difficult problem of justifiable violations of the rule of law in cases of national
emergency.

89 Kotliarevskii, Vlast' i pravo, pp. 112–113, 236.

90 Ibid., pp. 113–118. N. I. Palienko, Uchenie o sushchestve prava i pravovoi sviazannosti go-
sudarstva (Kharkov 1908) and idem, "Pravovoe gosudarstvo i konstitutionalizm", Vestnik prava,
kn. 1 (1906). A. I. Elistratov, Osnovnye nachala administrativnogo prava (Moscow 1914). Ko-
tliarevskii also reviews A. S. Alekseev, "Nachalo verkhovestva prava v sovremennom gosudar-
stve", Voprosy prava, kn. 2 (1910) and V. M. Gessen, "Teoriia pravovogo gosudarstva", in Politi-
cheskoi stroi sovremennykh gosudarstv, vol. 1 (St. Petersburg 1905), pp. 35–58. (On Gessen's
theory of citizenship, see Eric Lohr, "The Citizen and the Subject in Late Imperial Russia", forth-
coming in Kritika: Explorations in Russian and Eurasian History.) Hiroshi Oda, "The Emergence
of Pravovoe Gosudarstvo (Rechtsstaat) in Russia", Review of Central and East European Law,
vol. 25, no. 3 (1999), pp. 373–434, refers to all these thinkers.

91 Kotliarevskii, Vlast' i pravo, p. 119.
rule of law. But outside this sphere of negative liberty there is broad scope for the positive activity of the state. In fact, what is distinctive to modern constitutionalism is its combination of negative legal form with positive social content and a broad commitment to welfare policies. Kotliarevskii strongly endorses the social and cultural policies of the contemporary constitutional state, believing that they are not only compatible with but increasingly mandated by respect for the dignity of the human person. He wants to counter the historical image that the only task of the lawful state is to uphold law and order and limit to the extent possible interference in the life of citizens. He even suggests that there is no necessary contradiction between the socialist and lawful state. Like Vladimir Solov'ev and Pavel Novgorodtsev before him, he champions a positive conception of the “right to a dignified existence” as the next step in the practical development of the constitutional state as it goes beyond the largely negative duties of classical liberalism.

From personhood as the metajuridical foundation of the lawful state, Kotliarevskii draws other policy-type conclusions for modern constitutionalism. First, the idea of personhood utterly precludes capital punishment. This was a matter of great concern for him. “We can be sure”, he wrote pleadingly, “that the growth of legal and moral feeling will lead to the state’s complete renunciation of the death penalty, to the recognition of an impassable barrier, the absence of which in Christian Europe is one of the gravest indictments against contemporary civilization”. Kant and Hegel’s defense of the death penalty was,

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92 Ibid., p. 342. There is a good, succinct presentation of “The State and the Rights of the Citizen” in his Konstitutionnoe gosudarstvo, pp. 80–101. David Wartenweiler, in his analysis of the idea of civil society in Russian liberal thought, highlights Kotliarevskii’s contribution, quoting him from this source. “As Kotliarevskii remarked, the recognition and guarantee of individual rights ‘proves to be fully effective only when the entire nation is imbued with consciousness of the importance of these individual rights, with consciousness of the great danger that comes from their violation by state power, and with the readiness to defend them’. Associative practice was required to allow this consciousness to deploy its full creative force and, by the same token, could also act as a vehicle for raising this consciousness in the first place.” David Wartenweiler, Civil Society and Academic Debate in Russia, 1905–1914 (Oxford: Clarendon Press, 1999), p. 125, quoting Konstitutionnoe gosudarstvo, pp. 99–100, translation slightly emended.

93 Kotliarevskii, Vlast’ i pravo, pp. 119, 335–341. He refers to Novgorodtsev’s article “Pravo na do-stoinoe sushchestvovanie” in P. I. Novgorodtsev and I. A. Pokrovskii, O prave na sushchestvovanie (St. Petersburg 1911). Walicki shows that the right to a dignified existence was perhaps the main principle distinguishing Russian neo-liberalism from classic liberalism (B. N. Chicherin). The principle was formulated by Vladimir Solov’ev in his Justification of the Good (1897). Walicki, pp. 195–196, 203–205, 209–211.
he adds, a “sad aberration of great minds”. The principle of personal dignity also prescribes equality of rights for every member of the state. Class or national inequality was thus, of course, a glaring violation of the rule of law, and here Kotliarevskii points to the egregious example of the legal position of Jews in Russia. He also advocated the cause of women, writing that the “humiliating and rightless position of women is not only a great moral evil, but also a cultural danger for any society that permits it. This is one of the main illnesses of the Muslim East, preventing its renaissance, and at the same time one of main advantages of western civilization”. The status of foreigners was another problem facing the constitutional state:

The more the state is permeated by the principle of law, the more it abandons the view of the foreigner as a rightless entity . . . In this sphere the legislator faces real difficulties and, in an even greater degree, stubborn prejudices, for example, in guaranteeing foreigners personal inviolability, protection from arbitrary exile, and so forth. There is no reason to doubt, however, that here too harmony between constitutional and international law will gradually be established. The crisis created by the European war cannot stop the general movement of civilization.

The resolution of all these problems follows naturally from application of the basic principles of the lawful state: respect for human dignity, freedom, and equality. Kotliarevskii, ever the optimist, was hopeful about the future potential of the lawful state, even as it developed beyond its current constitutional embodiment. This was because “the lawful state relates to the world of ideas, but ideas that are unfailingly realized and that transform facts”—the fact, first of all, of unequal power in human relations.

96 Kotliarevskii, Vlast' i pravo, p. 344; he repeats his opposition on pp. 395, 400. This was another way in which he was a disciple of Vladimir Solov'ev. See Politics, Law, Morality. Essays by V. S. Soloviev, ed. and trans. Vladimir Wozniuk (New Haven: Yale University Press, 2000), pp. 111–123, 171–184.

97 Kotliarevskii, Vlast' i pravo, p. 344. But he then equivocates in his defense of this principle, writing, “This, however, does not entail national equality in the sense that individual national groups ought to have the same position in the state: to proclaim such equality among groups that are unequal in terms of population or culture would be a useless cause”.


99 Kotliarevskii, Vlast' i pravo, p. 346n. He cites here V. M. Gessen, Poddanstvo, ego ustanovlenie i prekrashchenie, vol. 1 (St. Petersburg 1909), which argued that growing recognition of the rights of foreigners was evidence of progress in international law. See Eric Lohr, “The Citizen and the Subject in Late Imperial Russia”, forthcoming in Kritika: Explorations in Russian and Eurasian History. Contrary to Gessen’s and Kotliarevskii’s optimism, domestic violence (expropriations, looting, riots, purges, deportations) against foreigners and “enemy” minorities was a major dimension of Russia’s wartime experience. See Eric Lohr, Nationalizing the Russian Empire: The Campaign against Enemy Aliens during World War I (Harvard University Press, 2003).

100 Kotliarevskii, Vlast' i pravo, p. 350.
V. JUSTICE, CHARITY, AND DIGNITY

In his final chapter, "Metajuridical Foundations", Kotliarevskii presents his concluding philosophical justification of the lawful state. He introduces a new formulation of the position he has defended throughout his treatise. Behind the changing historical forms of the lawful state there remains a constant aspiration, which he now identifies as justice. "The state ought to be lawful", he writes, "because it ought to be just". The premise of justice is the dignity of the human person, the absolute value in the name of which state power ought to be limited and transformed. Law, to the extent it does this, is just. Hence the idea of natural law, which Kotliarevskii simply defines as the juridical form of justice, writing that its "pragmatic task is to connect the legal order with its moral foundations". His argument can be summed up by saying that the lawful state is actually the natural-lawful state, because it is just in its striving to limit power in the name of human dignity.

Personhood is the crucial link between justice and progression to the higher morality of compassion, forgiveness, charity, and love. At lower levels justice is abstract and deals with general norms (hence its affinity with law), but in limiting power and equalizing human relations, it makes possible higher levels of moral development where persons can relate to each other as concrete ends-in-themselves to be loved and cherished. The higher level is not the negation of the lower but rather its further development and fulfillment. Kotliarevskii returns here to the right to a dignified existence. Contrary to socialist slogans, it is based not, of course, on the value of a person's work, but on his or her value as a person. Recognizing and fulfilling this right presupposes not merely justice but charity as well. Charity begins privately, develops organizationally and institutionally in civil society (of which charitable associations are, of course, a major component), and may infuse the state itself with its spirit. This last ideal, Kotliarevskii notes, was what Vladimir Solov'ev meant when he called the state "organized compassion" and charged it with the duty of meeting every person's right to a dignified existence. Kotliarevskii's ideas were deeply inspired by Solov'ev:

Power ought to be limited by law in the name of justice, and justice ought to be fulfilled by active charity, which in a certain sense is a higher justice, flowing from the dignity of the human person and from consciousness of

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102 Ibid., p. 396.
103 Ibid., pp. 397–400.
104 Ibid., pp. 400–401.
105 Ibid., pp. 401–403. Also see the fine study by Adele Lindenmeyr, Poverty Is Not a Vice: Charity, Society, and the State in Imperial Russia (Princeton University Press, 1996).
cosmic and moral unity. The higher level gives true meaning to the lower, encompassing it. But it is impossible for society to ascend directly to the higher level, and here is the basic justification of the lawful state. Not only is there no contradiction between it and higher moral-cultural forms, but the path to them lies through it. The lawful state is, so to speak, a threshold.

It is a step on the path toward the realization of our human-divine destiny in Godmanhood. Kotliarevskii’s idea of the lawful state fitted perfectly into Solov’ev’s concept of the “justification of the good”.

Kotliarevskii left no doubt that his philosophy of law required a theistic metaphysics. “The dignity of the human person”, he wrote, “cannot be substantiated from a limited scientific-empirical worldview”. Its source is transcendent, and can be fully apprehended only in religious consciousness and experience.

In this connection he returns to the question of theocracy, recalling that it was the first form of the lawful limitation of power, at a stage when law was not clearly differentiated from morality and religion. But theocracy has long since outlived its historical justification and become incompatible with modern legal consciousness, in two main respects. First, “it imposes on the state tasks alien to its nature, ones that for it are thus realizable only through constant extreme coercion, and moreover in spheres of the human spirit that most demand freedom and intimacy”. Hence the importance of separation of church and state and freedom of conscience, without which the full development of religious consciousness, and thus also the deepest type of respect for human dignity, are impossible. Second, theocracy debases the religious ideal by identifying it too closely with the temporal and relative. A proper balance must be sought between this type of conflation (“religious materialism”), on the one hand, and absolute separation of the two worlds (“religious spiritualism”), on the other. “Above one-

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\[106\] In Justification of the Good, Solov’ev wrote, “Charity presupposes justice and justice demands charity”. This sentence is quoted by Walicki, who continues, “It seems probable that he [Solov’ev] was remembering the following words from Dante’s Monarchy: ‘charity gives force to justice, so that the more powerful it is the more force justice will have’. He was very familiar with this classical work by the great Catholic poet and thinker and it is clear that its philosophy, stressing the moral order of the universe and the perfectibility of man”, reflected Solov’ev’s own views. Walicki, Legal Philosophies of Russian Liberalism, p. 204. Kotliarevskii also knew Dante’s works well.

\[107\] Ibid., pp. 403–404.

\[108\] Ibid., pp. 395, 411–412. Here he refers to the “great significance” of William James, especially his Varieties of Religious Experience (p. 412n.).

\[109\] Kotliarevskii, Vlast’ i pravo, pp. 412–413. Pointing to the central importance of human dignity in the American and French declarations of rights, Kotliarevskii notes that the revolutionary political philosophy behind them was closely tied to the religious movements of the seventeenth century, especially to the struggle for freedom of conscience (p. 394n.). In Konstitucionnoe gosudarstvo, pp. 81–82, he writes, “Religious freedom was apparently the progenitor of all ‘natural rights’—a fact that ought to be borne in mind by adepts of the exclusively economic interpretation of history.”
sided religious materialism and religious spiritualism, there rises faith in the drawing in of the world and man toward the divine". This "drawing in" is the ideal of Godmanhood, the self-realization of humanity's divine potential. The lawful state was, for Kotliarevskii, an integral part (if only a part) of the process. "Its realization", he concludes, "is a necessary link in the creative work that raises humanity from captivity to its physical elements to spiritual freedom".

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In many respects Sergei Kotliarevskii's work typifies the tragic paradox of Russian liberalism in the late imperial period: the same frail social foundations of Russian liberalism that contributed to its profound theoretical development (by making its intellectual defense all the more necessary) also prevented it from being realized in practice. Kotliarevskii himself astutely identified the underlying cause of the endemic weakness of Russian liberalism. According to him, a crucial threshold in the history of the modern lawful state was the transition from a private to a public conception of state power. Imperial Russia never crossed this threshold, as has been most recently and masterfully demonstrated by Richard Wortman in his two-volume study of the values and culture of Russian monarchy. "The Russian state never assumed an existence independent from the person of the monarch as it did in France or England", Wortman writes. "The notion of the state as an impersonal institution, operating according to laws of its own . . . could not take hold in the highly literal and personalized symbolic world of Russian monarchy". Jealously guarding state power as its own, the Russian autocracy had long impeded the development of a legal consciousness among all but a small section of the population (through the end of the regime that section, obshchestvo, remained a thin layer of Russian society

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10 Kotliarevskii, Vlast' i pravo, p. 414.
11 Kotliarevskii, as we have seen, asserts that Russia made the transition in 1905, but I suspect this was more a case of hoping to make constitutional Russia a reality by writing as if it already were one.
12 Kotliarevskii, as we have seen, asserts that Russia made the transition in 1905, but I suspect this was more a case of hoping to make constitutional Russia a reality by writing as if it already were one.
overall) and thus thwarted the rule of law. Kotliarevskii understood perfectly well that the prospects for a liberal Russia depended ultimately on a broad-based legal consciousness and civil society. But in his hopeful optimism he was sadly mistaken, as were many liberals, about the extent of their development in Russia. The triumph of his ideals over the harsh and abiding reality of autocratic state power (whether tsarist or communist) would have to wait for another day.