International Association of Legislation (IAL) 17

Luzius Mader/Sergey Kabyshev (eds.)

Regulatory Reforms

Implementation and Compliance

Proceedings of the Tenth Congress of the International Association of Legislation (IAL) in Veliky Novgorod, June 28th – 29th, 2012

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Preface

In 2008, the European Association of Legislation (EAL) decided to change its name and to become the International Association of Legislation (IAL), taking in this way into account that a considerable number of its members were coming from non European countries. For the same reason, it's only natural that the biannual congresses of the IAL should not be held exclusively in Europe. By deciding to organize its 10th congress in 2012 in Russia, the International Association of Legislation wanted to express its ambition to develop a broader approach to legislative or regulatory questions, an approach that isn't exclusively European any more. Russia is a country deeply rooted in Europe – and also in European legistic traditions – but it is not limited to Europe.

The breakdown of the Soviet Union led to fundamental changes in Russia in various fields and in many respects (institutional, economic, territorial, etc.). All these changes were, of course, important and difficult challenges for far-reaching legislative and regulatory reforms. The topic chosen for the 10th congress of the IAL ("Regulatory Reforms – Implementation and compliance") reflects this particular situation and permitted to address the general issues related to legislative and regulatory reforms with a special view on the specificities and the exceptional circumstances of such reforms in Russia. Special emphasis was given to the problems of implementation and compliance.

After the plenary session outlining the main general aspects of regulatory reforms from different perspectives (Russia, continental legal systems, common law), four panels addressed selected fields or questions: Panel 1 dealt with reforms in the field of social legislation; panel 3 was dedicated to the field of economy; panel 2 highlighted some reforms in the practical working of the administration (e-government); and panel 4 encompassed three different sub-topics concerning the preparation of legislation (regulatory impact assessment, anti-corruption review and public consultation). For all these elements an effort was made to combine Russian views and experiences with views and experiences from other countries.

The congress was organized by the Russian Law-making Society and hosted in particular by the Yaroslav-the-Wise Novgorod State University in Veliky Novgorod. We express our gratitude to the authorities and to the University of Veliky Novgorod who offered the participants a very warm

5. Future Plans

There are some problems in the area of the legal system required for the promotion of an e-government along with some other issues Korea has to address soon. These can be summarized all of them into three.

One, as new technologies continue to emerge, legal responses tend to be always belated. Two, as information moves across national borders all the time due to technological development, this matter deserves a serious international discussion. Three, rapid informatization requires solutions to the ever widening gap in the wealth of information between regions, generations and social classes .

The Korean government is ready to take part in forums to discuss these pressing issues with other countries and to share with any of countries what Korea has in terms of knowhow and technology.

The Efficiency of the Legislation on Transparency of the Public Power: A Social Context and the Quality of Laws

Olga Afanasieva

1. Introduction

As I understand the mission of the International Association of Legislation, IAL contains a coordination of the professional work and efforts in case of the constant reconsiderations and applications of principles of law in social life including the help of studying and distribution of the best practices of lawmaking.[1]The International status of Association unconditionally expands possibilities for realization the stated mission. At the same time an expansion of the international professional communications as well as everything in this world has not only the sunny side. The opposite side of the global communications is made by difficulties which we face at the coordination of discourses of the various national professional communities. They are mainly connected with the differences of social contexts and agendas. We can be solidary in understanding the right's principles. We all talk about up-to-date problems of their realization. However, what is up-to-date for ones can come out as sophistical brain game that can't change social realities.

The stated difficulty nevertheless shouldn't undermine our determination to make common cause. Understanding the problem is the first step of its overcoming. For each problem has cognitive character by definition, being an intellectual call. Answering this call, we should offer the procedure of the intellectual synthesis removing the found contradiction. Indeed, that circumstance, that certain measures are up-to-date in definite social context, and other measures are up-to-date in other social context, doesn't testify

1 I based the understanding not only on the declaration of the purposes IAL, but also on the very substantial disclosure of these purposes in the following publication: Prof. Dr. Luzius Mader. The European experience in the field of an assessment of laws – from standard idealism to lawmaking relying on obvious circumstances / Priority national projects and tasks of enhancement of the Russian legislation/ Edited by S.V. Kabyshev, G.V. Minkh, O.V. Afanasieva, M., 2007. P. 132-133

against expediency of those and other measures. On the contrary, various measures should be correlated with social spheres of their application and with each other, forming a difficult union. We have to head for formation a flexible, but *integral algorithm of lawmaking* which is suitable for the consecutive adoption of the Public Law in the different social situations.

This text is a summary of my reasons concerning three interconnected questions: a) how the social context determines the efficiency of laws on transparency; b) how the legislator can influence a social context; c) what criteria of quality of lawmaking on transparency is. Certainly, the reasons which are stated here are subjective and, probably, specifically Russian. I hope that neither this, nor that does exclude their possible utility for our discussion.

2. *Factors determining the efficiency of the legislation transparency of the public*

2.1. The Institutes and social context

The legislative regulation of the public authorities' transparency can consist of four sources and components: firstly, the democracy and the public law's principles are fixed by the national constitutions and international documents; secondly, the freedom of expression and information, the freedom of mass media, the public availability to certain categories of information, for example, the ecological convergence, sanitary-and-epidemiologic situations, financing of political parties, the income of elective officials etc. are fixed by the national laws and international documents; thirdly, laws on Access to Official Information; fourthly, the regulations which are managing an official information placement in the information systems of public use. The first two sources form the constitutional legal bases, institutional preconditions of transparency. The last two sources constitute the lawmaking on transparency in that confined and special sense of word which purchased an urgency in a context of the regulatory reforms occurring in the modern world in the last third of the past and the beginning present centuries.

People, who had an experience of life in former socialist countries, know that recognition of principles of the public law and democracy in case of their adaptation to domination of communistic party bureaucracy can turn into the declaration behind which modes of various degree of authoritativeness can disappear. At the same time a broader historical view allows us to

see that in case of refusal from, extreme forms of totalitarianism, democratic declarations and rituals even in patriarchal and bureaucratic forms of «a party management» could be a temporary form of the social contract allowing reforms and development. Therefore, emphasizing legal insufficiency of legislative provisions on «socialist democracy», it is not necessary to ignore their certain utility for restriction of corporate dominating bureaucracy's egoism and rooting the democratic values in mass consciousness.

Not only general principles of democracy and publicity of ruling can be used for dressing not a democratic power. Laws on transparency are also quite suitable for these purposes. Citizens can address in authorities and receive long, but empty answers. Websites can become the advanced advertisement of power. Here we face a problem of interaction of law and social context, of different social contexts, to be more precise.

Laws on transparency arose from crisis of modern democracy during a post-modern era which began with transition to a new form of life of homo sapiens. Life in the global electronic city, in the conditions of instant interaction of huge number of individual and group strategy, "fluidity" of all traditional and modern structures, aggravates an immemorial problem of an institutionalization of trust, putting it as a problem of opacity, closeness of social structures directing development – state bodies, corporations of big business, the international organizations. The mass request of an active part of global middle class caused to life new laws on access to information and programs of the electronic state. These institutional innovations are urged to build on and fill with a New World republic building.

The specified institutional innovations became a global trend and it is considered as an element of an obligatory dress-code in the modern world. At the same time it is found out that in certain social contexts an observance of a dress-code doesn't lead to essential social changes. Moreover, the absence of appreciable changes conducts to the best and not evidence of social advantage can discredit the innovations, give the grounds for speculation about inapplicability of foreign borrowings. Thus, we come up against a situation when laws on transparency, urged to strengthen the democracy but they strengthen it where it works well, and don't strengthen it where the democracy works badly.

That what we fixed is by no means a paradox. On the contrary, we observe a social regularity – various efficiency of innovations in case of big social capitals and of small ones. Douglas Nort called this phenomenon as the law of «an institutional track». The society which got used to live by democratic rules, naturally laws on transparency work better there than in the society

which got used to live without them. This conclusion doesn't need to be render neither as the indulgence, nor as a sentence. We should take this scientific conclusion into consideration and operate taking into account the circumstances.

What should we do? The legislator can hardly blankly change the society. However, he can make a contribution to a positive change of a social context by means of the high-quality legislation. Execution of this mission constitutes the sphere of the professional and civil legislator's responsibility. Certainly, the social context can reduce the efficiency of the law. However, the specified probability doesn't reduce but only raises lawmaking quality requirements. Before referring to the adverse social circumstances and the inadequate application of the law it is necessary to be convinced of the quality of the legislation and to check whether it contains itself the law with those necessary preconditions which allow us to expect its social efficiency.

2.2. The criteria of the quality of the legislation on transparency

It is necessary to circle some characteristics and criteria of the proper quality of the legislation on transparency from the developed democracies' experience and once again to emphasize with reference to lawmaking in the countries with weak democratic traditions.

To determine the law's purposes

The purpose of an adoption of the law should be clearly stated and fixed in it. A clearly stated public purpose of the regulation allows us to estimate the feasibility of establishments which is fixed by the law. On the contrary, the absence of the states in the law, determining the purpose of its acceptance, deprives us of the most important criterion of an assessment of legitimacy of specific legislative establishments.

The application of the Kant's principle of the public law's publicity to lawmaking allows us to approve that concealment of the legal action's purposes testifies to its injustice and illegitimacy. Therefore, the law, which is not clearly determining the purpose, also can't be acknowledged as a good legislation.

To declare the democratic principles

A Declaration of the democratic principles, which is fixed in the law, is an essentially important declaration on legislative intents. In the law making process the declaration of principles can be compared with a tuning fork and with the help of it, we adjust our tool. In a more extended social sense the declaration of the commitment to principles of democracy is a civil oath which is said over and over again by representatives, judges, officials and citizens.

The evasion from a civil oath is inadmissible for the legislator.

To fix the right

The fundamental task of the constitutional state consists of the definition of measure and freedom's approval for everyone. First of all, the state solves this problem, by means of the laws which are regulating the major spheres of the social relations. Only such regulation of the social relations, which respects freedom and the common right, is the legitimate legislation. The obvious fixing of the right in the law also promotes to the protection of the right in court.

As written before, it follows that those laws, which regulate an order of access to official information without fixing the right on access to official information, evade from implementation of a mission of the right state and can't be recognized as the good legislation.

To determine the sphere of action of the right

The right can't be fixed without a clear determination of the sphere of its action. The lawful determination of the sphere of action of the right on Access to Official Information is fixing by the law of the list of accurately certain exceptions of the specified right with a basic clause: «if only there is no any prevailing public interest in promulgation of such information» (this clause assumes carrying out an examination of the public interest) and also with indication of temporary validity periods of such exceptions.

When the law on access to official information specifies that exceptions are determined in other laws, the legislator evades from a determination of

the sphere of action of the right and, therefore, doesn't fix the right on access to official information.

To fix guarantees of the users' rights

Only such regulation of access to official information, which fixes the proper guarantees of the users' rights, is lawful.

The approved international standards of the users' rights are fixed in modeling laws on freedom of information of the British Commonwealth, the American States' Organization and in the Convention of the European Council which is opened for signing on access to official documents.

The following guarantees have special importance for the implementation of the right on Access to Official Information:

a) when possible, the state body should help the person who has addressed him with request and identify the required official document. In case of wrong addressing of request, it should forward the person who has made an inquiry, to state body which has such competence;
b) the decision of the state body on demand on receipt of access to official information should be accepted, bring up to the requesting person and performed in reasonable times as already pointed out;
c) in the decision of the state body on complete or partial refusal on access to official information, the reasons for it should be stated;
d) in case of assignment of access to official information the person which has made an inquiry, has the right to familiarize with an original or a copy or to receive a copy of the official document in any available form or a format upon his choice if only the preference, which he has stated, isn't unreasonable;
e) the acquaintance with the official document in public authority should be free;
f) for the assignment of a copy of the official document the payment can be levied but it should be reasonable and not exceed up-to-date expenses of the state body on production of a copy and its delivery;
g) the person, whose request about assignment on access to official information was rejected, should have a possibility to use an operational procedure of reconsideration the state body's decision or to implement the right to appeal that decision in court.

The stated standards of the users' rights are minimum necessary. Those national laws, which don't fix the specified guarantees of the users' rights, can't be acknowledged as the good legislation.

To reconsider the legislation

The national legal system usually contains a set of conditions, which are not conforming to requirements on transparency of the public bodies. That's why together with adoption of the law on access to official information it is necessary to carry out the revision of the legislation for the purpose of its reduction to compliance with the law on access to information.

Those national laws on access to official information, which establish a return principle according to which their conditions operate taking into account other conditions of the current legislation determining peculiarities of assignment of separate types of information, thereby do uncertain the sphere of action of the right and, therefore, don't fix the right on access to official information.

To create additional resources of protection of the right

The experience shows that only those laws on access to official information, which provide the creation of additional resources of protection of the right, are effective. Everyone, whose request on access to official information has been directly or implicitly, fully or partially rejected, has the right provided by the state to review the decision in the independent and impartial body which is law-based. The procedure of the review should be operational and inexpensive. The proper guarantee of the specified rights is legitimization in the law on access to information of the legal status of specialized body of the pre-judicial control which is responsible before parliament for effective implementation of the following necessary functions:

The proper guarantee of the specified rights is fixing in the law on access to information of the legal status of specialized body of the pre-judicial control which is responsible to the parliament for effective implementation of the following necessary functions:

a) the independent consideration of claims of those persons, whose request about extension of official information was directly or implicitly, it is fully or partially rejected;

b) the preparation and presentation to parliament of annual and special reports on execution of access to information legislation requirements to legal bodies;
c) the examination of public interest in disclosure of information and its public protection;
d) the control of execution by public bodies of stipulated by the legislation requirements about/on transparency on publication of official information.

The control of the law enforcement has crucial importance for ensuring the effectiveness of the law and implementation of the citizens' rights. The simple reference to possibilities appealing against official decisions in higher administrative instances and in court doesn't solve the problem of the state guarantees of the realization of the right of citizens on access to information. A refusal of creation the additional resources of protection of the right dooms the law to inefficiency and can't be consequently recognized as the good legislation.

To establish the state infrastructure

The up-to-date ensuring the access to official information requires a big organizational work in each state body and coordination of all works at the national level. Such work is usually planned, coordinated and supervised within acceptance and implementation of governmental programs on ensuring access to official information on requests of users, and also placements of official information in informative public systems. The stated programs include:

a) the training and further training of employees;
b) the development and approval of storage precautions and destruction of information, administrative regulations on handling of requests and communication with applicants;
c) the upgrade of storage systems and the search of official documents;
d) an acceptance of programs of placement of official information in informative public systems by state bodies
e) the public informing and ensuring the navigation on the national system of access to information;
f) the questions of management of the listed jobs and political responsibility for their execution.

National laws on access to information, which don't provide the adoption of the governmental program, don't determine the official responsibility and coordination and don't fix a governmental accountability to parliament, can't be recognized as the good legislation.

To apply the principles of relevance and reliability

The regulation of placement of official information in informative public systems should assume and fix these principles. The relevance of information is that it helps the user to implement *the rights, to understand the process of adoption of official decisions and to take charge of it.*

The principle of information's relevance reveals through the additional characteristics like a social demand, the timeliness, the materiality, the value for understanding and forecasting, a feedback.

The principle of reliability assumes: the truthfulness; the prevalence of content over a form; the neutrality in relation to various users; the discretion; a possible check; the clearness; the comparability.

An application of principles of relevance and reliability allows to determine the requirements for ensuring the up-to-date public access to the following official information:

a) the legislation;
b) drafts of regulations and their official conclusions;
c) shorthand reports of debates in parliament;
d) judgments;
e) agendas of meetings of the government and of other public authorities;
f) decisions of the government and of other public authorities;
g) information on execution of decisions of the government and of other public authorities;
h) programs of social and economic development and action plans of state bodies about their implementation;
i) information of the current and aggregate results of the programs for implementation of the social and economic development and action plans of state bodies for their realization;
j) annual reports of the government and of other public authorities;
k) disaggregated information of budget performance;
l) information about placement and execution of the state orders;

m) documents about implementation of the state control (supervision) about the results of carrying out the parliamentary investigations and administrative checks;
n) the complete set of indicators of social and economic development which are available for the state bodies;
o) information on unhealthy substances and activities;
p) the disaggregated information about the environmental situation;
q) accounting systems (lists and registers) which contain the detailed information about objects;
r) results of the sociological polls which are carried out by the request of state bodies.

The national legislation on access to official information and on placement of official information in the informative public systems, which doesn't provide requirements disclosuring the stated above data, can't be acknowledged as a good legislation.

Of course, the list of requirements of quality of the legislation on transparency, which are provided here, isn't complete. These are only basic elements of what we can call the good legislation[2] with reference on/to transparency questions. As I believe, basic elements require permanent attention to themselves. That's why the house stands on the base.

2 System consideration of the concept of «the good legislation», see: Quality of Legislation – Principles and Instruments / Proceedings of the Ninth Congress of the International Association of Legislation (IAL) in Lisbon, June 24th-25th, 2010 Edited by Prof. Dr. Luzius Mader and Marta Tavares de Almeida 2011, 355 pp.

Panel 3
Reform of Legal Regulation in Economics

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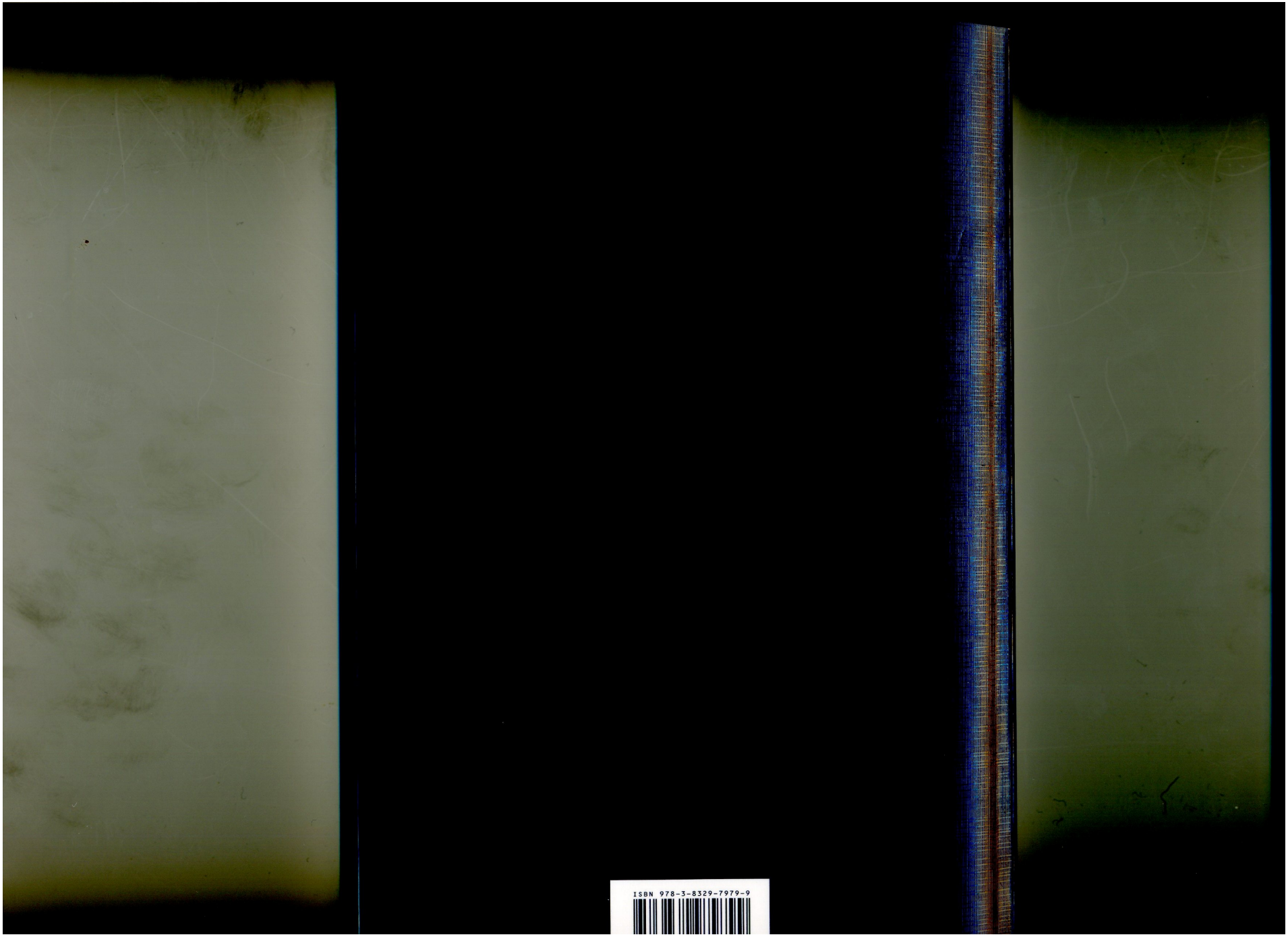
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