Formalism, realism and conservatism in Russian law

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List of Abbreviations

CIS: Commonwealth of Independent States
CPSU: Communist Party of the Soviet Union
ECHR: European Convention on Human Rights
ECtHR: European Court of Human Rights
EU: European Union
Foreign Agents Registration Act (22 U.S.C., §§611-621; FARA)—1938 US FARA
Levada Center: Yuri Levada Analytical Center
NATO: North Atlantic Treaty Organization
NKVD: People's Commissariat of Internal Affairs
PACE: Parliamentary Assembly of the Council of Europe
PEGIDA: Patriotic Europeans against the Islamization of the Occident
RF CAO: Code of Administrative Offences of the Russian Federation
RF Constitutional Court: Constitutional Court of the Russian Federation
RF Supreme Court: Supreme Court of the Russian Federation
ROC: Russian Orthodox Church
RSFSR: Russian Soviet Federative Socialist Republic
SZRF: Collection of Legislation of the Russian Federation
UN: United Nations
Venice Commission: European Commission for Democracy through Law
WTO: World Trade Organization

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All translations from Russian and other languages into English are made by the author unless otherwise indicated.

The author followed the rules of transliteration of Russian names set forth by the American Library Association and the Library of Congress except the cases when there are other generally accepted versions of transliteration.

Introduction

1 Background of the Study

The present volume deals with some particular features of Russian legal culture that are connected with the intellectual context in which legal norms are created, interpreted and applied. Russian law mostly uses the same conceptual apparatus as in Western legal systems. Historically taken from the West (mainly from German and French law), foreign legal concepts invariably become intertwined in a specific Russian intellectual context. In a new normative context, they have been adapted to the native legal culture in which respect to rights is lower than in the Western legal tradition and where legal validity is understood on the base of prerogative power. In the 20th century, a distinct legal theory—based on a specific combination of legal formalism and decisionism—was molded in Soviet law. This theory, inherited by Russian jurisprudence from the Soviet past, continues to shape the mind-sets of Russian lawyers and to nourish ideological narratives. Although in the last century, the rule-of-law, human rights and other Western legal concepts have been adopted into Russian law, they underwent a profound reconceptualization in terms of this theory. This has led to their "metamorphosis": their interpretation and application often yielding different results—to a greater or lesser degree—as compared with the meaning of these concepts in the original (Western) legal culture. There can be many explanations for these differences; from institutional or semantic distinctions to more profound divergences in the way of thinking about the law and rights. It is on this latter aspect that the works, included in this volume, are focused.

In Russia, the general communitarian perception of rights implies that they have no independent value but, rather, only are accepted insofar as they serve some supreme collective values (strong statehood, political unity, etc.). Even if Peter the Great made efforts in the 18th century to modernize Russia—in the sense of its Westernization—these efforts, continued by his successors, have not (yet) affected basic social conventions about rights and freedoms in Russian society. His reforms touched on various aspects such as trade, military forces, and cultural habits but did not attempt to profoundly change the governance structures. Peter and his successors—including the present Russian leadership—have tended to adhere to the assumption that, given its specific culture, Russia does not need liberal freedoms. In this respect, in order for it to survive, it must retain its distinctiveness.[1]

1 Jan Kusber, "Die Kontinuität der Fremdheit. Russland als das andere in historischer Perspektive", 63(2-3) *Osteuropa* (2013), 257-268.

The central question for Russian social philosophy was not the question about what makes a social order one which is justified and, therefore, binding. The more important topic was how to secure social solidarity and to achieve collective goals, sacrificing individual rights and freedoms, and the extent to which this sacrifice might be acceptable to society (if there has been any extent at all). Great masterpieces of Russian literature—such as Pushkin's *Boris Godunov*, Dostoevsky's *Crime and Punishment* and *The Brothers Karamazov*, Tolstoy's *Resurrection* and *War and Peace*, or Solzhenitsyn's *In the First Circle*—can be cited to justify this thesis.

This collectivist perception of rights in Russian legal thinking, in turn, is revealed in two main aspects. The *first* is a strict adherence to legal formalism; giving priority to state commands over individual rights, insofar as the state receives its power and sovereignty from the collective. Therefore, in case of a conflict between individual rights and state interests, the latter shall triumph because the state embodies this collective (society) and its interests. The image of the almighty Leviathan is appropriate to illustrate the relationship between the state, its law, and individual rights. (The Russian context is illustrated in a 2014 film of Andrey Zvyagintsev, "Leviathan".) The *second* aspect justifies exceptions made by judges and other legal actors when a formalist reading of constitutional or statutory laws allegedly goes against collective interests. Naturally, the problem of a rule and an exception thereto is universal; not specifically Russian. However, the way in which Russian legal doctrine and practice deal with this problem unveils one of the specific features of legal rationality in the Russian context. And this is precisely what the present volume envisages doing.

This research is theoretical rather than empirical—remaining mostly on the theoretical level of analysis of legal concepts and their interpretations. It does try, however, to connect legal texts with the societal environment in which they are active and with their intellectual background, and to retrace the feedback that is produced in this interaction between the texts and their interpretations.[2] This may reveal ideal-typical representations in that they prepare the conceptual apparatus necessary to make a selection and abstraction from social realities in Russia. As exemplified in a 2011 study of the policies and strategies of the European Court of Human Rights,[3] Weberian sociology provides a set of reflexive tools for understanding courts as evolutionary institutions that develop specific legal rationalities for their

2 A similar approach was advocated by the late Justice Scalia. See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, Princeton, NJ, 1997).

3 Mikael R. Madsen, "The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence", in Mikael Madsen and Jonas Christoffersen (eds.), *The European Court of Human Rights between Law and Politic*s (Oxford University Press, Oxford, 2011), 43-60; and Richard Munch, "Constructing a European Society by Jurisdiction", 14(5) *European Law Journal* (2008), 519-541. The avalanche of scholarly literature on the socializing role of the ECtHR can also be mentioned (but will not be cited) here.

decision-making processes. This perspective also can be applied to other international courts and, surely, to domestic courts; in our situation, to Russian courts and other state agencies interpreting and applying the law.

Such a methodological approach suggests that the structure of the present work should move from the general to the particular. Starting with the theoretical analysis of the formalist and decisionist elements in Russian (previously, Soviet) law, the volume will proceed to a reconstruction of these elements in the writings of the Chief Justice Zorkin. These works are, in the present author's opinion, representative for the mindsets of many Russian lawyers, especially of the older generation. Valerii Zorkin discusses these elements against such normative backgrounds as human rights, legal validity or sovereignty. His output reveals a number of important facets that illustrate implications of this combination of formalism and decisionism for the intellectual culture of Russian lawyers. Such a theoretical reconstruction invites one to address the philosophical context in which this theory has been formed, *i.e.*, one which is conservative in nature. After setting out these theoretical landmarks in the first three chapters, we proceed to an analysis of the practical impact of this intellectual framework for Russian law. Without undertaking the immense task of examining all the areas of Russian law, we will concentrate on two demonstrative examples: the protection of religious rights and of sexual minorities. This examination will reveal how the decisionist element in Russian law can, on the one hand, override the formal provisions of the statutory law and, on the other, can construct a symbiosis with the conservative mentality.

While constitutions and laws were copied and transplanted from the West in the early 1990s, they have not radically changed the legal landscape of Russia and other ex-USSR countries. The "law in books"—with almost the same textual content as its Western counterparts—is interpreted and applied quite differently. Instead of the expected Westernization, the Russian legal system has continued to work according to the logic of the statist legal theory. This system works as a medium of political will, while human rights and other constitutional guarantees were utilized more, in the years of Yeltsin, as "window-dressing" to display the desire of Russia to adhere to the "Western world".

However, soon it became clear that even adopting the Western-style 1993 Russian Federation Constitution, ratifying international human-rights treaties and covenants—including those for membership in the Council of Europe and other European institutions—Russia reads them in a particular way; asserting its civilizational distinctiveness that arguably allows Russia to depart from its international obligations. Perhaps, it could not be otherwise: legal rights can be "political trumps" against the state and its coercion only if they are conceived of as independent of commands of the political rulers. In order for rights to become truly binding upon the state, they need to be the primary reasons for action both of ordinary citizens and of state-court judges. In other words, reasons of political expediency need to step back when confronted with individual rights in courts of law. These rights,

thus, form the borderlines for the realization of state actions which will be overturned when they conflict with these rights.

These preconditions are not entirely fulfilled in Russian law. One can even argue that—for political, social and other reasons—such intellectual preconditions are absent (or at least underdeveloped) in Russian legal culture. A century ago (in 1909), the "Landmarks" (*Vekhi*) authors voiced this problem, and undoubtedly addressing it remains an actual issue for Russian law. An approach to Russian law from this perspective has its focal point in various historically grounded rationalities of Russian legal cultures;[4] in the ways in which these cultures reflect society and the general moods dominating this society. Such definitions, in turn, should help to shed light on the impact of landmark court decisions on the rationalization of law in the context of contestation over defining the "legal field"[5] in the sense of discussions about interpreting constitutional and international texts—the field on which, in recent years, Russia has been waging an intellectual war with the ECtHR, the Venice Commission, PACE and other European institutions.

As suggested above, one plausible explanation can be that the Russian vision of law is not centered on individuality; not on the protection of rights and freedoms of an individual but—first and foremost—on securing collective interests, social order and a strong, sovereign statehood.[6] This tendency can be traced back in history and confirmed, for example, in the post-war period when Soviet international lawyers at the UN (and, also, at other organizations) insisted on the primacy of collective and social rights, downplaying the individual rights advocated by the Western countries that did not fit the Soviet theoretical approach.[7] This approach suggested that individual rights only have a secondary character as they are derived from the material conditions of the collective in which individuals are included. These material conditions are central for legal regulation which needs to be focused on rights such as the right to labor, the means of production, medical care, and other guarantees granted by the state to individuals. Basically, this approach prevails in the Russian legal scholarship until now.

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4 We expressly use the term "legal culture" in plural to underscore the pluralist perspective which suggests that different social (national, economic, religious, etc.) communities within one society might well have different attitudes toward the law, religion, and sexuality. On this methodological issue, see Sally Engle Merry, "Legal Pluralism and Legal Culture: Mapping the Terrain", in Brian Z. Tamanaha, Caroline Mary Sage and Michael Woolcock (eds.), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press, Cambridge, MA, 2012), 66-82.

5 Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Judicial Field" (Richard Terdiman, transl.), 38(5) *Hastings Law Journal* (1987), 805-853; and Bruno Latour, *La fabrique du droit: Une ethnographie du Conseil d'Etat* (La Découverte, Paris, 2002).

6 *E.g.,* Manfred Hildermeier, "Das Privileg der Rückständigkeit: Anmerkungen zum Wandel einer Interpretationsfigur der neueren russischen Geschichte", 244 *Historische Zeitschrift* (1987), 557-603; and Stefan Hedlund, *Russian Path Dependence* (Routledge, London, 2005).

7 Lauri Mälksoo, *Russian Approaches to International Law* (Oxford University Press, Oxford, 2015).

One can consider decision-making processes in Russian courts not through the prism of a political analysis of respective influences but, rather, in the light of a socio-philosophical analysis (in the sense specified above). This will allow the reader to assess these processes in a more general framework of social development and social control in Russia. We are far from denying that political interference was and still is an important hallmark of Russian (previously Soviet) law; rather, we firmly believe that this interference is not the only important factor which shapes Russian law. The political powers do, sometimes, intervene in the judicial field—and not only in Russia. However, even in Soviet Russia with its notorious "telephone law', the Communist Party never went as far as repealing the judiciary function performed by judges who worked in their "semi-autonomous" field.[8]

We will argue that this communitarian (traditionalist) reading of rights is one of the pillars of Russian (Soviet) legal thinking which, in part, explains Russian exceptionalism in its relationship with the West. This reading was used in appreciating the working of the Russian Empire—not only the Soviet Union—and still characterizes the legal landscape of Russia. The theoretical scheme of "Orthodoxy, Autocracy and Nationhood" (*Pravoslavie, Samoderzhavie, Narodnost'*) goes back to German romanticism of the 19th century as adapted to the Russian political and legal context. This scheme is cemented by the following chain of ideas: it is only by living in society that one can become a human being; no contemporary society can exist without a state; rejecting state-created legal norms undermines the social order and will lead to the destruction of humanity. Therefore, state legal norms are absolutely binding and cannot be trumped by any other reasons or values.

At face value, the prevailing legal theory in Russia is positivist and follows the traditions of the first positivism of the 19th century in the spirit of John Austin or Jeremy Bentham: law seen as a set of the sovereign's commands.[9] Consequently, within this positivist paradigm, only subsumption can be accepted as the proper means for applying the law. The Russian legal system traditionally has demonstrated its propensity to adhere to this theory. It functions on the premise that the main task of judges is to interpret and apply the letter of the law (the conception of legality (*zakonnost'*)).

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8 Harold J. Berman, *Justice in the USSR: An Interpretation of the Soviet Law* (Harvard University Press, Cambridge, MA, 1962, 2nd ed.).

9 See William E. Butler (ed.), *Russian Legal Theory* (New York University Press, New York, NY, 1996). In this work, we will not make a strong distinction between the similar—but theoretically distinct—terms "positivism", "statism" and "formalism". In ordinary legal parlance, these terms refer to the idea that legal rules can be created (directly or indirectly, through recognition) by the state; that they contain state will which can be established and carried out on the base of the texts of these rules. For the purposes of the present work, such a language use can serve as a guideline, although in a broader philosophical perspective one can surely establish more nuanced distinctions between these terms. Throughout this work, we will address these distinctions where it will be relevant for the topics discussed.

Given the hierarchy of legal rules set out in Article 15 of the 1993 RF Constitution—the Constitution itself; international law; constitutional and ordinary statutes (*zakony*)—judges have no authority to apply any principles except those expressly fixed in laws and other posited sources of the law and, furthermore, are prohibited from refusing to apply laws because of their presumed contrariety to such principles. In this way, Russian legal theory retranslates the 19th-century positivistic ideal of *Rechtsstaat* where the law is independent and prevails over other social regulatory mechanisms.[10]

However, pure legal formalism is not observed in each and every court decision, including the practice of the RF Constitutional Court. The reality of the Russian legal order (and it was, also, the reality of Soviet law) is that it combines two underlying theoretical tendencies, reflecting the two pillars characterized above: statism and decisionism.

The *first* is about the rigid positivism as concerns the pedigree criterion of law: there can be no law unless it is promulgated (or accepted) by the state; the law is a means of coercion; the law's function is the coercion of lower, exploited social classes by the dominant class: the state uses its law for domination. In contemporary Russian law, this logic has been tweaked slightly: the link between the state and the dominant (proletarian) class has been removed. The state no longer is understood as serving the interests of a particular class. It is seen as an autotelic, absolutely independent entity with its own interests. This underscores the value of sovereignty in describing of the nature of the state and of the limits (to wit, lack of any limits) of its power.

Another tendency is based on the decisionism in which the law is whatever policy-makers consider indispensable for protecting and promoting the collective interest, so that legal norms do not really matter. In Soviet legal theory, fidelity to the "letter of the law' frequently was invaluable to the ends of the Soviet regime. In current Russian legal theory, the strict positivist attitude toward law is mitigated by these decisionist considerations allowing judges to avoid application of the law to the letter in "high-profile cases", exemplified by such prosecutions "to order' as those of Vladimir Gusinskiy,[11] Mikhail Khodorkovskiy,[12] and Aleksey Navalnyy.[13]

10 Frances Nethercott, *Russian Legal Culture Before and After Communism: Criminal Justice, Politics and the Public Sphere* (Routledge, London, 2007).

11 ECtHR Judgment *Gusinskiy v. Russia* (19 May 2004) Application No.70276/01.

12 ECtHR Judgment *YUKOS v. Russia* (20 September 2011) Application No.14902/04.

13 ECtHR Judgment *Navalnyy and Offitserov v. Russia* (4 July 2016) Applications No.46632/13 and 28671/14.

Theoretically, the state can restrict itself by adopting certain constitutional acts or by ratifying international treaties and conventions.[14] Nonetheless, from a monistic perspective—largely supported by Russian international lawyers—the state always retains the power to rescind these restrictions and to make its will triumph over any legal limitations by referring to its sovereign authority. Such logic repeatedly has come to the surface in the years-long polemics between the RF Constitutional Court and the ECtHR about the admissibility and the criteria for restricting human rights in Russia. These polemics consistently revolve around several central topics such as the limits of sovereignty, the binding force of legal rules, and the nature of human rights.[15]

These topics regularly refer to a set of arguments stemming from two different and contradictory logics: that of formalism and that of decisionism. On the one hand, the legal formalism—prevailing in Russian legal education and scholarship—neglects principles (although, according to Art.18, RF Constitution, human rights are defined as principles of law) either in favor of fixed rules or for the sake of the smooth and predictable operation of the legal machinery. It does not endorse human rights but, rather, delimits them; it does not respect individual autonomy and subordinates individual choice to collective interests.[16] In this intellectual sense, the Russian legal system stands apart from contemporary Western law in spite of its official constitutional texts based on Western standards and principles.[17] From this

14 In this sense, Russian constitutional theory is still based on Georg Jellinek's concept of the State's self-restriction (*Selbstverpflichtung*). In the Russian case, such restrictions are set forth in the 1993 liberal RF Constitution and, also, in a number of international treaties of which Russia is a member (such as ratification of the ECHR on 5 May 1998 which became an integral part of Russian law by virtue of para.4 of Art.15 of the RF Constitution).

15 See Mikhail Antonov and Ekaterina Samokhina, "The Realist and Rhetorical Dimensions of the Protection of Religious Feelings in Russia", 40(3-4) *Review of Central and East European Law* (2015), 229-284.

16 In particular, this *Weltanschauung* can be seen in the contentious Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii [Ruling of the RF Constitutional Court on the Primacy of the Constitution over International Law] (14 July 2015) No.21-P, "O proverke konstitutsionnosti polozheniia stat'i 1 Federal'nogo Zakona 'O ratifikatsii Konventsii ...'" [On Verifying the Constitutionality of Art. 1 of Federal Law "On Ratification of the Convention…"]. Texts of this and other rulings of the Constitutional Court of Russia cited in the present work can be found on the Court's website at <www.ksrf.ru>.

17 However, some contemporary Russian legal scholars and practitioners do criticize these intellectual frameworks underpinning Russian law. See the book of RF Constitutional Court Justice Yaroslavtsev in which he underscores the primary importance of the sense of justice (*spravedlivost'*) in the judicial process and investigates how this sense influences judicial rule-making in Russia: Vladimir Yaroslavtsev, *Nravstvennoe pravosudie i sudeiskoe pravotvorchestvo* [A Moral Judiciary and Law-making in Courts] (Justitsinform, Moscow, 2007). It is demonstrative that calling for wider application of morality in Russian courts, Yaroslavtsev systematically refers to the doctrine of Christianity. His basic thesis is that justice prevails over the law (*zakon*) because "application of the laws is not the ultimate goal of judges—they are there to search for justice and truth" (*ibid*., 9).

perspective, the notorious Russian exceptionalism and anti-Western stances of interpreting and applying human rights or norms of international law can be considered as results of different axiomatic propositions: rights as independent reasons for action in Western legal discourse *versus* rights as the sovereign's commands from a Russian perspective. It should come as no surprise that legal mentality may, significantly, influence the practice of interpreting and applying statutes so that similar texts and laws can have different effects in different cultural environments.

This exceptionalism is based on a system of traditionalist rhetoric about Russian legal, political and religious culture. These arguments have underpinned political and legal narratives since the Middle Ages, so that Hilarion's idea about the prevalence of morality and religion over law ("*Slovo o zakone i blagodati*" (Sermon on Law and Grace)) written in the mid-11th century) or Philotheus' understanding of Russia's missionary role in the logic of the Third Rome (formulated in the 16th century and revived by Russian traditionalists in the late 19th century) can be seen as still holding sway over Russian legal thinking. As will be shown below, this aspect is clearly revealed in the way Russian judges interpret statutes in light of accepted truths about the prevalence of some "traditional" confessions over others; about the pernicious effect of "non-traditional" values upon social solidarity and legal security.[18]

To be sure, this traditionalist rhetoric is not something peculiar to Russian law or Russian legal culture. It has existed for centuries, also in Western legal systems. Traditionalism[19]—serving as the philosophical base of investing such "accepted truths" with legal validity—implies that supreme societal value is ascribed to collective unity. Individuals are considered, first of all, as members of the collective and, thus, have no independent worth apart from that accorded to the social unit to which they belong.

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18 Several cases of Jehovah's Witnesses—considered by the ECtHR during the past decade—clearly show this tendency of state agencies interfering with religious ceremonies or inquiring into personal information with overly vague references to the alleged common good: ECtHR Judgment *Kuznetsov and Others v. Russia* (11 January 2007) Application No.184/02; ECtHR Judgment *Jehovah's Witnesses of Moscow v. Russia* (10 June 2010) Application No.302/02; ECtHR Judgment *Avilkina and Others v. Russia* (6 June 2013) Application No.1585/09; and ECtHR Judgment *Krupko and Others v. Russia* (26 June 2014) Application No.26587/07.

19 Here we utilize this term not in the sense of the traditionalist school (perennialism) asserting that all the world's great religions share the same origin and are based on the same metaphysical principles; rather, by "traditionalism" we refer here to the set of anti-individualistic ideas in epistemology and ethics developed by the Counter-revolutionists in France in the first decades of the 19th century. Among the most important works of these French traditionalists are: Joseph de Maistre, *St Petersburg Dialogues: On the Conversation on Temporal Government of Providence*, (McGill University Press, Montreal, 1993, Richard Lebrun, transl.); and Louis G. de Bonald, *The True and Only Wealth of Nations: Essays on Family, Society and Economy* (Ave Maria University Press, Notre Dame, IN, 2006, Christopher Blum transl.). See, also, Frederick Coplestone, *19th and 20th Century French Philosophy* (Continuum, London, 1975), 1-18.

With certain differences, this idea has been developed from Antiquity as formulated by such philosophers as Plato and Aristotle (the whole prevails over its parts, and therefore society prevails over individuals), through the Middle Ages on up to Modernity: Alexis de Tocqueville, Benjamin Constant, Edmund Burke, or Joseph de Maistre. Other thinkers of the 19th century include Hegel, Kant and Marx who Karl Popper considered to be "enemies of the open society" precisely because of this traditionalist aspiration toward the communitarian ideology.[20]

In appealing to this traditionalism—as regards the delimitation of rights—Russian leaders sometimes choose to justify their position as one reflecting not only the "true Russian" but, also, the "true European" legal tradition, thereby seeking to legitimize themselves as protectors of "European values" against liberal distortions and misinterpretations brought about by globalization.[21] The Russian leadership considers itself a part of those European conservative powers seeking to push aside liberal values; to protect Europe from becoming a melting pot of heterogeneous cultures, religions, and civilizations and, as a result, losing its "spiritual buckles".[22]

2 Outline of the Research

Before and after the 1917 Russian Revolution, the political environment was not favorable to encouragement of individual liberties, so that the Constitutional Acts of 1905 and the Soviet Constitution of 1936—with their liberal provisions about human rights—remained "paper law'. Human-rights observers frequently make the same conclusions about the 1993 RF Constitution. In their interpretations of religious freedoms in particular, and of human rights in general, these observers argue that the RF Constitutional Court (and other courts in Russia) fail to give proper justification to their decisions. The argumentation of Russian judges is usually based only on references to metaphysical concepts and constructions such as

20 Karl Popper, *The Open Society and Its Enemies* (Princeton University Press, Princeton, NJ, and Oxford, 2013; first published in 1945).

21 Vladimir Baranovsky, "Russia: A Part of Europe or Apart from Europe?", 76(3) *International Affairs* (2000), 443-458; Andrey Makarychev, "Rebranding Russia: Norms, Politics and Power", in Nathalie Tocci (ed.), *Who is a Normative Foreign Policy Actor? The European Union and Its Global Partners* (Centre for European Policy Study, Brussels, 2008), 156-210; and Alina Polyakova, "Strange Bedfellows: Putin and Europe's Far Right", 177(3) *World Affairs* (2014), 36-40.

22 See, *e.g.*, the brilliant analysis of this strategy by Ivan Krastev: "Russia as the 'Other Europe'", *Russia in Global Affairs* (17 November 2007) No.9779, available at <https://eng.globalaffairs.ru/number/n_9779>.

"social consciousness" (*obshchestvennoe soznanie*).[23] This latter term aptly combines Marxist philosophy—studied by today's senior Russian judges in their youth—with certain metaphysical ideas about the supra-individual psychological reality that stands over human beings and their minds and unites them into mystical communions. For maintaining traditional values, it may well justify limitations on rights and freedoms.

This logic of interpretation has been defended by the Chief Justice of the RF Constitutional Court, Valerii Zorkin—one of the most influential conservative legal scholars in Russia today. He insists that human beings are limited by chains of social solidarity which impede them from making an arbitrary choice about use of their rights, and that courts have to promote and impose this solidarity on individuals. Without addressing Rousseau, Marx or other Western thinkers, Zorkin finds in Russian legal philosophy a rich source of ideas for his argumentation. Referring to such conceptions as Boris Chicherin's "liberal conservatism", Zorkin legitimizes restrictions on human rights with references to the political, cultural or historical context of the "transitional period" (meaning the post-Soviet era in Russia).[24]

Logically, these narratives of Zorkin also have involved discussions about the power of judges to interpret law and overrule statutory norms which they deem to be inadequate, to make a reference to "social consciousness", and to other metaphysical entities.[25] If courts may in fact abolish

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23 Such references are abundant in the argumentation of the RF Constitutional Court. Citation here is made only of two examples: one RF Constitutional Court Ruling (28 June 2007) No.18-P on the interdiction of political parties based on religious credos; the other its famous 2007 decision on the constitutionality of the statutory interdiction against burying presumed terrorists in public cemeteries: Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii [Ruling of the RF Constitutional Court] (28 June 2007) No.8-P, "O proverke konstitustionnosti stat'i 14(1) Federal'nogo zakona "O pogrebenii i pokhoronnom dele" i "Polozheniia o pogrebenii lits, smert' kotorykh nastupila v rezul'tate presecheniia sovershennogo imi terroristicheskogo akta" v sviazi s zhaloboi grazhdan K.I. Guzieva i E.H. Karmovoi" [On Verifying the Constitutionality of Art.14(1) of Federal Law "On Burials and Burial Services" and of the Regulation "On Burying Persons Whose Death Was Caused When Interrupting a Terrorist Act Committed by Them" in connection with Complaints of Citizens K.I. Guziev and E.H. Karmova], *Rossiiskaia gazeta* (4 July 2007) No.4404.

24 V.D. Zorkin, "Pravo epokhi moderna" [The Law of the Epoch of Modernity], *Rossiiskaia gazeta* (25 June 2006) No.5217; *id.*, "Apologiia Vestfal'skoi sistemy" [An Apology of the Westphalian System], *Rossiiskaia gazeta* (22 August 2006) No.4150; *id.*, "Put' k svobode" [The Path to Freedom], *Rossiiskaia gazeta* (16 September 2009) No.4997; *id.*, "Predel ustupchivosti" [The Limit of Concession], *Rossiiskaia gazeta* (29 October 2010) No.5325; *id.*, "Pravo—i tol'ko pravo" [Law and Only the Law], *Rossiiskaia gazeta* (23 March 2015) No.6631; and *id.*, "Rossiia i Strasburg. Problemy realizatsii Konventsii o pravakh cheloveka" [Russia and Strasburg: The Problems of Implementing the ECHR], *Rossiiskaia gazeta* (21 October 2015) No.6809.

25 See the discussion between Zorkin and one of Russia's constitutional-law lawyers, Elena Lukianova, about Zorkin's references to "spiritual buckles" and other metaphysical terms: E.G. Luk'ianova *et al.*, *#KRYMNASH. Spor o prave i o skrepakh dvukh iuristov i ikh chitatelei* [#Crimea Belongs to Us. A Discussion about Law and about Buckles between Two Lawyers and Their Readers] (Kuchkovo pole, Moscow, 2015).

certain legal norms or change their contents, what are the justification and limits for it, if any? In this respect, Russian legal theory is in a difficult position. From the point of view of the command theory, all judicial discretion is prohibited. Judges are only to speak the words of the law and not to change it in any way. The law is objective in the sense that one can unmistakably deduce from the words of the law the presumed will of the sovereign (parliament, the people or the president). However, in some situations it is possible to override the literal meaning and to establish an "objective" meaning contrary to the literal text of the law.[26]

Seemingly, Zorkin and other important lawyers do not try to reconsider the command theory and to go beyond it. At the same time, they are looking for analytical tools to justify judicial freedom of interpretation. As a matter of fact, in many cases, the command theory is awkwardly combined with historical or sociological jurisprudence, or uncritically mixed with some ideas from realist jurisprudence. Normally, it leads to contradictions and inconsistencies and the presumed objectivity unfrequently turns into the pure subjectivity of judges.[27]

Addressing this theoretical issue of subjectivity and objectivity in law, the present volume will first analyze the combination of decisionism and formalism in Russian and Soviet legal theory. As argued in the first Chapter "Decisionism in Soviet and Russian Jurisprudence", the particular character of Russian (Soviet) law can be explained against the backdrop of this theoretical combination of conservative social philosophy, the Schmittean conception of exception, methods of legal positivism and the spirit of decisionism. These particularities and their methodological background are among the distinguishing features of Russian law and legal culture.

The major theoretical challenge for Russian legal theorists is to choose between two principal theses (excluding smaller methodological and conceptual issues): either the judge is bound by the law, or the judge is free

26 Typically for this style of reasoning, in 2000 the RF Constitutional Court found (7 June 2000) No.10-P that, despite the express wording of Art.5 of the RF Constitution—deeming constituent republics of the Russian Federation to be "states"—these republics shall not be referred to as "states" and are not considered as possessing sovereignty (contrary to the text of the 1992 Federal Treaty), because the wording of the Constitution and the Federal Treaty should not be taken literally and, rather, must be interpreted "with respect to national, historical and other factors" (para.2.1.). Another exemplary case is the interpretation which the RF Constitutional Court gave to the RF Constitution's provisions (in Art.15) about the priority of international law over domestic law: (14 July 2015) No.21-P, *op.cit.* note 16. In spite of the explicit language of para.4 of this Article, the Court decided that it should be interpreted in a way that makes the direct effect of international-law norms and principles dependent on the RF Constitutional Court's interpretations about the applicability of such norms and principles in light of "Russian constitutional values" (*rossiiskie konstitutsionnye tsennosti*).

27 *E.g.*, Kathryn Hendley, "The Puzzling Non-Consequences of Societal Distrust of Courts: Explaining the Use of Russian Courts", 45(3) *Cornell International Law Journal* (2012), 517-567; and Bill Bowring, "Russia and Human Rights: Incompatible Opposites?", 1(2) *Gottingen Journal of International Law* (2009), 257-278.

to decide cases against the law, basing her decision on principles that she might extract from traditional values and other metaphysical sources. In other words, the judge shall either abide by legal norm—even in cases brought to the courts by individuals against the state and its interests; or she may depart from them to secure the best interests of the state—even when these interests are contrary to the individual rights posited in the law.

Exemplarily, from this perspective, the idea of "socialist legality" did not, in fact, bind the hands of Soviet law-enforcement officers, let alone those of secret-service agents, when the supreme interests of the Soviet State or the Communist Party were at stake and required action contrary to the law. In Soviet jurisprudence, this exceptionalist conception of legality was reinforced with such categories as "class struggle". In our days, this exceptionalist approach to the law is based on ubiquitous references to "sovereignty" or "traditional values". It is remarkable that, in both cases, similar ideas—although with varying axiological content—are utilized to achieve the same conceptual goals: with the aid of broadly interpreted exceptions, to justify unchecked sovereign power to act above the law and to deny the inviolable rights of citizens. The analysis undertaken in the first Chapter of this work leads to the conclusion that the old legal mentality still holds sway among most Russian lawyers; in turn, giving rise to the proposition that revisiting established theoretical ideas could be one of the main steps toward reaching a better understanding between Russia and the West.

The philosophical conception of the Chief Justice of the RF Constitutional Court, Valerii Zorkin, is examined in the following Chapter "Philosophy Behind Human Rights: Valerii Zorkin vs. the West?". The position taken by Zorkin in his numerous writings and public speeches is exemplary for the philosophical underpinnings of Russian exceptionalism in legal matters. Zorkin's thesis about the prevalence of the whole (the collective) over the individual inevitably leads to an apology for elitism and autocracy. Zorkin entrusts the state with the task of moral education of the citizenry; implicitly endorsing authoritarian rule in Russia until this education bears fruit. This holist and conservative philosophy is incompatible with the liberal understanding of human rights which, historically, have appeared as *individual* freedoms and which have served to save individuality from the tyranny of the majority, of the state, of elites, and of the clergy.

Zorkin's approach is based on the normative ideal of a consistent and full legal system, with texts that provide answers to each question and rule out possible discretion—this ideal being the starting point for Zorkin's exceptionalism and for many similar theoretical constructions of other Russian legal scholars. However, this formalist ideal cannot stand in the light of Zorkin's ideas about the primacy of unofficial (traditional) law over official (statutory) law. In their turn, Zorkin's ideas on these matters are based on non-positivist theories which presume that there is only one correct morality—for example, the one that prioritizes certain values of the traditional family, traditional religion, and the like. Consequently, the official traditionalist narrative (including Zorkin's) turns out to be intoler-

ant of competing moral conceptions that may prioritize the innovative over the traditional, individual choice over collective interest, freedom over stability and security. The choice made among formally equal constitutional rights and values reveals the apriorism of the traditionalist ideology which provides the framework for judicial discretion and its justification in the contemporary Russian law.

This dichotomy between the formalist (the command theory of law) and the discretional dimensions of Russian law—and its relevance for the conceptualization and protection of human rights in Russia—are addressed in the next Chapter "Conservatism in Russia and Sovereignty in Human Rights". It examines the correlation between concepts of sovereignty, human rights, and democracy in Russian legal and political debates, analyzing this correlation in the context of Russian philosophical discourse. It argues that sovereignty can be used in Russian law as a powerful argument which allows the overriding of international humanitarian standards and the formal constitutional guarantees of human rights.

The specific understanding of democracy in post-*Perestroika* Russia serves as an illustrative example. Focusing on the concept of "sovereign democracy", we examine debates about democracy in light of Russian conservative traditions. We accept that conflicts between sovereignty and human rights also can be observed in other countries. In Russia however, this conflict is aggravated by certain characteristic features of the traditional mentality which frequently favors statism and collective interests over individual ones; by the state building a "power vertical" (*vertikal' vlasti*) subordinating regional and other particularistic interests to the central power. These features and policies are studied in the context of the 19th century Slavophile-Westernizer philosophical divide and its contemporary versions. This divide reveals the *pros* and *contras* discussed by Russian supporters of the isolationist (conservative) policy throughout history, and especially in the sovereignty debates in recent years.

The image of the decaying West picturesquely portrayed by Soviet propaganda was not, in the final analysis, its invention. It had already been widely used by the Slavophiles, and similar images of the West had been pictured by Russian intellectuals even since the Great Schism of the 11th century. In the present work, we argue that—as they invoke Russia's specific historical mission—contemporary Russian authorities rehash the same old discourse and find a nation-wide audience ready to support it and to legitimize the authorities. It should come as no surprise that the authorities use this rhetoric to reinforce their legitimacy. This traditionalism adjoins rational legitimacy which promotes respect toward law and rationality, which are conceived of differently than in the West. The ideology in question represents an attempt to formulate a new legal philosophy based on first legal positivism and opposed to "post-positivist', "new-positivist' or "non-positivist' legal philosophies.

The next Chapter "Religion, Sexual Minorities and the Rule of Law in Russia: Mutual Challenges" examines the appropriation and utilization of

these theoretical arguments in the case law of the Russian Supreme Court and the RF Constitutional Court concerning rights of sexual minorities. We analyze the cultural constraints that are factually imposed on the actors of the Russian legal system by the prevailing social philosophy characterized by a significant degree of conservatism. This conservatism is predictably opposed to sexual minorities and to those who want to defend or justify them. This analysis demonstrates that religious conceptions have a strong impact on decision-making in Russian courts and, sometimes, can overrule the formal provisions of Russian constitutional and statutory law granting protection to sexual minorities. This situation can be explained with reference to the prevailing social philosophy promoting conservative values and emphasizing collective interests. In its turn, this conservative social philosophy and the communitarian morality are based on religious patterns which still shape mind-sets and attitudes of Russians. These attitudes cannot be ignored by judges and other actors of Russian legal system who, to some extent, are subject to the general perception of what is just, acceptable, and reasonable in the society.

This religious context reveals the internal logic of legal regulation which outweighs the fundamental rights of sexual minorities with the help of moral argumentation based on a conservative philosophy. In order to maintain coherence in the legal order, judges and other legal actors have to balance the statutory interdictions and restrictions (like those against gay-pride parades or religious sects) with basic constitutional freedoms. Such balancing is the main argumentation point in court cases connected with "non-traditional" minorities; implicitly present also in the federal legislation and in the discourse of the supreme judges. This argumentation provides some clues to the philosophy underpinning Russian exceptionalism in matters of the rights of minorities. A closer look at this philosophy also discloses its anti-universalist stances. The proponents of this conservative approach stress that Russia has religious, cultural and other civilizational particularities which may justify an exemption of Russian law from the universalist non-discrimination standards of the West.

This analysis shows the deep interconnection between the religious and moral convictions that frequently serve as a normative ideal for judges to shy away from granting legal protection to minorities. Continuing this analysis in the next Chapter "Religious Beliefs and the Limits of Their Accommodation in Russia: Some Landmark Cases of the Russian Supreme Court", we will demonstrate how this logic works out in the cases concerning rights of religious minorities. These minorities are under the protection of the Russian Constitution which establishes liberal principles for the exercise of religious freedoms. But Russian statutory law fails to provide explicit rules on how to implement these principles and what the limits thereof are. This puts Russian courts in an ambiguous situation: they have to grant accommodations in religious cases pursuant to constitutional law but, practically, are precluded from granting such accommodations since, otherwise, courts could be viewed as snatching the legislative function away from the parlia-

ment. Meanwhile, Russian legislative authorities are reluctant to legitimize such accommodations for minorities, and yet they remain reluctant to formally accord a clearly privileged status to the Orthodoxy.

The courts generally are indisposed to recognize that their decisions develop statutory law. Therefore, they tend to hide their approaches and criteria behind the formalistic language of their decisions. Yet their case law does reveal how judges utilize their discretion to favor the prevailing religious denominations and to limit the rights of religious minorities. The analysis shows that the Russian Supreme Court has, in its arsenal, flexible methods of reasoning which enable it to avoid applying this legislation to the prevailing denominations—granting them exemptions from general legal obligations. However, utilizing the technique of "doublespeak", Russian courts shy away from making this argumentation transparent and do not explicitly recognize the substantial difference in protecting "traditional" and "non-traditional" religions. On the contrary, courts insist that the protection is equal and that they abide by constitutional principles. As follows from the analyzed case law, the real situation is different—predictably leading this doublespeak to contradictions in argumentation of the Russian Supreme Court and its subordinated courts.

3 Research Questions, Research Subject and Scope of the Study

The present volume examines the collectivist (conservative or traditionalist) reasoning as a counterpart that is not present formally in Russian constitutional texts but, in reality, sets out constraints limiting the application of constitutional and statutory rights and freedoms by courts and law-enforcement agencies. The main research question is therefore: how is legal formalism aligned with conservative philosophies (these, in their turn, justify anti-formalism and decisionism) in Russian legal thinking, and can this alignment be considered to reflect the specific style of this thinking? Answering this main question implies addressing a number of topics about the theoretical, cultural and historical reasons of the specific conceptualization of rights in Russian legal culture, and identifying what the normative relevance may be of this conceptualization for interpreting and applying law.

We will argue that in many instances, this conservative reasoning justifies the exceptions that judges make in interpreting and applying constitutional and statutory law. This exceptionalism has been subject to numerous philosophical debates and controversies, the most notorious of which is that from the 19th century between Westernizers and Slavophiles. Traditionalism was very much congruent with relativism and exceptionalism, while the universalist approach fitted well with the agenda of Russian liberals who believed that legal development has the same trajectory in different societies and, therefore, implies the same legal principles and values everywhere. Evidently, seen from these two different vantage points, human rights, con-

stitutionality, the rule-of-law and many other fundamental legal concepts may be interpreted in radically divergent ways; what, in fact, happens with Russian law.

In line with the relativist theory based on such a conservative philosophy, Russian law schools and academia translate and reproduce the state-centered perspective of the law understood as a set of commands of the sovereign having absolute power to create and enforce any legal enactments whatsoever. The state possesses sovereign powers allegedly delegated to the state by the people, and in this light the state is immune to any criticism of its laws and regulations. From the standpoint of the relativism inherent in the positivist theory of law, there can be no superior criteria to evaluate the legality and validity of these commands.[28] Another normative message that lies in the theoretical foundation of Russian law is that judges can discard legal norms if these do not fit the values prioritized by the prevailing social and political philosophies. Analyzing the interplay of these two elements can provide a response to the research question outlined above, and this is the research subject addressed in the five chapters of the present work.

This combination of two incompatible elements (legal formalism and decisionism) predictably leads to theoretical contradictions and to practical tensions between supporters of different political views who can find justification for their positions in either of these two elements. It happens also in other legal orders: for example, the dialectics of originalism and interpretivism in US constitutional law. In a number of important issues, tensions between decisionism and formalism suggest to Russian legal scholars and practitioners that they should take issue with the ensuing theoretical and practical problems.

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This dissertation has been written according to the Leiden University rules which permit submission of a PhD dissertation prepared on the basis of articles published or submitted for publication. Each chapter in the present work was developed first as stand-alone articles; they are revised for the present work. We have sought to connect these chapters and introduced into them a number of changes reflecting the main methodological idea of the present research. Nonetheless, since each of them was written as a stand-alone work on one of the many aspects characterizing the problem, the chapters do not flow from one another as otherwise would be the case.

Without pretending to deal with the problem of rights (human rights, minority rights, and religious freedoms) in Russian law in all their possible implications and aspects, we will concentrate in the present work on examining the impact of tensions between formalism and decisionism on

28 For some positivists (such as Hans Kelsen, for example), it is possible to utilize international law as such a criterion. However, this utilization would require "purifying" the legal science from value judgments, which is hardly conceivable in light of Russian intellectual tradition and language use.

the conceptualization of rights in Russian law. In the concluding Chapter, we summarize our theoretical findings to explain contemporary Russia's exceptionalism in the matter of rights against the backdrop of the officially supported versions of conservative philosophy. The conclusion tries to outline certain regularities in this interconnection between the underlying conceptual background and its practical effects in Russian case law and legal scholarship. We are fully aware of the complexity of this interconnection and many other of its aspects remaining outside of the scope of this volume. Nonetheless, we hope that this study will be a modest contribution to discussions pertaining to this matter.

1 Formalism and Decisionism in Soviet and Russian Jurisprudence[29]

Foreword

In this first Chapter, we will analyze the combination of the decisionist and formalist elements in Russian law, and previously Soviet law. This analysis will prepare the methodological ground for further elaborations on the impact of this combination on different aspects of legal regulation in Russia.

We will argue that Soviet law is often viewed as based on legal positivism, while its ideological background and the practices of political interference are considered in an extralegal (political) dimension. This Chapter calls this approach into question and suggests that the alleged dualism can be considered in light of the basic presuppositions and methods of the Soviet (Russian) theory of law and state. The methodological presumption that we develop in the present Chapter is that Russian jurisprudence was and still is based on a combination of formalism and anti-formalism, which provided a certain degree of unity and coherence of legal knowledge. Our examination addresses the philosophical and methodological origins of this decisionism and argues that the particular character of Russian (Soviet) law can be explained against the backdrop of this theoretical combination, which brings together conservative social philosophy, the Schmittean conception of "exception', methods of legal positivism, and the spirit of legal nihilism. These particularities and their methodological background are, in our opinion, among the distinguishing features of Russian law and legal culture. In the following chapters, we will show how the study of these particularities can provide clues for a better assessment of the conservative attitude of Russian law toward minority rights.

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29 A previous version of this Chapter was first presented at the 2018 Annual Conference "Legal Identities and Legal Traditions in Central and Eastern Europe" of the Central and Eastern European Network of Legal Scholars (CEENELS) at the University of Latvia (Riga). The Chapter benefited enormously from feedback from a number of colleagues who gave their feedback during and after the Conference, especially Dr. Rafał Mańko and Professor Cosmit S. Cercel. An elaborated version of this Chapter was published in 43(4) *Review of Central and East European Law* (2018), 483-518. The present Chapter is an updated version of that work.

Introduction

One of the interesting comparative-law ideas in recent years has been the argument that there is a specific (Central and) Eastern European legal tradition (family, circle) that is distinguished from other traditions (including the Western legal tradition) by common history, ways of legal thinking, and specific approaches to the application of the law.[30] This idea can be a rich source of parallels and comparisons about legal developments on the European continent and helpful for explaining why similar institutions transplanted from the Western legal tradition have different effects in the countries of Eastern Europe (the countries of the former Soviet bloc).

What might be the correct *tertium cooperationist* (along with history, institutions, and other criteria well established in comparative law) in order to determine the correct explanation for differences in legal traditions? Every system (in continental-law countries at least) departs from the general formula: legal norms are established by competent social institutions (the state), they must be observed regardless of one's personal convictions, but they can be disobeyed in certain situations. This principle, albeit common to many legal systems, is developed in Russian law through a set of theoretical ideas about the law, its nature, machinery, purposes, and value. In the following pages, we will dwell on some of the particularities of Russian law that result from different intellectual frameworks. This analysis will also require us to address Soviet law as the historical source of contemporary Russian law.

There is something specific about Russian attitudes to the law that often strikes foreigners who do business with Russians or simply observe how Russians use their laws.[31] This elusive "something" can be conceptualized as a set of ideas and attitudes in a legal community,[32] a general consciousness or experience of law that is widely shared by those who inhabit a particular

30 Rafał Mańko, Cosmin S. Cercel, and Adam Sulikowski (eds.), *Law and Critique in Central Europe: Questioning the Past, Resisting the Present* (Counterpress, Oxford, 2016); and Rafał Mańko, Martin Škop, and Markéta Štěpáníková, "Carving Out Central Europe as a Space of Legal Culture: A Way Out of Peripherality?", 6(2) *Wroclaw Review of Law, Administration & Economics* (2018), 4-28.

31 The descriptions of Russian legal culture in the 19th century made by the Marquis de Custine provide paradigmatic examples of Western perceptions of Russian law and of the culture that underpins this law. See Astolphe de Custine, *Letters from Russia* (Review Books Classics, New York, NY, 2002). See, also, George F. Kennan, *The Marquis de Custine and His Russia in 1839* (Hutchinson, London, 1972); and Vladimir Bibikhin, *Vvedenie v filosofiiu prava* (Institut filosofii RAN, Moscow, 2005). For a more generalized perspective, see, for example, Elise Kimerling Wirtschafter, "Russian Legal Culture and the Rule of Law", 7(1) *Kritika* (2006), 61-70.

32 Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon Press, Oxford, 1995). In this respect, the present analysis will be confined only to the ideas and attitudes of legal professionals and will not imply any generalizations about the Russian population.

legal environment.[33] The general consciousness of law was (in the Soviet past) and still is (in contemporary Russia) situated at the crossroads between legal formalism and decisionism. Still, in this respect, Russian law is far from unique, and its epistemic schemas are similar to how rules and exceptions are conceptualized in other countries, as their dichotomy is central to every legal system, *e.g.*, the textualism and judicial activism in US courts and the respective legal philosophies behind these approaches, which Karl Llewellyn once generalized as "formal style" and "grand style", respectively. However, there are some particularities of the theoretical combination of formalism and decisionism in Russia that will be partly examined in the present Chapter.

For the purposes of this Chapter, the former will mean the priority of a literal interpretation of the law, the mechanical conception of the application of the law, and the idea that the law is limited to sources that are established or recognized by the state. Decisionism will refer to somewhat contrasting ideas: the law is what law officers (judges, prosecutors, police officers, etc.) consider to be legally binding for themselves and others, with these law officers being limited not by legal texts but by factual power relations.

In the previous version of this Chapter, the term "realism" was utilized to describe this second (decisionist) dimension of law. This terminology prompts lengthy discussions between legal philosophers as to what is to be understood by "realism" in law. The ordinary language usage refers to American legal realism represented by such names as Jerome Frank, Karl Llewellyn or Felix Cohen. This version of realism borrowed methods from the social sciences to carefully study the law as experienced by lawyers, judges, and average citizens and promoted a progressive vision for American law and society. There are some affinities between this version of legal realism and what we describe in the present volume by the term "decisionism", although affinities do not mean a "proximity" or "identity". Reviewing this volume, Professor Kathryn Hendley has justly indicated at the fact that for an average reader "legal realism" will mean its American version and that this could result in confusion. Therefore, we have revised the terminology accordingly. In fact, this volume has not been intended to be a place for philosophical debates about legal realism, which would lead the research in a quite different direction. Still, the affinity between the idea that the law is what judges say the law is and decisionism—in the practice of Russian (Soviet) courts—can have the same methodological base. The scholarly debates of the early 20th century gave rise to anti-formalist legal conceptions not only in the USA but, also, in the Russian Empire (the ideas of Leon Petrażycki or his followers, who are often called "the Polish school

33 Roger Cotterrell, "Comparative Law and Legal Culture", in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford, 2006), 710-737.

of legal realism" or the school of "Eastern European legal realism"[34]). In addition, there is the rich literature of the Scandinavian legal philosophers also known as "legal realists": Karl Olivecrona, Alf Ross, Axel Hägerström and others. In contemporary legal philosophy, one finds also the French (Michel Troper, Eric Millards and others), the Italian (Ricardo Guastini, Enrico Pattaro and others) and other national schools of legal realism which do not follow the methods of American realism.

As a matter of fact, the term "realism" is broader than the methodological approach usually labeled as "American legal realism": it is plurisemantic and reveals several competing meanings. From the philosophical point of view, realism implies that there is an object of cognition that exists independent of our conceptual schemes. In international law, realism is another term for *Realpolitik*, meaning that everything goes if backed by the strongest power, and legal issues are therefore decided by struggles between powers, as a final resort. In legal philosophy, realism refers to theories that assert that court decisions are products of judicial discretion and are not essentially determined by an interpretation or application of legal norms. In the arts, realism refers to the requirement to represent an object truthfully, without artificiality. The common feature in these different types of realism is that it conceptualizes a concern for "objective reality" and rejects impractical and visionary (ideal) dimensions: later, this will help us distinguish between realism and natural law. Applied to the law, the term "realism" in all these contexts could be utilized as a shortcut for the idea that the substance of the law is formed at the moment of interpretation and application of the law.

These two approaches are mutually exclusive in theory, but they were, nonetheless, combined in the legal practices of the Soviet regime and in Soviet legal theory. This contradiction was due to, among other reasons, the original ambiguity of the Marxist-Leninist attitude to the law. The law was understood as a tool of class oppression and at the same time as a necessary means of state governance under the conditions of the dictatorship of the proletariat. Following ardent debates in the 1920s about the nature and the future of the law, Soviet legal theory and practice in the late 1930s became a binary combination of formalism and decisionism—their characteristic features throughout Soviet history, which still survive in Russian law to this day.

The image of an experienced investigator, Gleb Zheglov (played by Vladimir Vysotsky), who trampled on the law in order to apprehend and convict criminals in the 1979 cult Soviet film *Mesto vstrechi izmenit' nel'zia*

34 Kazimierz Opałek, "The Leon Petrażycki Theory of Law", 27(3) *Theoria* (1961), 129-150; Anna Ovsiannikova, "Rossiiskii pravovoi realizm" [Russian Legal Realism], in Evgenii Tonkov (ed.), *Tolkovanie zakona i prava* [Interpretation of Statutory Laws and Law] (Aleteiia, St Petersburg, 2015); Edoardo Fittipaldi, "Introduction: Continental Legal Realism", in Enrico Pattaro and Corrado Roversi (eds.), *A Treatise of Legal Philosophy and General Jurisprudence*, Vol. 12, tome 2 (Springer, Berlin, 2016), 297-316; and Jerzy Stelmach, Bartosz Brożek, and Julia Stanek (eds.), *Russian Legal Realism* (Springer, Berlin, 2018).

(The Meeting Place Cannot Be Changed), reflects this feature. One of the main lines in the film was uttered during a disagreement between Zheglov and a young, idealistic investigator named Sharapov, who saw the law as having value in itself and thought that it should not be trampled upon even with the best of intentions. Zheglov looked at things more realistically and insisted that "a thief's place is in prison, and the public could not care less about how I put him there". To that end, Zheglov argued in favor of using dubious tactics such as planting evidence. The ideological message of the film—and of legal ideology in general—was the idea that the "regime of socialist legality" did not, in fact, bind the hands of Soviet governmental officials, let alone those of the secret service or law-enforcement agents, when the supreme interests of socialist society (which meant of the Soviet state or of the Communist Party) were at stake and that required one act contrary to the law. As we will see below, the Soviet authorities adopted the same strategy.

The sympathies of those who watch the film obviously remain with Zheglov's position, which is confirmed by the actions in the film. However, the logic of this conflict does not fit in the divide between anti-formalism and formalism, as there are no doubts that formal law is good and necessary: it is simply that, in some situations, excessive formalism might preclude the attainment of the goals enshrined in the law itself, and in these situations, formalism must be dropped. Problematizing the situation of exceptions to legal norms (their defeasibility) nudged Soviet lawyers in the direction of questions about the conditions and limits of this permanent state of exception in a way similar to Carl Schmitt or Giorgio Agamben. In the reality of the Soviet regime, however, no such discussion could have taken place, although it was implied in many scholarly discussions between Soviet lawyers. To a certain extent, the profound interest of some contemporary Russian scholars and politicians in Carl Schmitt and his ideas about sovereignty as the right to decide about exceptional situations[35] can be explained with reference to this decisionist dimension of Soviet (Russian) legal thinking.[36]

The formalist element in Soviet and contemporary Russian law has been documented by many scholars[37] and is beyond doubt, but the decisionist

35 As demonstrated by Professor Bowring, an important number of those Russian scholars close to political decision-making processes, such as Aleksandr Dugin, Aleksandr Filippov, and others, base their conclusions and recommendations on Schmittean ideas. These ideas are also expressed in political discussions about Russia's political leadership. See Bill Bowring, *Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power* (Routledge, Abingdon and New York, NY, 2013), 194-203.

36 On the intellectual proximity of Schmitt's political theology and the Marxist-Leninist doctrine of the dictatorship of the proletariat, see Cosmin S. Cercel, *Towards a Jurisprudence of State Communism: Law and the Failure of Revolution* (Routledge, Abingdon and New York, NY, 2018), 72-96.

37 Eugene Huskey, "Vyshinskii, Krylenko, and the Shaping of the Soviet Legal Order", 46(3-4) *Slavic Review* (1987), 414-428.

element so far largely has been viewed and criticized as a result of ideological indoctrination or political manipulation. Along with these perspectives, this combination of formalism and anti-formalism in Soviet law can also be explained against the background of the theoretical dualism between positivist and decisionist ideas that formed the starting methodological point in Soviet legal scholarship and education after 1938. This theoretical heritage is not thoroughly reconceptualized in Russian law, and an analysis of it might shed more light on the intellectual roots of the continued discrepancies between Russia and the West on sovereignty, human rights and other key legal issues.[38]

1 Methodology

In comparative legal studies, different social attitudes to the law in various areas of the world are frequently analyzed through the lenses of "legal culture", which can be broken down into external (societal) and internal (juristic) legal culture.[39] Nonetheless, this term stirs ardent debates in comparative-law scholarship, as it is suspected of being a means of arbitrarily ascribing cultural features to peoples and nations whose legal systems are different from the Western legal tradition.[40] By way of example, the literature on Russian legal culture is abundant with narratives about Russian "legal nihilism, which in fact refers to quite a wide and multifaceted range of phenomena and evaluations. The 19th-century Russian philosopher Alexander Herzen once expressed this nihilism in the celebrated words: "Complete inequality before the law has killed any trace of respect for legality in the Russian people. The Russian, whatever his station, breaks the law wherever he can do so with impunity; the government acts in the same way."[41] Strongly condemned by the Russian intelligentsia in the 1909 work *Vekhi*,[42] this assumed Russian "aversion" to law became, over the years, proverbial in Western political scholarship, sometimes even becoming truly grotesque, suggesting that aversion to law in the nature of Russians.[43]

38 See, for example, Mikhail Antonov, "Conservatism in Russia and Sovereignty in Human Rights", 39(1) *Review of Central and East European Law* (2014), 1-40.

39 Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation, New York, NY, 1975), 194ff. Regarding Russian legal culture, see Frances Nettercott, *Russian Legal Culture Before and After Communism*: *Criminal Justice, Politics, and the Public Sphere* (Routledge, Abingdon and New York, NY, 2007).

40 On methodological problems connected with the use of the term "legal culture", see David Nelken, "Using the Concept of Legal Culture", 29 *Australian Journal of Legal Philosophy* (2004), 1-26.

41 Alexander Herzen, "Du développement des idées révolutionnaires en Russie", cited by Bogdan Kistiakovskii in his contribution to Marshall S. Shatz and Judith E. Zimmerman (transl. and eds.), *Vekhi: Landmarks* (M.E. Sharpe, Armonk, NY, 1994), 130.

42 *Vekhi: Landmarks*, *op.cit.* note 41.

43 Jessica C. Wilson, "Russia's Cultural Aversion to the Rule of Law", 2(2) *Columbia Journal of Eastern European Law* (2008), 195-232.

It is not at all unusual to read comments about "culturally predetermined" ways in which Russians allegedly express their lack of respect for the law, and swarms of Russian and Western commentators repeat mantras about Russian legal nihilism as if it were a universal intellectual tool for picking the lock of Russian law.[44] For example, Marina Kurkchiyan generalizes about today's "Russian way of thinking and doing things", in legal matters, as "something that combines the glossy outward trappings of western law with the more cynical inward conniving of the Russian tradition",[45] concluding that "Russia is not on the way to a rule of law culture".[46]

Such an approach can be challenged from at least two perspectives. On the one hand, as one reads from sociological polls, different groups in Russian society may demonstrate different attitudes depending on their education, age, and other variables, and these are not so different from the attitudes of Western Europeans or North Americans.[47] On the other hand, cultural perceptions of law are not identical among Russians. The attitudes advocated by Dostoevsky, Tolstoy, and Solzhenitsyn are certainly anti-formalist and underplay law as inferior to morality or religion. If we think about the Russian liberal tradition,[48] however, things would appear differently and would definitely call into question black-and-white pictures of the Russian legal culture and its supposed "aversion" to the law.

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44 See the analysis and criticism of this approach in Kathryn Hendley, "Who Are the Legal Nihilists in Russia?", 28(2) *Post-Soviet Affairs* (2012), 149-186. In this article and on many other occasions, Professor Hendley persuasively shows that Russians are not more nihilistic about their legal rights and obligations than other peoples.

45 Marina Kurkchiyan, "Researching Legal Culture in Russia: From Asking the Question to Gathering the Evidence", in Reza Banakar and Max Treves (eds.), *Theory and Methods in Socio-Legal Research* (Hart Publishing, Oxford, 2005), 277.

46 *Ibid.* Professor Kurkchiyan's analysis of informal practices and paralegal mechanisms in Russia is correct. However, her general conclusion misses the point, as such practices and mechanisms normally thrive in every society, even in those that are paragons of a rule-of-law culture. This is well attested by of the extensive literature on legal pluralism (*e.g.*, Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", 30(3) *Sydney Law Review* (2008), 375-411), of which Professor Kurkchiyan is undoubtedly aware but—for some unclear reason—discards in her analysis of the "shadow law" in Russia (a term coined by the Russian legal theorist, Professor Vladimir Baranov). See Vladimir M. Baranov, *Tenevoe pravo* [Shadow Law] (NA MVD RF, Nizhnii Novgorod, 2002).

47 See, for example, Marina Kurkchiyan, Varvara Andrianova, Kathryn Hendley, Gilles Favarel-Garrigues, and William Simons, *Experiences of Law in Contemporary Russia: Report and Analysis of a Workshop Held at Wolfson College, Oxford 4 October 2012* (The Foundation for Law, Justice and Society, Oxford, 2012), available at <http://www.fljs.org/sites/www.fljs.org/files/publications/Law-in-Contemporary-Russia_0.pdf>; Sergei Mel'kov, "Kak rossiiane sami otsenivaiut sostoianie svoei pravovoi kul'tury?" [How Do Russians Themselves Evaluate the Status of Their Legal Culture?], *lawinrussia.ru* (29 October 2016), available at <http://lawinrussia.ru/content/kak-rossiyane-sami-ocenivayut-sostoyanie-svoey-pravovoy-kultury>; and Kathryn Hendley, *Everyday Law in Russia (*Cornell University Press, Ithaca, NY, and London, 2017).

48 Andrzej Walicki, *Legal Philosophies of Russian Liberalism* (University of Notre Dame Press, Notre Dame, IN, 1992).

To avoid intellectual traps of essentially contested terms like '(legal) culture", some comparative legal scholars (see below) suggest examining ways of conceptualizing legal concepts and institutions in different legal epistemic communities. One can use the perspective of legal theories[49] to determine whether there is any specific way to theorize about law in Eastern European countries.

This terminological choice needs a brief clarification. The main theoretical questions for lawyers everywhere are how to find a solution to a legal problem and what they have to do in situations where their legal system does not provide a clear-cut solution. Finding a solution in such penumbra and lacunae cases logically implies an array of other questions: about the sources of validity, the nature and limits of interpretation, the hierarchy of norms, and so on—something close to what H.L.A. Hart dubbed the "secondary rules" of legal systems.

The conceptual limits within which different epistemic communities search for and formulate responses to these questions normally shape a country's "working legal theory", although their boundaries are not always clearly distinguishable. In this sense, one may say: "according to the prevailing Russian legal theory, there are so many approaches to this issue, and namely […]". Surely, there can in fact be different legal theories accepted among different groups of legal scholars or practitioners. The "jurisprudence" (both in the sense of case law and of the legal theory underpinning that case law) of one high court can be based on theoretical premises that are different from the premises accepted by another high court. The same goes for different law schools and think tanks. This notwithstanding, our hypothesis is that it is possible to generalize a set of ideas (a legal theory) that is more or less uniformly shared by most Russian scholars and practitioners.

We will not get into debates about the best terminology for describing differences between what Zweigert and Kötz labeled *Rechtskreise*,[50] which is a particularly contested issue in comparative law.[51] Culture, tradition, mentality, ideology, or other terms can serve for this purpose, and the choice between them is purely a terminological matter, as they are in fact used in an interchangeable manner. Thus, in the words of John H. Merryman, "legal tradition is a set of attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a

49 Thomas Grey spoke in this context of the "working legal theory" shared by lawyers of a given legal community, as opposed to the "high theory" of legal scholars. See Thomas C. Grey, *Formalism and Pragmatism in American Law* (Brill Academic Publishing, Leiden, The Netherlands, and Boston, 2014).

50 Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Clarendon Press, Oxford, 1998). In the English translation from the German original, *Rechtskreis* was translated not as "legal circle" but as "legal family".

51 On these debates, see the Chapter "Comparative Law and Legal Cultures" in Reza Banakar, *Normativity in Legal Sociology* (Springer, Berlin, 2015), 145-168.

legal system, about the way law is or should be made, applied, studied, perfected and taught".[52] It is also quite close to Pierre Legrand's understanding of legal culture as legal mentality or episteme[53] or to what William Ewald called "law in the minds".[54] One could argue that this difference is a matter of the intellectual culture (or tradition) of lawyers: the particular ways they understand, interpret, and apply law.

For the purposes of the present analysis, Belarus, Ukraine, Russia, and the countries of Central Asia and the Caucasus will be included in the category of Eastern European countries. In this sense, this tradition also covers countries that, strictly speaking, do not belong to Europe geographically. Due to their common history, they developed similar legal theories known under the banner of "Soviet theory of state and law", which still has a grip on their legal education and research. Historically, these societies were included, although to different extents, in the Russian cultural sphere (including that of the legal technique and the intellectual representations that underpin this technique). Russia is the paradigmatic example of the Eastern European legal tradition, as it used to exert considerable cultural, political, and other influences on its neighboring countries in the region that once belonged to the Russian Empire, and then to the Soviet Union and also to the former Soviet bloc. From this vantage point, one can speak about Eastern European legal theory as, to some extent, tantamount to Russian legal theory.[55]

A disclaimer must be added in advance to avoid misinterpretation. Speaking about a prevailing legal theory in the Soviet Union, and then in Russia and in other former Soviet countries, we do not suppose that this theory is shared by each and every Soviet/Russian lawyer. Undoubtedly, there are Russian lawyers who are completely skeptical about this theory and who do not teach it to their students, offering them other theories instead. But these possibilities are limited in several respects. On the one hand, students already at secondary school are inculcated with the formalist legal theory uniformly taught within the discipline of Social Sciences (*Obshchestvoznanie*). On the other hand, legal theory is intended to prepare

52 John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford University Press, Stanford, CA, 1985, 2nd ed.), 1-2.

53 Pierre Legrand, "European Legal Systems Are Not Converging", 45(1) *The International and Comparative Law Quarterly* (1996), 52-81.

54 William Ewald, "Comparative Jurisprudence I: What Was It Like to Try a Rat?", 143(6) *University of Pennsylvania Law Review* (1995), 1889-2149; and *id.*, "Comparative Jurisprudence (II): The Logic of Legal Transplants", 43(1) *The American Journal of Comparative Law* (1995), 489-510.

55 Doubtlessly, many prominent legal thinkers in the Russian Empire or in the Soviet Union were not Russians (*e.g.*, the Ukrainian Bogdan Kistiakovskii, the Latvian Piotr (Peteris) Stuchka, the Pole Leon Petrażycki, and the Lithuanian Evgeny Pashukanis). Therefore, speaking about a "Russian theory", we use this term as a reference point to describe common features of the legal thinking developed in the Russian Empire and then in Soviet Russia; surely, this thinking was not ethnically Russian.

law students for further practical courses (constitutional law, criminal law, and so on) that are often taught by professors with the ironclad formalist-nihilist background acquired in Soviet times. And, unfortunately, it is true that law students, having learned the prevailing theory, would be better prepared for professional survival in the Russian legal system after graduation than those students who have learned natural-law doctrines and other theories that are marginal for Russian law. There are also compulsory educational standards imposed by the Russian Ministry of Education on the majority of Russian universities that reinforce this theory at law schools.[56] There is no need to mention the force of intellectual inertia and the interest of legal continuity and stability that is secured by stable conceptual and linguistic frameworks. These factual, normative, and intellectual constraints shape the prevailing legal theory in Russian jurisprudence.

2 Historical Development

The development of this prevailing legal theory in Russia (and in the Soviet Union before) can also be described as an interplay of the formalist and decisionist approaches. On the one hand, there was a statist theory of law uniformly imposed in Soviet legal scholarship in the late 1930s, and, on the other hand, there was a disrespect for rights that permeated the legal system and justified anti-legal practices in situations considered exceptional (be it the struggle against "enemies of the people" or building a socialist society).[57] The obvious contradiction between these theoretical premises could be easily tolerated through the prism of Marxist-Leninist (Hegelian) dialectics, which sought the truth by the way of opposing two contradictory theses: a thesis and its negation lead to a true synthesis that overcomes the contradiction.[58]

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56 See the 2016 "Jurisprudence" bachelor's degree standard, available at <https://минобрнауки.рф/документы/9604/файл/8790/Приказ%20№%201511%20от%2001.12.2016.pdf>; and the 2010 "Jurisprudence" master's degree standard, available at <http://www.edu.ru/db-mon/mo/Data/d_10/prm1763-1.pdf>.

57 This disrespect, implying that expediency should triumph over legality, was analyzed by Vladimir Gsovski as a "pragmatic Soviet concept of law". See Vladimir Gsovski, "The Soviet Concept of Law", 7(1) *Fordham Law Review* (1938), 1-43, at 13-29. However, the term "pragmatism" does not seem to fit here, as many Soviet ideas and projects were rather irrational, as were the steps designed to carry out these projects.

58 Facing an evident contradiction between the Marxist thesis that the state would wither away under the conditions of socialism and his own thesis that the new socialist society needed to have "the mightiest and strongest state power that has ever existed", Stalin did not shy away from recognizing this contradiction, reasoning that "this contradiction is bound up with life, and it fully reflects Marx's dialectics". See Joseph V. Stalin, "Political Report of the Central Committee to the Sixteenth Congress of the CPSU", in *id.*, *Collected Works*, Vol.12 (Foreign Language Publishing House, Moscow, 1955), 38.

In the context of Soviet legal theory, the dialectical solution to the contradiction between formalism and anti-formalism implied that the law did not have its own value and that effective social regulation could be successfully carried out through administrative command and control. Professor Cercel writes that "the basic feature of this jurisprudential simulacrum is the art of contradiction, supporting a return to positivism and formalism, while at the same time pretending that this theoretical gesture is still consistent with Marxist theory".[59] However, there were more coherent Marxists. For example, in the 1920s Evgeny Pashukanis argued that the best means of social coordination is to replace laws by directives that work like a *railroad schedule* regulates the movement of *trains*, and instead of court litigation to impose decisions in the way medical prescriptions are delivered to sick people.[60] Following Marx's writings, every Marxist theoretician had to acknowledge that in the bright future, the state and its law would wither away, that the classless future would put an end to the contradiction between the form and the substance of law. This anti-legal thesis of Marxist philosophy was gradually softened by Soviet legal theorists who argued that the attainment of such a bright future could take a long time and that, in the meantime, Soviet law could be an effective tool for attaining said bright future and the hallmark of a new, Socialist society.[61]

Accessing Soviet legal tradition, researchers often indicate a strict positivistic approach to interpretation and application of law (some scholars dub this approach "hyperpositivism"[62]), which is attributed to the influence of the German *Begriffsjurisprudenz* of the 19th century and to the statist doctrine of law rooted in the legal systems of the Soviet countries. In some opinions, the command theory of law propelled by Soviet legal positivists was a good match for the authoritarian political regimes in tsarist and then Soviet Russia and elsewhere.[63]

This can be completely true in the case of pre-revolutionary legal theory in Imperial Russia, where the statist conception of the law, although in different forms,[64] clearly prevailed. It is more controversial when applied to

59 Cercel, *op.cit.* note 36, 105.

60 Evgeny Pashukanis, "The General Theory of Law and Marxism", in *id.*, *Selected Writings on Marxism and Law* (Academic Press, London and New York, NY, 1980), 32-131.

61 See Rudolf Schlesinger, *Soviet Legal Theory: Its Social Background and Development* (Routledge & Kegan Paul, London, 1945), 258-272.

62 Rafał Mańko, "Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome", 7(2) *Polemos: Journal of Law, Literature and Culture* (2013), 218-226.

63 See, for example, Marc Raeff, *The Well-Ordered Police State* (Yale University Press, New Haven, CT, 1983); and Rafał Mańko, "Survival of the Socialist Legal Tradition? A Polish Perspective", 4(2) *Comparative Law Review* (2013), 1-28.

64 About different variants of positivism in Russian philosophy, see Andrzej Walicki, *A History of Russian Thought: From Enlightenment to Marxism* (Stanford University Press, Stanford, CA, 1979), 349-370.

Soviet jurisprudence, although there are good reasons to argue that legal positivism always had a strong theoretical impact on Soviet legal theory. Nonetheless, fidelity to the letter of the law was not common among Soviet legal practices or moral standards, while a general disrespect for rights could not fail to influence the conceptualization and teaching of law, let alone its application.[65]

These main features of this theory in the Soviet era (the formal requirement of fidelity to the letter of the law and a factual disrespect for legal rights and enactments) reflected the doublespeak of the communist ideology:[66] to proclaim one thing (*e.g.*, the guarantees and lofty ideals enshrined in the 1936 Soviet Constitution) and to do the contrary (the appalling atrocities carried out in purges under Stalin that began just after the adoption of this Constitution). But explaining law only through the prism of ideological indoctrination cannot satisfy lawyers, even if they accept that law is permeated by ideology.[67] Unlike ideologists, who may eventually be satisfied with a "false consciousness",[68] legal theorists are supposed to provide coherent descriptions and explanations in order to intellectualize the law as it exists (and/or as it should exist). As shown by Harold Berman, Soviet law itself was not homogeneous and included at least three different intellectual components: socialist ideology, Russian legal culture, and a system of moral precepts (in Berman's terms, the "parental factor"), which could eventually come into conflict.[69] Although the theoretical synthesis obtained by Soviet lawyers was not perfect, it provided for conceptual solutions that assured the unity of theoretical reflection about law and that still remain influential in post-Soviet legal theory. Its variables might differ ("constitutional identity" instead of "class consciousness", "traditional values" instead of "communist morality", etc.)

65 This conceptualization took place in the first years of Bolshevik rule: the idea that law is the means for imposing the class interest enshrined in the "Rukovodiashchie nachala po ugolovnomu pravu RSFSR" [Guidelines on Criminal Law of the RSFSR], *Sobranie uzakonenii RSFSR* (1919) No.66 item 590. As Stuchka explained later: "When the Collegium of the Popular Committee of Justice […] needed to formulate its own, so to say 'soviet understanding of law', we agreed the following formula: 'law is a system (or an order) of social relations that corresponds to interests of the dominating class and protected by the organized force of this class'." See Piotr I. Stuchka, *Izbrannye proizvedeniia po marksistsko-leninskoi teorii prava* [translation] (Latgosizdat, Riga, 1964), 58.

66 Hans Kelsen, *The Communist Theory of Law* (Praeger, New York, NY, 1955). To some extent, this doublespeak characterizes every ideology, which might suggest more general conclusions, not only about communist ideology.

67 "Law is both real and ideological, insofar as ideology in itself emerges from real, material structures and it hints [at] an unarticulated real. Yet, it also distorts the perception of reality, and this distortion is constitutive of reality." See Cercel, *op.cit.* note 36, 67.

68 This definition of "ideology" derives from the Marxist theory of social class and refers to the systematic misrepresentation of dominant social relations in the consciousness of subordinate classes.

69 Berman, *op.cit.* note 8.

and even be described using terms borrowed from Western law, but the schema largely remains the same.[70]

Historically, the ground for this dualism in Soviet legal thinking was prepared by legal developments that took place in tsarist Russia. In the course of the Westernization launched in Russia by Peter the Great in the early 18th century and continued by his successors, the legal culture of the landowning nobility and of officialdom (*chinovnichestvo*) was clearly separated from the mass legal culture of the peasantry[71] and other social strata: the former having its hallmark in the statist perception of the law, while the latter tended to identify the law with moral truth (*pravda*) and to challenge the validity of formal legal enactments that eventually collided with the generally accepted precepts of truth.[72] This duality prompted a discussion about the best fit between positivism and natural law in the Russian legal philosophy of the Silver Age,[73] as well as debates about the value of law that followed the publication of *Vekhi* in 1909.[74] These discussions revealed that the basic theoretical assumptions were incompatible: the revolutionary intelligentsia could criticize the law, understood as an incarnation of the state's will and consequently as a means of class oppression, while liberals asserted that the law was not about the sovereign's commands (at least, not

70 As to human-rights law, the Soviet doctrine of human rights presupposed that "the substance of human rights has a social content and meaning determined by the social, economic, and political structure of a given society in which the rights in question exist and function". See Christopher Osakwe, "Soviet Human Rights Law Under the USSR Constitution of 1977: Theories, Realities and Trends", 56 *Tulane Law Review* (1981-1982), 249-293, at 255. There is only a very slight, if any, difference between this theoretical position and today's exceptionalist discourses about a Russian constitutional identity determined by social and cultural particularities. See Benedikt Harzl, "Nativist Ideological Responses to European/Liberal Human Rights Discourses in Contemporary Russia", in Lauri Mälksoo and Wolfgang Benedek (eds.), *Russia and the European Court of Human Rights: The Strasbourg Effect* (Cambridge University Press, Cambridge, 2017), 355-384.

71 The majority of the population in the rural world lived according to their own legal norms independent of the official law, while there was another world that "represented an underdeveloped but emerging civil society of classes, defended by a reformist bureaucracy willing to face a modern world that traditional Russia preferred to ignore". See Frank Wcislo, "Soslovie or Class? Bureaucratic Reformers and Provincial Gentry in Conflict, 1906-1908", 47(1) *The Russian Review* (1988), 23. Something began to change at the turn of the 20th century (Jane Burbank, *Russian Peasants Go to Court* (Indiana University Press, Bloomington, IN, 2004)), but this process was not completed before the 1917 Revolution.

72 Richard Wortman, *The Development of a Russian Legal Consciousness* (University of Chicago Press, Chicago, IL, 1976).

73 This term denotes the Silver Age of Russian culture, which encompasses the first two decades of the 20th century.

74 *Vekhi: Landmarks*, *op.cit.* note 41.

only about them) but about justice—this implied the theoretical possibility of distinguishing between the legal and the arbitrary.[75]

On the one hand, the main feature of the Marxist-Leninist theory of state and law that replaced the intellectual diversity of legal scholarship in Imperial Russia was rigid positivism in what concerns the pedigree criterion of law: there can be no law unless it is established or recognized by the state. On the other hand, the specifically Marxist approach to law was to consider it as a means of class domination. As Marx and Engels put it in *The German Ideology*, law is an expression of class relations and a juristic form of the ideology that allows one class, through the intermediary of the state, to dominate another.[76] From this point of view, the state is the very expression of class dominance,[77] while law was conceived only as a means of state coercion[78] and could not be conceptualized the other way round: as compelling the state to respect the rights of its citizens.

This theoretical mixture was reflected in the definition of law coined by Vyshinsky: "The totality of the rules of conduct, expressing the will of the dominant class and established in legal order".[79] Seen this way, Soviet law meant "the aggregate of the rules of conduct established in the form of legislation by the authority of the toilers and expressive of their will", and no law was possible without "the entire coercive force of the socialist state".[80]

3 The Anti-formalist Element in Soviet Law

The definition mentioned above does not, however, represent something that can be unambiguously characterized as "legal positivism", as this theory did not suppose that power holders were bound, in their actions, by the law or by the notorious 'will of the legislator'. Rather, on the contrary, this perspective implies that there is a supreme law above the statutory law that allows power holders to determine what will qualify as exceptions to the legal rules, remaining unaccountable for their choice and for their

75 Frances Nettercott, "Russian Liberalism and the Philosophy of Law", in G.M. Hamburg and R.A. Poole (eds.), *A History of Russian Philosophy: 1830-1930* (Cambridge University Press, Cambridge, MA, 2010), 248-265; and Andrzej Walicki, "Russian Marxism", *ibid*., 305-325.

76 Karl Marx and Friedrich Engels, *The German Ideology* (Prometheus Books, Amherst, NY, 1998).

77 *Ibid*., 60: "The rule of a definite class of society, whose social power, deriving from its property, has its practical-idealistic expression in each case in the form of the state."

78 Karl Marx and Friedrich Engels, *Manifesto of the Communist Party* (International Publishers, New York, NY, 2007), 26: "Your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economic conditions of existence of your class."

79 Andrei Vyshinsky (ed.), *The Law of the Soviet State* (The Macmillan Co., New York, NY, 1948, Hugh W. Babb, transl.), 50.

80 *Ibid*., 51.

exercise of power in general.[81] This supreme law refers to "a living reality, expressing the essence of the social relationship between classes".[82] Therefore, it reflects "objective realities" (economic relations, class struggle, etc.) and for this reason has greater validity as compared with statutory law. This latter notion stems from the subjective will of legislators, who can distort these objective realities.[83] This became particularly evident in Pashukanis' commodity exchange theory of law and in Stuchka's conception of revolutionary consciousness, as well as in the class theory of law generally.

Even if Stuchka's and Pashukanis' conceptions were, in the end, rejected and condemned by the Soviet theory of state and law,[84] the anti-formalist element of Soviet law remained undisputed: the state could do whatever it wanted with the rights of citizens, provided that a "legal form" was observed. This decisionism was justified in terms of the basis-and-superstructure logic with reference to objective needs supposedly reflected in the social consciousness that made it possible to overrule statutory norms in situations of exception. Such an attitude toward the law can be characterized as legal cynicism that wanted the law to be whatever pleased real

81 Lev S. Yavich, *Sushchnost' prava. Sotsial'no-filosofskoe ponimanie genezisa, razvitiia i funktsionirovaniia iuridicheskoi formy obshchestvennykh ontoshenii* [The Nature of Law: A Sociophilosophical Understanding of the Genesis, Development and Functionning of the Legal Form of Social Relations] (Izdatel'stvo LGU, Leningrad, 1985); and Olufemi Taiwo, *Legal Naturalism: A Marxist Theory of Law* (Cornell University Press, Ithaca, NY, 1996). Characteristically, the same way of thinking is followed by contemporary Russian lawyers, including the Chief Justice of the RF Constitutional Court. See Valerii D. Zorkin, "The Essence of Law. Lecture before the participants of the VII St. Petersburg International Legal Forum on 18 May 2017", *ksrf.ru*, available at <http://www.ksrf.ru/en/News/Documents/V.D.Zorkin_The%20Essence%20of%20Law_Lecture_2017-05-18.pdf>.

82 Andrei Vyshinsky, "The Fundamental Tasks of the Science of Soviet Socialist Law", in *Soviet Legal Philosophy* (Harvard University Press, Cambridge, MA, 1951, Hugh W. Babb, transl.), 38.

83 This suggested to some scholars that the class theory of law had affinities with natural-law doctrines. See Francis F. Homan Jr., "Soviet Theory of Jurisprudence", 14(2) *Cleveland State Law Review* (1965), 402-410. This author concludes that in Stuchka's legal theory: "there was "natural law' growing out of social intercourse. This "natural law' had precedence over "artificial law" consisting of statutes and governmental decrees". *Ibid.*, 405. However, the Soviet conception of objectivity (*e.g.*, Sergei S. Alekseev, "Ob"ektivnoe v prave" [Objective Law], *Pravovedenie* (1971) No.1, 112-118) had only a superficial likeness to the objectivity on which natural-law doctrines are based. Unlike these doctrines, Soviet legal theory denied absolute values and universal principles of practical rationality, so that this "objectivity" referred only to the economic basis. This basis was thought to be reflected in ideological superstructures, including the law.

84 Stalin's attorney-general, Andrei Vyshinsky, was a proponent of this theory. On the theoretical situation at that time, see Lon L. Fuller, "Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory", 47(8) *Michigan Law Review* (1949), 1157-1166.

power holders,[85] who had sovereign power to determine ways of attaining social objectives. This resulted in the practical conclusion that legal norms and individual rights could be legitimately trampled upon if this was considered expedient by those power holders.

Inviolable individual rights and freedoms were considered a hallmark only of the bourgeois law stemming from private property, while more progressive forms of social cohesion (socialism and communism) would deny this bourgeois "atomization" of society: its division into a mass of independent individuals each with their own inalienable and inviolable rights egoistically utilized against others and against the collective. "In a higher phase of communist society […] the narrow horizon of bourgeois right will be fully left behind."[86] In the bright future, people will learn not to distinguish between their personal interests and social interests; then the state and its law will wither away, and law books will be handed over to museums as reminiscences of the barbaric past.[87]

This sort of cynical attitude prepared the intellectual ground and provided the ideological justification for building up, along with legal formalism, a parallel decisionist dimension of the law. In accordance with this theoretical construct (a mix of public morality, communist ideology, and materialist philosophy), "important' cases are decided in the best interests of society without regard to legal norms.[88] This construct unveiled the decisionist dimension of Soviet legal theory, according to which law is nothing but a result of an interplay between political and economic powers. If there are formal legal rules and informal rules employed in decision-making in courts and elsewhere, it is rather these informal rules that play the decisive role insofar as they are supposedly based on the "objective" structure of

85 "Power holders" is a broad category that includes not only state officials but, also, party bosses and cronies of political leaders who formally do not belong to state officialdom. The term "*nomenklatura*" would fit this category quite well in the context of this Chapter, but its connotation is linked only to the Soviet regime. See, for example, Michael Voslensky, *Nomenklatura: The Soviet Ruling Class, an Insider's Report* (Doubleday, Garden City, NY, 1984, Eric Mosbacher, transl.), while this analysis refers to a more general situation in various cultures and under different political regimes.

86 Karl Marx, "Critique of the Gotha Programme", in D. MacLennan (ed.), *Karl Marx: Selected Writings* (Oxford University Press, Oxford, 1977), 569.

87 Frederick Engels, *The Origin of the Family, Private Property and the State* (International Publishers, New York, NY, 1972, Eleanor Burke Leacock intro. and notes), 232: "Society […] will put the whole machinery of state where it will then belong: into the museum of antiquity, by the side of the spinning-wheel and the bronze axe."

88 Surely, this might also happen in legal systems that can express a strict commitment to a rule-of-law culture. On this problem in the European Union, see Gunnar Beck, "The Court of Justice, Legal Reasoning, and the Pringle Case: Law as the Continuation of Politics by Other Means", 39(2) *European Law Review* (2014), 234-250; and *id*., "The Court of Justice, the Bundesverfassungsgericht and Legal Reasoning During the Euro Crisis: The Rule of Law as a Fair-Weather Phenomenon", 20(3) *European Public Law* (2014), 539-566. The US Supreme Court and its living constitutionalism doctrine, which explicitly allows decisions that are contrary to the letter of the law, represent another paradigmatic example.

society, which, in turn, reflects the economic basis of social life. Unlike the similar ideas of Roscoe Pound and the US legal realists about "law in books" and "law in action", the real decision makers are not judges but state or party officials who are empowered to express and implement the will of the ruling class or, in other words, the state.

In practice, this decisionism implied that when provisions of a formal legal code (*e.g.*, a civil or criminal code) collide with the principles set out in moral codes (*e.g.*, the Moral Code of the Builder of Communism[89] or the Communist Party program), nothing guarantees that the former would prevail even in court. Moreover, the validity (binding force) of law in this logic was conceived as dependent on how the power holders appreciate the expediency of the application of legal norms in a given case.[90] If, in the opinion of judges and other law officers individual rights are against the collective interest, these rights would, predictably, hardly win any legal protection. Surely, in the avalanche of mundane cases, this reasoning was not applied, but in "high-profile" cases such "objective needs"[91] could be referred to as grounds for an exception.

Legal proceedings against several Soviet dissidents (Volpin, Litvinov, Bogoraz, and others) in the 1960s can serve as examples of this exceptionalism: the dissidents presented their defense based on the Soviet Constitution and the statutory laws that directly allowed demonstrations (Art.124, 1936 Soviet Constitution, guaranteed Soviet citizens the freedom of speech and the right to meetings and demonstrations) and did not establish criminal liability for publicly expressing an opinion, while the prosecution and the charge framed the issue in larger socio-political and moral dimensions and condemned such "legal formalism" on the part of the dissidents.[92] Another example is the 1960-1961 trial of illegal street currency traders (*fartsovshchiki*). In 1960, three *fartsovshchiki*—Ian Rokotov, Vladislav Faibishenko, and

89 Twelve principles that every member of the Communist Party of the Soviet Union and of the Komsomol was supposed to follow. See *Moral'nyi kodeks stroitelia kommunizma* [The Moral Code of a Builder of Communism] approved in 1961 as a part of the Third Program of the CPSU at the XXII Convention of the CPSU, available at <http://krotov.info/lib_sec/11_k/kom/munizm.htm>. On the correlation between legal and moral regulation in Soviet Russia in general, see Georges C. Guins, *Soviet Law and Soviet Society* (Martinus Nijhoff, The Hague, 1954); and George L. Kline, "Socialist Legality and Communist Ethics", 8(1) *The American Journal of Jurisprudence* (1963), 21-34.

90 As Stuchka wrote in 1926, "From the standpoint of historical materialism, law does not exist as an independent power that regulates social relations." Piotr Stuchka, *Entsiklopediia gosudarstva i prava* (Izdatel'stvo Komakademii, Moscow, 1926), 14. See, also, Augusto Zimmermann, "Marxism, Communism and Law: How Marxism Led to Lawlessness and Genocide in the Former Soviet Union", 2 *The Western Australian Jurist* (2011), 1-60.

91 In 1938, Vladimir Gsovski stated that: "Although now the soviet jurists wish to use the traditional legal concepts […] they are not prepared to inscribe on their banner the real supremacy of law and rights. They take the body of traditional jurisprudence but repudiate its soul." Gsovski, *op.cit.* note 57, 43.

92 See Robert Horvath, *The Legacy of Soviet Dissent*: *Dissidents*, *Democratization and Radical Nationalism in Russia* (Routledge, Abingdon and New York, NY, 2005).

Dmitrii Iakovlev—were sentenced to eight years in prison for conducting illegal currency transactions, which was the maximum prison sentence for this *corpus delicti* according to the RSFSR Criminal Code. Just before the trial, the Criminal Code had been amended to introduce a maximum penalty of 15 years in prison for this *corpus delicti*. This new wording was not applied because of Article 6 of the RSFSR Criminal Code, which explicitly prohibited the retroactive application of laws that impose stricter punishment. When the verdict was brought to the attention of Khrushchev, he demanded harsher punishment based on the opinion of the working class. At the Politburo, Khrushchev cited letters from factories that discussed the case from moral and political standpoints and demanded that "tendencies hostile to society" be put to an end. The verdict was reconsidered, and the *fartsovshchiki* received the maximum prison sentence of 15 years. Still dissatisfied, Khrushchev adopted, in July 1961, a retroactive decree introducing the death penalty for conducting illegal currency operations, and at a third trial in 1961, the three *fartsovshchiki* were sentenced to death. This verdict was evidently contrary to the letter of Soviet criminal law but was justified based on the moral, political, and economic foundations of Soviet society.[93]

Soviet legal scholarship formed a theory that reflected this doublespeak and dualism and revealed the formalist and the prerogative (decisionist) dimensions of the law. This more or less uniform legal dogma is, with no significant methodological changes since the Vyshinsky era, still widely recognized and taught at law schools, only superficially decorated with some odd elements that are alien to it, such as human rights or constitutionalism. For example, one leading Soviet/Russian legal theorist just replaced in his theory the concepts of "the state will" and "the will of the ruling class" with the concept of "the state will of the society", arguing that this replacement made it possible to integrate human-rights and rule-of-law discourses into Russian legal positivism, hoping thereby to link Soviet legal theory with the Western legal tradition.[94] The statist and anti-liberal character of this Soviet legal dogma that survived the fall of Soviet rule still shapes the mindsets of Soviet (Russian) lawyers in a certain way and prompts them to draw

93 See Aleksandr E. Khinshtein, "Koroli i kapusta" [Kings and Cabbage], *Moskovskii komsomolets* (21 December 1997), available at <https://public.wikireading.ru/64142>.

94 Mikhail I. Baitin, *Sovremennoe pravoponimanie na grani dvukh vekov* [The Contemporary Understanding of Law at the Turn of Two Centuries] (Pravo i gosudarstvo, Moscow, 2005), 59ff. See criticism of such approaches in Andrei V. Kashanin and Sergei V. Tret'iakov, "Obshcheteoreticheskie osnovaniia issledovaniia problem pravoprimeneniia" [General Theoretical Bases for Researching Problems of Applying the Law], in Iu.A. Tikhomirov (ed.), *Pravoprimenenie: teoriia i praktika* [Application of Law: Theory and Practice] (Formula prava, Moscow, 2008), 12-73; Leonid Golovko, "Postsovetskaia teoriia prava: trudnosti pozitsionirovaniia v istoricheskom i sravnitel'no-pravovom kontekste" [The Post-Soviet Theory of Law: Problems with Its Positioning in a Historical and Comparative Context], in *Problemy postsovetskoi teorii i filosofii prava. Sbornik statei* (Iurlitinform, Moscow, 2016), 92-126; and Nataliia Varlamova, "Geterarkhichnost' sovremennykh pravovykh sistem i postsovetskaia teoriia prava" [The Heterarchy of Contemporary Legal Systems and the Post-Soviet Theory of Law], *ibid.*, 30-71.

conservative conclusions that fit contemporary exceptionalist narratives in Russia and turn out to be appropriate for the prevailing conservative ideology.[95] It is around this intellectual axis that legal thinking is organized in the community of Russian (Soviet) lawyers, and it is through this prism that this community creates and applies Russian law.

4 A Dual System of Law?

This construction could serve as justification for the widespread practices of extralegal reprisals, although to different degrees: from the extraordinary *troika* tribunals that, in the years of Stalin's purges, condemned millions to death without following the established criminal-court procedures (with the exception of some demonstrative mock trials) to the notorious practices of "telephone law'[96] in the years of *zastoi*. The presence of such practices in Soviet law gave some Western scholars reasons to speak about a "dualism" that reflects two concomitant legal orders: one, formal order imposing general legal rules applicable by default in "normal cases" and another, prerogative order that reserved privileges for power holders to interfere with "special cases" in an extralegal way.[97]

Following Fraenkel's famous book on dual states,[98] such scholars identified two legal systems in the Soviet Union:

> "One legal system that, day in, day out, maintains law and order, enacts and enforces the law, and adjudicates the disputes that inevitably arise among citizens and institutions in modern societies. Existing alongside this legal system is an arbitrary and repressive system used to punish critics of the regime."[99]

The dualist logic is undeniably apt for describing political systems: in every politically organized society, we can find some channels for political powers that work according to the posited law and other channels that work independent of the posited law or even contrary to it. This logic is particularly suitable for a description of Russian political life over many centuries: from

95 See, for example, Angelika Nussberger, "Der 'russischer Weg': Widerstand gegen die Globalisierung des Rechts?", 53(6) *OstEuropa Recht* (2007), 371-386.

96 This term refers to formal influence or pressure exerted by the Communist Party on the Soviet judiciary, usually by way of telephone calls. See Alena V. Ledeneva, "Telephone Justice in Russia", 24(4) *Post-Soviet Affairs* (2008), 324-350.

97 Robert Sharlet, "Stalinism and Soviet Legal Culture", in Robert C. Tucker (ed.), *Stalinism: Essays in Historical Interpretation* (W.W. Norton, New York, NY, 1977), 155-179. Apparent in criminal- and public-law cases, this dualism also can influence civil and commercial cases.

98 Ernst Fraenkel, *The Dual State* (Oxford University Press, New York NY, 1941).

99 Gordon B. Smith, *Soviet Politics: Continuity and Contradiction* (Palgrave, London, 1988), 137-162, at 137. See, also, Sergei Alekseev, *Pravo: azbuka – teoriia – filosofiia. Opyt kompleksnogo issledovaniia* [Law: ABC, Theory, Philosophy: An Experience of Multifaceted Research] (Norma-Infra, Moscow, 1998), 482-483.

the *zemshchina* and *oprichnina* division under Ivan the Terrible to the coexistence of the Soviet system and the Communist Party system in the Soviet Union, and, with some modifications, also today.[100]

However, attempts to apply this logic to the legal sphere can result in unresolvable theoretical deadlocks for lawyers, although ordinary people have no trouble accepting it.[101] If one admits that the prerogative use of law constitutes a parallel legal system, then one may conclude that Stalin's repressions were illegal from the vantage point of official Soviet law and at the same time were legal from the standpoint of another, parallel system of law. Legally, this would make no sense. Having two parallel legal systems, we can figure out what happens if a competent person in one system (a judge acting under the posited law, for example) makes one decision and a competent person in another system (a party boss acting under party law, for example) makes a decision with the opposite effect. In legal terms, these two decisions would collide, and a lawyer would have to decide on the prevalence of one of the decisions. Obviously, this description does not fit the realities of Soviet (and eventually Russian) law and is normatively erroneous.

To a lawyer, it is preferable to describe this configuration as one legal system in which a cohort of officials have factual discretionary power to decide about exceptions in the application of the law, although in terms of the official law such practices were illegal, or at least their legal validity was uncertain. A parallel system of justice existed only for a relatively short period of time in the years of Stalin's purges when troikas (commissions of NKVD officers who dealt with accusations against "enemies of the people' in the late 1930s) rendered millions of verdicts,[102] coexisted with the state-run criminal courts. Professor Feldbrugge justly remarks that:

> "In striving for a full understanding of Soviet law one cannot disregard manifestations which indicate a rejection of certain values and principles basic to most legal systems in the West […], the belief that law should be more than just an instrument of politics, that the state most of all should respect certain basic human rights."[103]

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100 Richard Sakwa, "The Dual State in Russia", 26(3) *Post-Soviet Affairs* (2010), 185-206; and *id*., *The Crisis of Russian Democracy: The Dual State, Factionalism and the Medvedev Succession* (Cambridge University Press, Cambridge, 2011), 1-52.

101 For an interesting sociological examination of how legal dualism might be reflected in the mindsets of ordinary people, see Kathryn Hendley, "Varieties of Legal Dualism: Making Sense of the Role of Law in Contemporary Russia", 29(2) *Wisconsin International Law Journal* (2011), 233-262.

102 Robert Conquest, *The Great Terror: A Reassessment* (Oxford University Press, Oxford, 2008), 286ff.

103 Ferdinand J.M. Feldbrugge, "Law and Political Dissent in the Soviet Union", in D. Barry, W. Butler, and G. Ginsburgs (eds.), *Contemporary Soviet Law* (Nijhoff, The Hague, 1974), 55.

It is hard to see what the added value might be of considering this parallel system as legal, at least for those who do not confuse the law and organized coercion, which can exist semi-autonomously in relation to one another. In the end, the verdicts of the troikas were found to be invalid (contrary to Soviet criminal law of the time), and the victims of the purges were rehabilitated during the Khrushchev Thaw. The same goes for "telephone law' and similar illegal practices in the Soviet system that were formally prohibited but went unpunished. As a result, they did not become legally valid and therefore cannot be classified as legal, constituent parts of a parallel legal system. A description of Russian law in terms of this institutional dualism would lead to serious conceptual confusion. In order to avoid such confusion, lawyers should carefully distinguish between *de iure* and *de facto*, between normative imputation and factual coercion.

A more appropriate tool for describing the dualism that was visible in Soviet law and is still apparent in contemporary Russian law is an analysis of legal thinking. On the one hand, from the standpoint of both Soviet and Russian law, judges and other law officers are bound only by the law (Art.112, 1935 Soviet Constitution; Art.155, 1977 Soviet Constitution; and Art.120, RF Constitution). On the other hand, lawyers in these legal systems do not consider legal norms as independent imperatives (whose validity is not dependent on someone's will). Law is conceptualized formalistically as a set of imperatives (commands) mandated by the sovereign power. The specific Russian connotation of the term "state" (*gosudarstvo*)—*prima facie* referring not to the institutions but to the person of the ruler[104]—could not but reinforce the decisionist element in Russian law. Based on this logic, the law is always a means to implement someone's will: not the abstract will of an abstract legislator (which conceptually leads to conferring lawmaking power on judges) but the real will of political rulers or other power holders. To avoid subjectivism in the application of the law, judges are asked to implement the will of these power holders, which is real or, in this sense, objective for these judges, who are not trained to find "objective constraints" in practical rationality and in tacit social conventions.[105] This prompted the Soviet theory of state and law to look for a synthesis between formal and decisionist dimensions of the law.

104 Oleg Kharkhordin, "What Is the State? The Russian Concept of *Gosudarstvo* in the European Context", 40(2) *History and Theory* (2001), 206-240.

105 In this light, one can explain the fact that most legal norms in Russia have always emanated from the bureaucracy (decrees, instructions, etc.) and not from an independent parliament. See William E. Pomeranz, *Law and the Russian State: Russia's Legal Evolution from Peter the Great to Vladimir Putin* (Bloomsbury, London, 2018).

5 Legality, Decisionism and Formalism

One of the theoretical curtains used to hide the decisionist dimension of the law in Soviet legal scholarship was the conception of socialist legality (*zakonnost'*). This legality was conceived as permeating all activities of all authorities and, in some interpretations, all important aspects of private life too.[106] The idea of legality first appeared in the first years of Soviet rule when "revolutionary legality" was proposed by Stuchka as a counterargument to bourgeois legal theories of the rule of law.[107] As a matter of fact, this idea was coextensive with the concept of "revolutionary expediency" and contained a sort of theoretical solution to the problem of exception in law.[108] As Professor Cercel notes, the Soviet conceptualization of legality implied the exceptional character of the application of the law, as "legality was historically consubstantial with a normalized state of exception marked by extrajudicial measures, deportations and killings, and which was itself a state of exception".[109]

At face value, this conception presupposed that the law is a set of independent directives that leave no room for interpretation to judges or other law officers. From the vantage point of formalism, there can be only one correct interpretation of a legal rule: the interpretation that reveals the true will of the sovereign, who imperatively sets out this will in statutes and other legal texts. This will is supposed to control all social relations. The coherence or persuasiveness of legal reasoning is irrelevant when it comes to the correct interpretation of this will. A judge simply has to establish the sovereign will (which in fact can well be the will of the *Politburo* (the Political Bureau of the CPSU which was the supreme government body in the USSR), a *partburo* (a local bureau of the CPSU) or a *partkom* (a committee of the CPSU) and settle cases based on that will regardless of the justification (if any) the judge gives for their decision or how coherent their reasoning is. This positivist account of law was (and still is) widely accepted at Soviet (Russian) legal academies, constituting one of the main conceptual foundations of the Soviet theory of state and law.

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106 In the words of one of the main proponents of this theory, socialist legality is "a strict and indisputable observance and execution of Soviet laws by all organs of the Soviet state, by all establishments and social organizations, by all officials and citizens". See Mikhail S. Strogovich, *Osnovnye voprosy sovetskoi sotsialisticheskoi zakonnosti* [Key Problems of Soviet Socialist Legality] (Nauka, Moscow, 1966), 3. On this theory, see Gordon B. Smith, "The Development of 'Socialist Legality' in the Soviet Union", in Peter B. Maggs, Gordon B. Smith, and George Ginsburgs (eds.), *Law and Economic Development in the Soviet Union* (Westview Press, Boulder, CO, 1982), 77-97.

107 Postanovlenie IV Vserossiiskogo Chrezvychainogo S"ezda Sovetov (8 November 1918) "O revoliutsionnoi zakonnosti" [On Revolutionary Legality], *Sobranie uzakonenii RSFSR* (1918) No.90 item 908.

108 See, for example, Aron Trainin, "O revoliutsionnoi zakonnosti" [On Revolutionary Legality], *Pravo i zhizn'* (1922) No.1, 5-8.

109 Cercel, *op.cit.* note 36, 103.

But this was only one side of the coin. On its flipside, this conception of legality supposed the freedom of action for those decision makers who did not belong to law enforcement or the judiciary. If judges had to be bound by the law, this did not mean that high-ranking members of the Communist Party and other privileged individuals had to be bound by it as well. On the contrary, the Communist Party, as "the leading and guiding force in Soviet society", had to specify the social priorities and the manner of implementing those priorities, including identifying cases in which it would be expedient not to observe the law.[110] Evidently, the "bright communist future" could not be built by observing the law. In many practical situations, legal formalism only impedes the attainment of such lofty goals, and in this light certain political bodies were vested with the power to decide about the state of exception, to put this in Schmittean terms.

This conclusion is not surprising: if the law is conceived of not as a tool of practical rationality that makes it possible to reasonably manage individual and eventually public affairs, the application of the law (the law being taken as the sovereign's will) would easily result in irregularities—the will of the sovereign (the state, the ruling class, etc.) is only an intellectual construct that cannot be established in any empirical way. Soviet judges and lawyers faced the same problems as their confrères in the West: in certain situations, the literal application of legal norms could result in injustice, and therefore the legal system had to provide a way to avoid this undesirable effect. The question was how to determine just what justice and injustice meant. If the law was understood merely as a set of commands, while the interpretation of the law in such situations required law officers to address not a practical rationality but the "objective needs" of the Soviet state, judges in such difficult cases should have consulted Party functionaries who could, *ex officio*, provide some "competent" advice. In this sense, telephone law was a logical sequence stemming from the prevailing legal theory, and in many instances it was a judge who called a *partkom* in uncertain

110 Art.6 of the 1977 Soviet Constitution defined the Communist Party of the Soviet Union as "the leading and guiding force of Soviet society and the nucleus of its political system", which, armed with Marxism-Leninism, "determines the general prospects for the development of society and the course of the domestic and foreign policy of the USSR, directs the great constructive work of the Soviet people, and imparts a planned, systematic and theoretically substantiated character on their struggle for the victory of communism". Constitution (Fundamental Law) of the Union of Soviet Socialist Republics, adopted at the Seventh (Special) Session of the Supreme Soviet of the USSR, Ninth Convocation, on 7 October 1977, in F.J.M. Feldbrugge (ed.), *The Constitutions of the USSR and the Union Republics: Analyses, Texts, Reports* (Sijthoff and Noordhoff, Alphen aan den Rijn, The Netherlands, 1979).

situations (where judges were not confident about the best interpretation of Soviet law), and not the other way around.[111]

This concept was reconfigured in 1937, when Vyshinsky tried to provide a theoretical justification for Stalin's invectives against those Soviet legal scholars who denied the law and its value. Denouncing these "nihilist' moods that did not toe the Bolshevik Party line, Vyshinsky argued against Pashukanis and Stuchka, saying that:

> "In reducing the law to policy, these gentlemen have depersonalized the law as the totality of statutes, undermining the stability and authoritativeness of the statutes, and suggesting the false idea that the application of the statute is determined in the socialist state by political considerations, and not by the force and authority of the Soviet statute. Such an idea means bringing Soviet legality and Soviet law into substantial discredit [… and results in] disarming the working class in the face of its foes, and in undermining the socialist state."[112]

In Soviet jurisprudence, this exceptionalist conception of legality was developed with such categories as the "interests of the class struggle" or the "interests of building Communism" (*interesy kommunisticheskogo stroitel'stva*). Today, this exceptionalist approach to the law is based on ubiquitous references to sovereignty or traditional values, and it is not hard to recognize this line of thinking in contemporary debates about inviolable Westphalian sovereignty and the "limits of concession".[113] It is remarkable that, in both cases, similar ideas, although with different axiological content, are utilized to achieve the same conceptual goals: to justify the unchecked sovereign power to be above the law and to deny the inviolable rights of citizens with the help of broadly interpreted exceptions. One could argue that this dualist attitude toward the law (the hyper-positivism and decisionism in the prevailing legal theory) still persists in Russian approaches to the law.[114]

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111 Robert Sharlet, "The Communist Party and the Administration of Justice in the USSR", in D. Barry *et al.* (eds.), *Soviet Law after Stalin*, Vol. 3 (Sijthoff & Noordhoff, Alphen aan den Rijn, The Netherlands, 1979), 321-392; and Peter Solomon Jr., "Soviet Politicians and Criminal Prosecutions: The Logic of Intervention", in J. Millar (ed.), *Cracks in the Monolith* (M.E. Sharpe, Armonk, NY, 1992), 3-34. This situation resembles the *référé legislatif* in revolutionary France, where judges had to ask the parliament how to interpret and apply the law if they were unclear about its meaning. It should be mentioned in passing that the 1789 Revolution in France was considered to be among the immediate predecessors of the 1917 October Revolution in Russia and, therefore, its events and experience could be legitimately referred to as a source of useful examples.

112 Andrei Vyshinsky, *K polozheniiu del na fronte pravovoi teorii* [About the Situation on the Legal Front] (Iurizdat, Moscow, 1937), cited in *Soviet Legal Philosophy* (Harvard University Press, Cambridge, MA, 1951, Hugh W. Babb, transl.), 329.

113 Valerii Zorkin, "An Apologia of the Westphalian System", 3(2) *Russia in Global Affairs* (2004), available at <http://eng.globalaffairs.ru/number/n_3371>; *id.*, "Predel ustupchivosti", *op.cit.* note 24.

114 For an example of the Russian-specific attitude toward international law, see Mälksoo, *op. cit.* note 7.

In the years of the Khrushchev Thaw after Stalin's death, some Soviet legal scholars (including Alfred Stalgevich, Stepan Kechekian, and Andrei Piontkovskii) sought to reconsider the formalist approach imposed by Vyshinsky. They argued that the law is based not only on state commands but, also, on social relations, consciousness, ideology, and other societal phenomena that shape legal normativity. However, the all-pervasive "state will" was supposed to be in the background of these "objective" elements of legal regulation.[115] Therefore, this "broader approach" could not create theoretical obstacles for state officials or party bosses to carry out their intentions under the cover of "state will". To legitimize their discretion, it sufficed to mention that statutory norms would be overruled for the sake of some "objective needs" or "social determinisms". To a certain extent, in the 1960s this exceptionalist approach enshrined the use of general clauses in legislation that allowed very different interpretations.[116]

In this way, anti-formalism, the second element of Soviet legal theory, hidden in the shadows in Vyshinsky's legal theory, once again rose to the surface in the form of "objective determinisms" allegedly reflected by the collective consciousness, the official ideology, or social practices. Unlike in Western non-positivist legal theories, these "determinisms" did not address human rationality or moral principles as reference points for identifying a law's validity. The lengthy and extensive discussion among Soviet lawyers about both narrow and broad approaches to the law in the second half of the 20th century[117] practically focused, for the most part, on the question of whether it was laudable or not to depict the law as it is (distorted in its applications by ideology and discretion) or to hide this prerogative side of Soviet law behind theoretical curtains. These debates were still ongoing on the eve of perestroika, and a group of influential Soviet legal theorists in 1986 called for "re-establishing on a broader theoretical foundation the unity of law, once analytically undermined, for representing law as a whole where all its parts interact, and for showing the place and the function of each part".[118]

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115 See, for example, *Marksistsko-leninskaia obshchaia teoriia gosudarstva i prava: osnovnye instituty i poniatiia* [The Marxist-Leninist General Theory of State and Law: The Basic Institutions and Concepts], Vol.1 (Iurlit, Moscow, 1970), 377-378.

116 Gianmaria Ajani, "Formalism and Anti-formalism under Socialist Law: The Case of General Clauses within the Codification of Civil Law", 2(2) *Global Jurist Advances* (2002), 1535-1661.

117 The main points of these debates were summed up during a 1979 discussion among Soviet legal theoreticians about their understanding of Soviet law. Their proceedings were published in two issues of the central Soviet law review as "O ponimanii sovetskogo prava" [About An Understanding of Soviet Law], *Sovetskoe gosudarstvo i pravo* (1979) Nos.7&8.

118 Vladimir P. Kazimirchuk, Vladimir N. Kurdiavtsev, and Aleksei M. Vasiliev, *Pravovaia sistema sotsializma: poniatie, struktura, sotsial'nye sviazi* [The Legal System of Socialism: Its Concept, Structure, Social Links], Vol.1 (Iurlit, Moscow, 1986), 28-29.

6 Actual Implications

The persistence of such ideological attitudes does not necessarily mean that there are real social or cultural foundations for this theoretical dualism: taken as "false consciousness", ideology does not imply any necessary congruence between its postulations and real facts, although it still can direct our social behavior.[119] Therefore, this conceptual dualism in legal thinking does not necessarily presuppose any factual dualism between how mundane cases and high-profile cases are considered in Russian courts.[120] Because of their different characters, moral standings, personal experiences, or life conditions, judges can be closer to one or another pole of this dichotomy, no matter what they learned at law school. Nor is there any conceptual need to construct two parallel legal systems to explain the systematic practice of political meddling in judicial (and, more broadly, legal) decision-making.

It is rather an evaluative judgment to say that the number of high-profile cases justifies putting them into a particular class (a prerogative legal system that supposedly coexists with the system of official law) and, therefore, justifies a binary logic in describing Russian law. Given our focus on the intellectual representations that an epistemic community of lawyers may have about their law, we do not need to discuss whether the ideology that underlies these representations corresponds to facts or not. At the same time, logical inconsistencies do not weaken ideologies. One may well criticize the defeasible argument from authority (the cornerstone of the command theory of law) for its fallacy or argue that the formalist fidelity to the letter of the law logically excludes nihilist contempt for the posited law. However, these logical confusions do not necessarily discredit and sometimes may even reinforce ideological constructs and their "fetishistic mode of functioning".[121]

This characterization of the prevailing legal theory (not of the legal system) in the Soviet Union as a dualist one leads to the conclusion that the positivism (formalism) that allegedly reigns in Central European jurispru-

119 Slavoj Žižek, *The Sublime Object of Ideology* (Verso, London and New York, NY, 2008); and Rafał Mańko, "'Reality is for Those Who Cannot Sustain the Dream': Fantasies of Selfhood in Legal Texts", 5(1) *Wroclaw Review of Law, Administration & Economics* (2015), 24-47.

120 One may well argue that political interference could potentially take place in any legal system, although to different degrees. The law is politics everywhere, as Duncan Kennedy and other proponents of critical legal studies (CLS) would say, and in this sense every legal system may reveal some elements of its "dark", prerogative side—examples of cases decided in favor of power holders and contrary to the letter (spirit) of the law. The number of such cases would be lower in established democracies with lengthy rule-of-law traditions such as the United Kingdom, the United States, France and Germany than in authoritarian states or in transitioning legal systems, but this proviso does not undermine the veracity of the general postulation of CLS.

121 Žižek, *op.cit.* note 119.

dence[122] did not unconditionally prevail in the Soviet Union or in former Soviet countries. Both in Soviet legal theory and in current Russian theory, the strict positivist attitude toward the law has always been significantly mitigated by decisionist considerations that made it possible to avoid applying the letter of the law in "high-profile cases". Slavophiles, populists (*narodniki*), and monarchists underplayed the relevance of legal norms in imperial times: for the communist ideology, fidelity to the letter of the law was anything but valuable for the purposes of the Soviet regime.

This inevitably raises the question: what then could work as the supreme criterion of validity? Or, in other words, how can judges and other law officers identify the state of exception and/or those who have the power to decide about this state? A simple reference to formal legal acts (including constitutions) would not work here, as these acts are themselves defeasible and can be repealed by way of exception. The factual will of individual political rulers is a better indicator, and Pashukanis was well aware of this when he suggested that the administration in a socialist society would not need norms at all and would be better managed manually. As elucidated above, however, a number of practical reasons prompted the Soviet authorities to keep the law as a means of social regulation and to tackle this question in a different manner. One apparent response to this question follows logically from Lenin's idea that there are some objective realities ('material basis") that predetermine our thinking and action, which only reflect these realities.[123]

But even this reflection is indirect. First, this basis is mirrored in the social consciousness, which is a reservoir of collective values and ideas and serves as the supreme source of normativity in society,[124] imposing itself over individual consciousness. Norms or principles that do not fit these sources can be considered devoid of binding force. The latter should rather be sought in vague conservative ideals that supposedly serve as manifestations of these realities. As hinted at above, this approach has many affinities with the natural-law doctrine, which is based on the same methodological strategy: to construe two parallel legal systems (posited law and natural law, the latter being the criterion of validity of the former).

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122 Zdenek Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?*, in William B. Simons (ed.), *Law in Eastern Europe*, No.61 (Martinus Nijhoff Publishers, Leiden, 2011).

123 Jane Burbank, "Lenin and the Law in Revolutionary Russia", 54(1) *Slavic Review* (1995), 23-44.

124 Typical of this logic, the first Bolshevik Decree on Courts "O sude" [On Courts], *Sobranie uzakonenii RSFSR* (1918) No.26 item 404, proclaimed that the legal norms of the previous government were valid to the extent that they did not conflict with the "revolutionary legal consciousness" (*revoliutsionnoe pravosoznanie*). This consciousness did not refer to the personal legal feelings and emotions of judges but rather to collective intuitions allegedly shared by the working class (the author of this decree, Mikhail Reisner, was a follower of the Polish legal realist Leon Petrażycki).

Both Soviet legal theory and natural-law doctrines thereby recognized that there is some "objective reality" that is supposed to be behind the law. Nonetheless, unlike in ius naturalist philosophy, such suppositions in Soviet law did not lead to discussions about moral or intellectual dimensions of this "objectivity" or about ways to rationally ascertain these dimensions. Having turned Hegelian philosophy upside down, Marx and his followers could not recognize the superiority of ideals over social practices, which is the central point in most natural-law doctrines.[125] Then, this "objectivity" is usually proclaimed from above, so that establishing objectivity implies an intellectual deconstruction of the ideological messages of political (or in some situations judicial) authorities by way of guesswork, fishing from them what ought to be done. This dimension was clearly visible in the ideological messages from the Communist Party, the Komsomol, and other ideological bodies in the Soviet Union and, to some extent, in directing guidelines decreed by the Soviet supreme courts.[126]

History repeats itself, albeit with different configurations, in Russia and in other former Soviet countries where challenges to official narratives about this "objectivity" (be it national values, spirit, or identity) are often seen as subversive: in the end, they risk calling into question the lawmaking power of the state. If there were social authorities (public opinion, the legal community, the expert community, international bodies, and so on) that could assume the power to decide about an "objective dimension" of the law, their evaluations could undermine the prevailing scheme of the binding force of the law—everything decreed by the state is legally binding. In democratic countries, such "moral authorities" can exert far-reaching influences on lawmaking and on the application of the law, and they normally constitute an important element in the societal system of checks and balances that prevent the state from becoming authoritarian.[127] There is no need to point out how dangerous such "moral authorities" (be it the legal community or any other societal organism) could possibly become for authoritarian political regimes.

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125 One could well argue that Marx's wishful thinking about the proletarian revolution and classless society rested equally on idealism and not on material realities. See, for example, Nikolai A. Berdyaev, *The Origin of Russian Communism* (Univ. of Michigan Law School, Ann Arbor, MI, 1959, R.M. French, transl.). This is evidently true, but what matters here is how Russian Marxist-Leninists understood this perspective and not whether their understanding was correct.

126 Such directing guidelines (*rukovodiashchie raz"iasneniia*) were set forth in normative rulings (*postanovleniia*) of the presidiums of the supreme courts of the Soviet Union and of its constituent republics. Such guidelines contained instructions to lower courts on how to interpret and apply the law and were binding on them.

127 David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, Cambridge, 2006). Surely, these mechanisms can be subject to improper interference and lobbying, which can distort their work even in democratic countries. In light of the voluminous critical literature, there is no way to idealize these mechanisms in Western countries, and we do not attempt to do so here.

In this light, disrespect toward the law in Russia (the notorious "legal nihilism") is not the inevitable result of a nihilist legal culture that, according to some scholars,[128] is specifically Russian. It can be understood as a result of an indoctrination that is not premeditated but that is the result rather of intellectual inertia. Accepted theoretical opinions about the law suggest that it be considered instrumentally, only as a means of carrying out the sovereign will, while rights are valid only insofar as they are tolerated by state power.[129]

The many negative sides of legal nihilism notwithstanding, some philosophers would nonetheless argue that this dualist attitude toward the law is not something intrinsically wicked: such famous Russian thinkers as Vladimir Soloviev, Fyodor Dostoevsky or Aleksandr Solzhenitsyn justified contempt for the law by claiming that moral and religious precepts took priority over legal ones,[130] even if it stands beyond doubt that the relentless application of the decisionist approach can often result in injustice. Also, in some situations, the decisionist approach will possibly lead to better results than strict positivism of the "*Gesetz ist Gesetz*" sort, especially in countries with relatively poor-quality statutory laws. This was, in particular, the source of inspiration for Russian proponents of precedent law (the so-called "precedent revolution" flagged by the chief justice of the former RF Supreme Commercial Court, Anton Ivanov[131]) who, several years ago, called for the vices of Russian legislation to be cured by allocating more freedoms to high courts to broadly interpret and change statutory norms.[132]

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128 Manfred Hildermeier, "Das Privileg der Rückständigkeit. Anmerkungen zum Wandeleiner Interpretationsfigur der Neueren Russischen Geschichte", 244 *Historische Zeitschrift* (1987), 557-603; Laura Engelstein, *Slavophile Empire, Imperial Russia's Illiberal Path* (Cornell University Press, Ithaca, NY, 2009), 20-23; and René Provost, "Teetering on the Edge of Legal Nihilism: Russia and the Evolving European Human Rights Regime", 37(2) *Human Rights Quarterly* (2015), 289-240.

129 Henry E. Hale, "Civil Society from Above? Statist and Liberal Models of State-Building in Russia", 10(3) *Demokratizatsiia* (2002), 306-321; and Petr Preclik, "Culture Re-introduced: Contestation of Human Rights in Contemporary Russia", 37(2-3) *Review of Central and East European Law* (2012), 173-230.

130 Realist approaches also exist in leading civil-law countries, *e.g.*, the realist school of Michel Troper in France or the realist jurisprudence of Giovanni Tarello, Riccardo Guastini, and others in Italy, not to mention realism in US legal philosophy. Surely, these are based on axioms and ideas that are quite different from the Russian context. It goes without saying that realism in the Eastern European context leads to quite different results than in the Anglo-American or Scandinavian legal systems, where it does not have the nihilist connotation that is specific to the realist approach in Russian legal culture. The latter context refers to the absolute power of the sovereign to grant or take away rights.

131 Mikhail Antonov, "O nekotorykh teoreticheskikh voprosakh pretsedentnoi revoliutsii v Rossii" [Some Theoretical Questions Concerning the Precedent Revolution in Russia], 34(4) *Zhurnal konstitutsionnogo pravosudiia* (2013), 9-14.

132 William Pomeranz and Max Gutbrod, "The Push for Precedent in Russia's Judicial System", 37(1) *Review of Central and East European Law* (2012), 1-30.

Even after the Supreme Commercial Court was disbanded in 2014, this decisionism still holds sway in Russian jurisprudence on the basis of this theoretical justification.

Conclusion

This undercurrent theoretical combination of the formalist and anti-formalist accounts of law existed throughout the history of Soviet law, implying that, on the one hand, there was a statist theory of law, and, on the other hand, there was decisionism inspired by the Marxist-Leninist class theory.[133] It is this decisionism that transpires in Russian (Soviet) legal thinking where the law is only an epiphenomenon of economic relations, so that "within the Marxist position the signifier law does not denote, if anything, a self-referential, closed system of rules; rather it points towards a specific part of social normativity entangled in the fabric of economic dynamics".[134] The law is represented as either the result of class struggle or, in current debates, as the result of struggle for identity and sovereignty. Legal norms (propositions) as such have never been prioritized in either Soviet or Russian legal theory—these norms are normally seen as indicators of what the political will is and not as imperative, independent of the political, judicial, or other will. What is legal is what the political authorities order—that is the point at which legal formalism and decisionism perfectly fit each other. The liberal narratives about the intrinsic value of rights and of the law used to be (in Soviet law)—and still are—taken by many scholars *cum grano salis*, and in the prevailing official discourse they are often considered an artificial cover for subversive influences conducted with the help of such ideas as human rights or the rule of law.

This follows quite clearly from this theoretical position. At best, the law was accepted in Marxist legal theory as a provisional means of regulation until the enemies of the working class were defeated and a classless society emerged. Then the law would fade away as redundant, but, until that moment, the law should be tolerated and pragmatically utilized under the ideological supervision of the Communist (Bolshevik) Party. It goes without saying that this attitude did not imply any respect for the law: it could be disregarded whenever necessary for a higher cause (attainment

133 Rett R. Ludwikowski, "Socialist Legal Theory in the Post-Pashukanis Era", 10(2) *Boston College International and Comparative Law Review* (1987), 323-342.

134 Cercel, *op.cit.* note 36, 51.

of communism or preservation of sovereignty).[135] The logical conclusion from this theoretical posture implies that rights are not generally perceived as binding in virtue of their intrinsic meaning in an epistemic community (as preconditions of civilized interaction), but only insofar as they are commanded and supported by the state, or if their observance is consistent with the priorities of state policies.

It remains to be discussed whether post-Soviet Russia (and other countries in the region) can go beyond this theoretical impasse, as adopting new laws and constitutions is not enough to change mindsets. The analysis undertaken above leads to the conclusion that the old legal mentality still holds sway among lawyers, although this conclusion should not be understood in black-and-white terms: there are non-conformist lawyers who may re-evaluate the Russian legal system from alternative standpoints. But so far, Russian legal theory and legal scholarship in general have done too little to catch up to the level of discussions taking place in the world and eventually to become a moral authority that could, through public debates, provide constraints against incompetent, excessive legislation and flawed court practices. Such a revision of the legal system and unveiling its intrinsic rationality to restore the genuine value of rights was the major message of *Vekhi* a century ago, and this task is likely to remain something that contemporary Russian lawyers need to deal with. Revisiting established theoretical ideas could be one of the main steps in this direction.

With this purpose in mind, in the next chapter, we will examine the conception of Chief Justice of the RF Constitutional Court, Valerii Zorkin, to reveal the methodological and philosophical premises of their works. These premises hinge on the theoretical constructions of Russian jurisprudence, developed in pre-revolutionary legal philosophy and, also, in Soviet legal scholarship. It is revealing to study these premises against the backdrop of Western legal conceptions to which Chief Justice Zorkin attempt to adjust Russian intellectual tradition. Despite their arduous efforts, this attempt fails. This failure only reveals the methodological distinctiveness between the premises in question and the relevant Western conceptions (the economic analysis of law and human rights doctrine, respectively). This confirms our thesis that any ideological changes in Russian law—involving

135 As an example, we can cite Art.1 of the 1922 RSFSR Civil Code:

> "Civil rights are protected by the law except in situations in which these rights are utilized contrary to their social and economic purpose." Art.5 of the 1964 RSFSR Civil Code made this even more explicit: "Civil rights are protected by law, except in instances in which they are exercised in contradiction to their purpose in a socialist society in the period of the building of communism. In exercising their rights and performing their obligations, citizens and organizations must observe the law, and must respect the rules of socialist communal living and the moral principles of a society which is building communism."

See *Civil Code of the Russian Soviet Federated Socialist Republic* (Univ. of Michigan Law School, Ann Arbor, MI, 1965, Whitmore Gray and Raymond Stults, transl.).

an adaptation of Western conceptions without revisiting the main methodological schemes and theoretical tools of legal thinking—will be only decorative. Such changes will not touch upon the substance of Russian law and, quite likely, will end up in controversies, as the divergence of the starting methodological points sooner or later will come to the surface.

2 The Philosophy behind Human Rights: Valerii Zorkin vs. the West?[136]

Foreword

This Chapter continues to analyze the tension between formalism and decisionism against the background of Russian exceptionalism in legal matters. This analysis focuses on the writings and public discourses of another member of the Chief Justice of the RF Constitutional Court, Valerii Zorkin. Approaching this problem from the aspect of legal philosophy, the Chapter suggests that two key points are important to understanding this exceptionalism: that of human rights and that of sovereignty. The Russian exceptionalist understanding of these two key points largely foreshadows Russian international policy and its "living" constitutional order. The ideas set forth by Valerii Zorkin are highly illustrative of this exceptionalism and can serve as a litmus test for revealing the philosophical background of Russian policies toward the ECtHR and, more generally, toward the Western liberal tradition. The narratives of Valerii Zorkin can be seen as illustrative of the conservative backlash of the Russian judiciary which was initially enthusiastic about Western legal principles and standards. As many other Russian constitutional lawyers, Zorkin became more critical toward them when he saw their theoretical and practical consequences. In our opinion, this track is also characteristic for the moods of the Russian judiciary in general. These moods fit to the prevailing style of legal thinking that still is based on the positivist doctrine as well as on the political constraints imposed on sovereign state power by supreme legal principles such as human rights.

136 An earlier version of this Chapter was originally published in 2017 in Mälksoo and Benedek, *op.cit.* note 70, 150-187. The present Chapter is an updated version of that work. References to page numbers, in parentheses, in the main text and footnotes of this Chapter are to works of the Chief Justice Zorkin.

Introduction

The hurdles preventing the modernization of Russian law and the spread of a culture of human-rights law[137] in Russia have already earned the attention of some leading Russian[138] and Western[139] experts. Their careful examinations reveal the many structural challenges faced by Russian courts and legislators, including those connected with legal mentality.[140] Examination of these challenges consequently leads to questioning their cultural and other foundations and the ways in which Russia reacts to them. Historically, one Russian reaction used to be opposing itself to the West[141] considering itself as the last stronghold of Orthodoxy or as the main outpost of socialism. Experiencing difficulties in modernization, Russia is likely to

137 By this term I mean the set of values, ideas and principles justifying the international-law constraints imposed on state policies and state legal rules for the sake of protection of basic rights and freedoms. See the description of this culture, its rise and its impact on international and constitutional law in the second half of the twentieth century in Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, Cambridge, MA, 2014).

138 For example, Anton L. Burkov, *Konventsiia o zashchite prav cheloveka v sudakh Rossii* [The Convention on Protection of Human Rights in Russian Courts] (Kluwer, Moscow, 2010); Sergei Iu. Marochkin, *Deistvie i realizatsiia norm mezhdunarodnogo prava v pravovoi sisteme Rossiiskoi Federatsii* [The Validity and Application of Norms of International Law in the Russian Legal System] (Norma, Moscow, 2011).

139 For example, Bowring, *Law, Rights and Ideology in Russia, op.cit.* note 35; Angelika Nussberger, "Russia and European Human-Rights Law: Progress, Tensions and Perspectives. Foreword", 37(1) *Review of Central and East European Law* (2012), 155-157; and Lauri Mälksoo, "Concluding Observations. Russia and European Human Rights Law: Margins of the Margin of Appreciation", 37(1) *Review of Central and East European Law* (2012), 167-170.

140 See Gennadii A. Satarov, Iurii N. Blagoveshensky, and Vladimir L. Rimsky, *Sotsiologicheskii analiz pravosoznaniia sudei, naseleniia i predprinimatelei* [A Sociological Analysis of the Legal Consciousness of Judges, The Populace at Large, and Enterpreneurs] (Indem, Moscow, 2015). Based on public opinion polls, the authors point to many examples of how confusingly Russian judges perceive human rights. One of these examples is that 70% of the judiciary think that human rights are inherent to individuals, who entrust protection of these rights to the state; and at the same time 58% of the same judiciary think that human rights can be granted only by the state and do not exist before being recognized and posited by the state (p.60). This means that at least 28% of the judges interviewed do not see the fundamental difference between the two contradictory propositions, which evidently demonstrates the deficiency of their basic legal education. Not surprisingly, more than 8% of judges find that ECtHR judgments against Russia humiliate their country (p.31). The authors wisely remark that their research "undoubtedly shows that there are problems in legal education […], so that neither professional legal education nor daily legal practice exercises any impact on formation of the fundamentals of legal mentality" (p.119).

141 In this chapter, we utilize the term "West" or "Western" in an ideologically neutral sense, aiming to cover the culture and institutions that prevail in the countries of Western Europe and North America, keeping in mind that conflicts and inconsistencies can arise between certain cultures and institutions from different countries belonging to the same legal tradition and even within the same country. At the same time, we are not inclined to label as "Western" everything that comes from the EU and its structures—a good deal of differentiation is needed in this aspect.

revert to the same strategy in the post-*perestroika* years. This is attested to not only by public speeches and discussions by political leaders but, also, by a series of legislative amendments and important court decisions.[142] With that in mind, below we will undertake an analysis of some aspects of the prevailing legal thinking in Russia[143] that, perhaps, underlies a great deal of exceptionalism in legal matters—especially as far as human rights are concerned.

The Russian legal system sometimes is represented as heterogeneous to Western law, as a regulative order with another ideology, mentality, and cultural attitude to law and legal institutions.[144] These representations are methodologically questionable as very few of them focus on the dialectics of specificity/identity (*i.e.*, to what extent a set of specific characteristics makes a country part of another "legal universe", separating it from a set of other countries), without which one cannot appreciate the relevance of the differences that always exist between legal cultures. However, there is more than a grain of truth in describing Russian law as based on an intellectual background somewhat different from that of Western law. Entering into communication with Russian lawyers, their Western confrère (or a Russian lawyer with a Western education) can frequently sense that basic categories, principles, and concepts are perceived and applied quite differently—even if they bear the same titles and fulfill similar functions. As a rule, the difference does not go as far as the point of complete misunderstanding. Still, some preparatory work is reasonably needed to alert both sides to possible discrepancies in interpretations. Our experience is that, with this preparatory work done beforehand, further communication goes more smoothly and normally leads to more or less positive results in particular issues of legal practice.

142 In light of the relationship between Russia and the ECtHR, the most important signs of this growing exceptionalism are: (A) a 2015 law empowering the RF Constitutional Court to rule out execution of certain judgments of the ECtHR: Federal'nyi konstitutsionnyi zakon [Federal Constitutional Law] (14 December 2015) No.FKZ-7 "Ob izmeneniiakh v Federal'nyi konstitutsionnyi zakon O Konstitutsionnom sude Rossiiskoi Federatsii" [On Amendments to the Federal Constitutional Law 'On the Constitutional Court of the Russian Federation'"]; and (B) a Ruling of the RF Constitutional Court (14 July 2015) No.21-P, *op.cit.* note 16, holding that the Russian Constitution and its interpretations by the RF Constitutional Court enjoy primacy over international law and, also, over interpretations rendered by such supranational courts as the ECtHR. With these two legal acts, Russian exceptionalism has gained momentum after several years of ongoing controversies with European institutions.

143 Here and below, references to "Russian" or "Russia" will imply the Russian political leadership and judicial authorities whose rhetoric is the main subject matter of the present chapter. If not indicated otherwise, such references will not imply anything about the opinions of the Russian population or about Russian culture in general.

144 See Jessica C. Wilson, "Russian Cultural Aversion to the Rule of Law", 2(2) *Columbia Journal of East European Law* (2008), 195-231.

This kind of preparatory work is something that, in our view, is critically missing in top-level relations between Russian and Western politicians and the judiciary, which is patently attested by mutual indictments about "information wars" or "propaganda'. As a rule, "propaganda' turns out to be an interpretation from one standpoint which differs from the interpretation flowing from another standpoint, and "information wars" are related to coordinated policies to promote and justify these interpretations. Many scholarly papers are devoted to narrative analyses of such interpretations, and not a few ex-Sovietologists are thriving on these grounds. However, it is not the disparity between these interpretations that may constitute the object of important research but, rather, the distinction between the implicit conventions underpinning these respective standpoints.

To keep this chapter about Valerii Zorkin's legal philosophy at a manageable arm's length, we will not assess attitudes toward the ECtHR among the professional community of Russian lawyers or in the Russian population generally.[145] Some of these important sociological inquiries have already been conducted[146] offering many vital insights into the practical advantages, *e.g.*, for lawyers and their clients to have the ECtHR as one more "appeal" instance. Nonetheless, even if their findings do shed light on the impact of the jurisprudence of the ECtHR on the lives of Russians, the relevance of such public opinion polls is limited.

First, the population in general and even the community of lawyers in particular hardly possess full knowledge about all the convolutions and perplexities of membership, and the masses are hardly ever capable of basing their judgement on carefully elaborated and balanced scientific research; rather, drawing off-hand conclusions. From certain philosophical perspectives, the masses can be construed as the bearers of supreme wisdom; societies can be thought of in terms of a big organism (like the *Grand Être* in Emile Durkheim's sociology) developing a collective mentality which stands above and directs individual mentalities. However, we will hereafter base our analysis on the presupposition that only individual consciousness is real, and that all kinds of collective consciousness are merely intellectual constructs.

Second, popular and even professional opinions may fluctuate or be influenced by the (badly informed or biased) media. Therefore, nothing assures the relevance of human expectations to real institutional or cultural exigencies. At the same time, even if the focus of this chapter is not on

145 For some interesting indicators, see Alexei Trochev, "All Appeals Lead to Strasbourg? Unpacking the Impact of the European Court of Human Rights on Russia", 17(2) *Demokratizatsiya* (2009), 145-178.

146 For example, the detailed, 300-plus page report which was prepared by the Institute of Sociology of the Russian Academy of Sciences in 2011: *Dvadtsat' let reform glazami rossiian (opyt mnogoletnikh sotsiologicheskikh zamerov)* [Twenty Years of Reforms Seen through the Eyes of Russians (The Experience from Long-term Sociological Polls)] (ISRAN, Moscow, 2011).

popular mindsets or opinion polls, we briefly will address some available sociological data on legal education in Russia and on the "legal consciousness" of Russian judges and lawyers.

After a concise estimation of the problem of exceptionality and of how Russia's membership in the Council of Europe has (or has not) influenced the Russian legal system, we will characterize the philosophical foundations of Russian exceptionalism as they are set forth in Zorkin's writings. This analysis will provide material for pondering how Russia's membership in the ECtHR can contribute to overcoming deficiencies in prevailing legal thinking (and, in this sense, in the modernization of Russian law) and how the dialogue between Russia and the West about human rights could be better framed. This research question is not tantamount to evaluating whether ECtHR jurisprudence can (or should) establish the basic principles of Russian law or substitute/amend the principles already elaborated in the Russian legal system. These aspects undoubtedly are interconnected but not identical: analytically, it is possible that ECtHR jurisprudence will be supportive of modernization without having a direct binding (or even persuasive) force on the judiciary and the citizenry.

1 The Problem of Russian Exceptionality and Legal Education

Valerii Zorkin, the Chairman of the RF Constitutional Court, is highly influential in both the institutional and intellectual dimensions of the Russian legal sphere. If we choose Zorkin's writings for further analysis, this surely does not signify that his thinking is absolutely representative of the Russian legal community as a whole. A picture of Russian legal scholarship cannot be drawn only in black-and-white terms, and if below we equate Zorkin's attitudes to the general attitudes of Russian lawyers, this should be understood as an intentional shortcut for the sake of brevity and in the interest of a more concise analysis. That is why our conclusions should not be interpreted in terms of "each and every lawyer' or "each and every stratum of lawyers". For example, it is quite likely that our conclusions do not hold true for many human rights activists. Among Russian colleagues, there are some who also do not fall under this characterization although they are few in numbers. Our educated guess that the majority of Russian lawyers would readily share Zorkin's philosophy is based—along with our professional experience and intuition—on our evaluation of the available sociological data about the Russian judiciary and legal community.[147] But this guess is not a declaration of some objective and immutable truths.

147 Several important sociological agencies such as the Levada Center or WTsIOM which periodically publish polls and surveys on various questions including data concerning perceptions in Russian society of courts, of law-enforcement agencies, and so on. Some interesting data have been collected by such research centers as the St Petersburg-based Institute for the Rule of Law (<www.enforce.spb.ru>).

The same caveat needs to be added to our description of the prevailing legal education which, also, is rather a Weberian ideal type. The reality is that some (but still not many) Russian lawyers and law professors can read professional literature in foreign languages; some have a Western educational background or opportunities to go abroad for continued studies. However, these legal scholars and practitioners do not (yet) occupy key positions in the Russian political or academic establishment. They remain a negligible number as compared with the masses of those who graduate from Russian law schools and who stay to teach in those schools without experiencing any need for (discussions of) changes in the basic assumptions of their disciplines or, especially, any need whatsoever for (or rather, on the contrary, having an aversion to) "learning from the West'.

Consequently, intrusions into basic assumptions of the legal dogma taught in Russian legal academia (which, basically, repeats the dogma coined in the Soviet era) might easily be viewed by these "traditionalist" lawyers as destructive for legal science as a whole, as a part of the notorious "information war"[148] waged by the West against Russia which is one of the most frequent topics in Russian official media. This is something that clearly comes to the surface of Zorkin's narratives. In this sense, his writings are helpful to understanding the *Weltanschauung* underpinning the attitude which one can expect from an average Russian judge or law professor. Our hypothesis is that this *Weltanschauung* is not a random outcome of the Chief Justice's intellectual development but reveals some important dimensions that characterize the basic legal education of Zorkin's generation and of succeeding generations of graduates of Russian (Soviet) law schools.

Given his philosophical background, his strong personality[149] and keen legal intuition, as well as his interest in alternative Western legal conceptions—which is still rather rarely encountered in other Russian judges—Zorkin better (or, perhaps, deeper) than anyone else illustrates

148 Or "unfair competition", another term specially utilized by Russia's top justices—Valerii Zorkin and, also, Anton Ivanov, former Chairman of the Supreme Arbitration (Commercial) Court—to show that Russian courts are denigrated by their Western counterparts and, for this reason, are held to be corrupt and unprofessional. The term ("unfair competition" or "*nedobrosovestnaia konkurentsiia*" as applied to foreign courts and their policies toward Russian courts) was introduced in 2012 by Anton Ivanov in his speech under the pretentious title "The Declaration of Court Sovereignty": Anton A. Ivanov, "Deklaratsiia sudebnogo suvereniteta", presentation made on 17 May 2012 at the Second International Legal Forum in St. Petersburg, available at <http://www.arbitr.ru/press-centr/smi/52305.html>. See the comments by RF Constitutional Court Chief Justice Zorkin on this idea: Valerii Zorkin, "Transformatsiia otnoshenii sobstvennosti: global'nye tendentsii i rossiiskii opyt" [The Transformation of Property Relations: Global Tendencies and Russian Experience], presentation made on 31 May 2012 at the Dialogue of the Judges of the Russian and German Higher Courts in Moscow, available at <https://rg.ru/2012/05/31/zorkin.html>.

149 Zorkin is famous for presiding over the RF Constitutional Court which, in 1993, declared as unconstitutional Yeltsin's Edict No.1400 on disbanding the Parliament. Predictably, it led to Zorkin's dismissal after Yeltsin shelled Parliament and gained the upper hand.

how the majority of Russian lawyers are disposed to think about human-rights law, and what implications this thinking might eventually bring about for the dialogue between Russia and the West about human rights. Zorkin's deliberations are also remarkable because they reveal a relatively coherent philosophical position that might be illustrative of the conceptual difficulties connected with the modernization of Russian law.[150] Unlike the shallow ideas of such Russian contemporary conservative thinkers as Aleksandr Dugin, Sergei Kurginian, or Vladislav Surkov, the Chief Justice tries to develop a balanced legal philosophy combining different approaches although solely within the perspective in which he himself understands law and sees the Russian legal *Sonderweg*.

Zorkin demonstrates a good deal of intellectual honesty when he directly admits his propensity to authoritarianism;[151] this is not an easy step for the constitutional chief justice of a country that, according to its constitution, is democratic. And of intellectual bravery: he undertakes an attempt to demonstrate philosophically that authoritarianism is better (for contemporary Russia) than "liberal" Western democracy exactly from the vantage point of the protection of human rights (*sic*!).[152] Educated as a legal philosopher—his 1967 PhD (candidate of sciences) thesis dealt with the legal philosophy of the Russian pre-revolutionary legal philosopher Boris Chicherin (1828-1904); and his 1978 habilitation thesis was devoted to positivism in Russian legal philosophy—Zorkin appositely discerns the central philosophical problem which may cast a shadow on the legal development of Russia. In Zorkin's description, this problem pertains also to human rights and can be articulated as follows.

On the one hand, transplanting foreign institutions (human-rights principles and standards inclusive) can provide no solution to a country's plight without appropriate shifts in legal culture and mentality. Transplan-

150 Here and in the following pages, we will use the term "modernization" only as far as legal systems are concerned and only in the sense of updating a legal system to the best and most efficient achievement in other legal systems, to "best world practices". How to define what is best and efficient, and if the best legal practices can be found only in the West, are separate questions that will not be addressed here.

151 In his 2014 speech at Moscow University, for example, he claimed that authoritarianism is a "good travel friend" for independent courts in Russia for the time being. Valerii Zorkin, "Sudebnaia reforma Aleksandra II: uroki dlia Rossii" [The Court Reform of Alexander II: Lessons for Russia], presentation made on 25 November 2014 at the IV Moscow Legal Week. Unless otherwise indicated, all discussions involving Zorkin will be cited according to their full versions available on the website of the RF Constitutional Court: <http://www.ksrf.ru/ru/News/Speech/> (one of the sections on the Constitutional Court's webpage is especially devoted to public speeches by the Chief Justice).

152 In 2015, the RF Constitutional Court Chairman asserted that a profound gap exists between individual and collective rights, the former being based on the philosophy of individualism, meaning they are therefore destructive for society. Collective rights are rooted in Christian values, so that a full imposition of human rights in Russia would mean a conflict between traditional Russian values and the individualist Western idea of rights. See Valerii Zorkin, "Pravo sily i sila prava" [The Law of Force and the Force of Law], presentation made on 28 May 2015 at the St. Petersburg International Legal Forum.

tation also will be meaningless if new institutions are detached from the political and social realities of the recipient country and will, therefore, remain inactive and inefficient. The Chief Justice asserts that every society is a "super-complex system with its specific culture, tradition and morality, with its nuances of internal moral legislation".[153] This complexity implies that there is the primacy of "basic ethical values" over formal legal texts (including international declarations); that legal principles and rules (also human-rights law) created for societies with other cultures and mentalities cannot be simply transplanted without adaptation to these "basic ethical values" of the recipient country.[154]

On the other hand, in the contemporary world, a country the size of Russia cannot remain unresponsive to legal developments in other countries and in international law. This is also true of human rights, and Zorkin regularly underscores that his Court strives to incorporate the world's best human-rights standards into the Russian legal order; that he personally does not intend to oppose the "Western doctrine of human rights.[155] However, these principles and standards cannot be incorporated mechanically, without the aforementioned "cultural acclimatization" of human rights to Russian realities and to "basic ethical values". That is why Zorkin's speeches usually end up in ecumenical pleas about mutual dialog; in equable calls to elaborate, together, a kind of integral theory of human rights.[156]

It is from these two ultimate points that Zorkin proceeds and to which he constantly returns in his various papers and discourses on Russia's place on the legal map of the world and on the protection of human rights in Russia. The solutions that he proposes for implementation of human rights in Russian law also oscillate between these two endpoints. Zorkin, to use his own metaphor, wishes to forge "scissors to suit the moral normativity of local Russian identities to legal enactments of a global world".[157] As a

153 Zorkin, "Sudebnaia reforma Aleksandra II: uroki dlia Rossii", *op.cit*. note 151, 13.

154 *Ibid*.

155 Zorkin, "Rossiia i Strasburg", *op.cit*. note 24.

156 His figurative discussions are, however, often ambiguous. For example, he concluded a 2016 narrative with a pathetic tirade that hinted at US world leadership saying that:

> "The current epoch of change brings the risk that under the leadership of 'conductors', configured in a certain way, a 'light music' of legal texts would sound like a funeral march […] In the name of the rights of present and future generations, we must do everything so the bright music of 'legal spheres' does not turn into a death knell."

Valerii Zorkin, "Doverie k pravu – put k razresheniiu global'nykh krizisov" [Trust in the Law Is the Way to Solve Global Crises], presentation made on 19 May 2016 at the St. Petersburg International Legal Forum.

157 Valerii Zorkin, "Problemy konstitutsionno-pravovogo razvitiia Rossii (k 20-letiiu Konstitutsii Rossiiskoi Federatsii)" [Problems of Russia's Constittuional and Legal Development (Dedicated to the Twentieth Anniversary of the Russian Federation's Constitution)], presentation made on 26 November 2013 at the International Conference "Constitutionalism and Legal System of Russia: Outcomes and Perspectives", 22.

legal philosopher, the Chief Justice cannot ignore the hiatus between two extreme positions (exceptionalism and universalism) in understanding human rights but does hope to decrease this gap through further "positivation" or "codification" of international law—to wit, through the meticulous formulation of texts of treaties and conventions that would enable (as he claims) the elimination of "double standards" and restoration of confidence in international law that was shattered after the "bipolar world" ceased to exist.[158]

Provided that the very function of human rights is to serve as supreme criteria of the legality of positive state enactments, it is not evident that this gap can ever be covered in any satisfactory way. The idea of "positivation" sounds doubtful against the backdrop of the major findings of twentieth-century legal philosophy (indeterminacy, defeasibility of legal texts, the impossibility of their "objective" interpretation).

Following this approach, Zorkin ends up with the thesis that Russian law is "particular, distinctive and not fitted for the framework of the European conception of human rights" and—repeating the words of Dostoevsky from his *Notes from the Underground*—paradoxically concludes that even if his (Zorkin's) conception sounds "retrograde, it is better than nothing".[159] However, the correct alternative here would be not "nothing" but, rather, a great deal of contemporary legal philosophy (including the modern versions of legal positivism) that could amply enrich and ameliorate the "dialogue with the West" for which Zorkin is desperately looking, and in which, in his opinion, the ECtHR has so far shown no serious will to engage. One could agree with Zorkin that what comes from the ECtHR as the "universalia of human rights" is not entirely democratically legitimated, and is sometimes conceptually contestable, but it does not justify his further thesis that "positivation of international law' or exceptionalism can be good ways to move forward.

Numerous comparative lawyers count Russia among the continental-law (civil-law) countries; some historical and ideological differences with other Romano-Germanic legal systems notwithstanding.[160] In fact, from the 18th century on, Russian law has been based on Western legal scholarship, especially German scholarship, and until now remains thoroughly imbued with Western concepts and techniques. But it is not only the historical aspect that matters: a swift look at the way Russian statutory law is crafted today shows clear traces of Western laws in almost every Russian draft bill. A striking example is the RF Civil Code (Part 1), largely inspired by the Dutch

158 Valerii Zorkin, "Pravo v usloviiakh global'nykh peremen" [Law in the Conditions of Global Changes], presentation made on 15 May 2013 at the St. Petersburg International Legal Forum, 2.

159 Valerii Zorkin, "Tsivilizatsiia prava: sovremennyi kontekst" [The Civilization of Law: The Contemporary Context], presentation made on 18 June 2014 at the St. Petersburg International Legal Forum, 9.

160 See Peter Maggs, William Burnham, and Gennadii Danilenko, *Law and Legal System of the Russian Federation* (Juris Publishing Inc., Huntington, NY, 2012, 5th ed.).

example, and even one of the most tarnished recent Russian laws—No.FZ-121 (20 July 2012) on foreign agents—ultimately finds its roots in the 1938 US FARA. This list could include many other examples, among which are curious attempts to incorporate Anglo-American rules on trust ownership into Russian law or to make Russian commercial courts follow the Anglo-Saxon precedential style of reasoning and decision-making.[161]

However, these and other abundant examples of Western rules, standards, and institutions transplanted into Russian law do not assure that this law becomes truly modernized in the sense of following the Western models and practices. The use Russian lawyers and judges make of such rules and institutions demonstrates that—being transplanted into the Russian intellectual and institutional context—these rules and institutions are applied in a very different manner. Evidently, Russian civil law does not resemble Dutch civil law just because its Civil Code was transplanted; rules on trusts regulate completely different issues in Russia and in the United Kingdom (to the point that no genuine "trust ownership" has appeared in Russian law); and the impact of the Russian foreign-agents law on NGOs is different compared with that of the 1938 US FARA.

The question arises as to whether Russia's ratification of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and its membership in the Council of Europe is not just a continuation of this long list of failed transplantations. Can it be that—while formally recognizing the primacy of international law and the supreme value of human rights—the RF Constitution (its Arts.15 and 2) does not correspond to Russia's "living" constitution describing how the legal order is really organized, how it functions, and how it actually treats international law and human rights? Some observers readily draw this conclusion, asserting that no genuine mechanisms for the protection of individual freedoms are available in Russia; that ECtHR jurisprudence provokes no substantial changes in Russian law; that it has not altered the mentality of the Russian judiciary in any way.[162]

The membership in the Council of Europe (and other European institutions) has undoubtedly influenced the development of Russian law. Nonetheless, ratification of treaties or transplanting statutes cannot, as such, bring about any substantial changes in the legal order or in the underpinning legal mentality; indeed, to think otherwise would be a naivety.

This naivety was patent in the years of Yeltsin's rule when Russian legislation was modified drastically—and, to a certain extent, inaccurately—in accordance with Western models. The liberal 1993 RF Constitution, numer-

161 Andrei Zhdanov, "Transplanting the Anglo-American Trust in Russian Soil", 37(1) *Review of Central and East European Law* (2012), 179-231; and William Pomeranz and Max Gutbrod, "The Push for Precedent in Russia's Judicial System", 31(1) *Review of Central and East European Law* (2006), 1-30.

162 Johnathan D. Weiler, *Human Rights in Russia: A Darker Side of Reform* (Lynne, Boulder, CO, 2004).

ous statutes copied from Western prototypes, a raft of treaties and conventions ratified—all this has left a visible imprint on the development of Russian law and, still, formally constitutes the cornerstones of the Russian legal order. Nonetheless, even if Yeltsin's government was working hard on westernizing the country and its law, *something* seriously hindered and lowered the value of all these efforts. It does not appear that "political will" alone might have been the main cause of this, especially given that Yeltsin gained no small amount of political dividends by virtue of his Westernization policy. This "something" might include many variables, among which could be institutional realities or civilizational differences. As to the latter, we do not see any such differences that would make Russian law irreconcilable with Western legal systems, the famous nihilism being rather a catchword than any real penchant in Russian legal culture.[163] To our mind, the most important of these variables is the prevailing approach in legal education and the legal reasoning which is reproduced and legitimized by legal education in Russia.

It comes as no surprise that old patterns of reasoning and mentality considerably distort transplanted rules and institutions, diminishing their effect or even making them reinforce the existing state of affairs rather than alter it. Nor is it a surprise to anyone that such patterns do not fade away overnight. Moreover, they tend to legitimize the institutional realities and *le capital symbolique* (according to Pierre Bourdieu) that secures the survival and existence of elites in high courts, in legal academia, and elsewhere. This "cultural capital" still largely prefigures the Russian legal landscape and, to some extent, provides individual lawyers with a reference point for their self-identification as "Russian jurists". This scheme of mutual reproduction and legitimation between legal dogma and the legal community makes it much harder to carry out any consistent reforms which could compromise the basic assumptions of this dogma. The latter, due to this symbiosis, continues to mold the prevailing legal education and conceptual standards of reasoning in the legal community.

Realistically, this legal education and this legal dogma cannot be fully receptive to human rights if we recall what used to be the basic points of this education and of Vyshinsky's legal theory in Soviet times.[164] The assertions that human rights sprang up as smart inventions of the liberal bourgeoisie fighting with the nobility and the clergy and that, afterwards, these rights became an ideological tool legitimizing capitalist rule and individualistic culture are well known.[165] Retrograde as they may seem, these viewpoints

163 Kathryn Hendley, "Who Are the Legal Nihilists in Russia?", 28(2) *Post-Soviet Affairs* (2012), 149-186.

164 Andrei Vyshinsky was the prosecutor-general of Stalin's regime, famous for, in addition to his atrocities, coining Soviet legal theory based on the idea that law is everything that issues from the state. This theory was proclaimed in 1938 as the only truth and, therefore, obligatory for all Soviet lawyers.

165 Franciszek Przetacznik, "The Socialist Concept of Human Rights: Its Philosophical Background and Political Justification", 13 *Belgian Review of International Law* (1977), 239-278.

still hold their grip on the older generation of lawyers who internalized them as students and who, in turn, expect to inculcate the same (or similar) ideas in their students today.

We will see how Zorkin, although in more careful words, reproduces this "socialist' conception of human rights, at the same time swearing by his fidelity to the supreme value of human rights. However, if we trace the logical sequence of his approach, "human rights" here becomes a concept without a reference point. In condemning liberal Western "all-permissiveness", the Chief Justice does not provide any other indicators for finding and identifying these rights in society, except the implicit logic of *ipse dixit*, or "human rights are what the Russian Constitutional Court says human rights are". This ambivalence in attitude toward human rights—for which we provide here the example of Zorkin's narratives only as an illustration[166]—represents one of the main impediments to the modernization of Russian law and seriously aggravates relations between the Russian top-level judiciary and the ECtHR.

Legal education in Russia and in other former Soviet countries, on the one hand, was (and still is) based on the methods of German *Rechtswissenschaft* from the turn of the 20th century, and, on the other, has no coherent conceptual history, owing to Stalin's purges, Vyshinsky's dogmatization of legal theory in the late 1930s, the indoctrination of Marxism-Leninism into legal philosophy, and finally, for these reasons, being detached from the development of Western jurisprudence. From the vantage point of Soviet legal ideology (which succeeded the "first positivism" of the 19th century in this aspect), law was the will of the ruling class, statutes contained this will, and judges were there to reveal and interpret this will. As added value could be an explanation of how this will is formed: either it is the economic basis that prefigures the infrastructure, or a more or less ontologically independent collective mentality (*obshchestvennoe soznanie*) forms the "will of the people" for which the parliament serves as an oracle. Most of the explanatory and conceptual schemes in the jurisprudence of Russia and other former Soviet countries are still derived from these basic Marxist-Leninist assumptions.[167]

Strange as it may seem, during the thirty years since *perestroika* began, very little has been done in terms of reconsidering these assumptions in light of the new Western standards of human rights to which Russia and many other former Soviet countries have declared their adherence. Needless to add, these assumptions are outlined rather conservatively with almost no place in legal education reserved for "proportionality", "due process",

166 Assessing general Russian attitudes toward the West, Zorkin would paradoxically appear to be quite moderate as compared with other Russian judges and members of parliament.

167 An exception should, perhaps, be made as to the Baltic States where the intelligentsia did not experience the terrible Stalin purges of the late 1930s; where legal scholarship developed more organically and, therefore, was better suited for successful Westernization.

"balancing of values", "justification", and other methods so important for contemporary Western legal scholarship. The accent is still on the sovereign and on the ways in which it creates and applies the law, so that protection of sovereignty stands quite predictably in the foreground of many of today's discussions. This situation is aggravated by an authoritarian political rule that favors centralization and uniformity in almost every aspect of society, higher education included; and the concept of sovereignty and of law as the sovereign will fits very well with the needs of that centralization.

Consequently, legal scholarship in Russia comprehends law almost exclusively through the lenses of this exegetic jurisprudence, largely ignoring not only non-positivist approaches but, also, the important conceptual achievement of legal positivism in the 20th century. The opposite theoretical element of decisionism (realism) that has been examined in the previous chapter does not gain any substantial attention among Russian legal scholars who tend to identify both the rule-making power and the power of discretion with the concept of sovereign (state) and thereby to evade serious scholarly discussions on justification and limits of power of exception.

This theoretical problem resonates in many contemporary tensions between the RF Constitutional Court and the ECtHR. Zorkin's legal philosophy can serve as a prominent example of this state of affairs in the Russian legal community and in the mindset of Russian lawyers. He abundantly illustrates this mindset, reiterating that without the sovereign there would be no law; that without Westphalian sovereignty no "civilization of law" would be possible; and warns that human rights are not individual values but, rather, collective resources for better public governance.[168] In terms of the distinction drawn by Benjamin Constant as early as 1819 between the "Liberty of the Ancients Compared with that of the Moderns", Zorkin—with his understanding of human liberty—falls back to antiquity. Unsurprisingly, this collectivist understanding of freedom prefigures the place which can be allocated to human rights and to their protection.

2 Russia's Accession to the ECtHR: A Step toward Modernization?

The question about the advantages and disadvantages of Russia's membership in the Council of Europe and the ECtHR is ambivalent. Gains and losses can hardly be evaluated from any objective standpoint putatively marking this membership as a historical phase on the way to any ultimate goal or any social ideal. This aspect can be better assessed from the perspective of what various actors may wish to achieve through membership. However, this evaluation represents an arduous task, insofar as it is far from easy to establish firmly and objectively what the real intentions of legal and

168 This set of ideas was first explicitly formulated in Zorkin's 2006 article "An Apology of the Westphalian System", *op.cit.* note 24.

political actors are—this is true of each actor taken apart, let alone the large number of actors acting together in a huge legal system the size of Russia's. An option for such an evaluation could be a comparative analysis of the objectives set forth in various official program documents (such as the goals proclaimed in the RF President's 1995 *Ukaz* on legal reform in the Russian Federation[169]), and how these objectives have or have not been achieved or might or might not be achieved through interaction with the ECtHR and with the Council of Europe. Such an enterprise—even though important in certain aspects—nonetheless cannot yield a clear understanding of the real landscape given the distance between paper declarations, on the one hand, and the real actions of the Russian authorities (perhaps not only in Russia but, also, elsewhere) on the other.

Moreover, the benefits that political elites may draw from certain situations, *e.g.*, from joining the ECtHR and interacting with it (or from obstructing such interaction), do not always amount to institutional gains for the entire legal system. And the other way around: some steps toward the enhanced protection of individual freedoms may endanger a system based on collective values and, thereby, affect actors whose leadership is legitimized through those values. At the same time, the actors themselves often do not have clear strategies, so that their actions may be rather off-hand; not rationally premeditated. To a large extent, this was (and still is) true about the legal reforms undertaken in Russia so far. In spite of the existence of several official programs and conceptions on reforming Russian law, they remain largely paperwork. Decisions on concrete modalities and timing of reforms are, in fact, taken at the discretion of political leaders and their aides depending on varying circumstances and momentary needs. That is why an examination of formal legal texts is not of much help here, although we do not rule out that this might be important in some other dimensions such as a comparative analysis of regulations in two or more legal systems.

Turning our attention to the dynamics of Russian law and its rapprochement with European standards in recent years, these dynamics inspire a rather positive mood. During the two decades as a member of the Council of Europe, Russia has significantly ameliorated its legislation as far as concerns the execution of domestic judgments, pre-trial detention and prison conditions, legal capacity, re-registration of religious denominations, and other vital issues. These (and a number of other legislative amendments) evidently have been triggered by judgments of the ECtHR against Russia even if implementation of these judgments—requiring revision of Russian laws in the areas suggested by the Strasbourg Court—in each case remains mainly a question of the political will of Russia's rulers.

169 Ukaz Prezidenta Rossiiskoi Federatsii [Edict of the President of the Russian Federation] (6 July 1995) No.673 "O razrabotke kontseptsii pravovoi reformy v Rossiiskoi Federatsii" [On Elaborating a Concept of Legal Reform in the Russian Federation], *SZRF* (1995) No.28 item 2642.

The Russian courts have learned to cite[170] the jurisprudence of the ECtHR; at least, the higher courts such as the RF Constitutional Court or the RF Supreme Court have done so. These higher courts also explicitly instruct the lower courts to apply the ECHR and to take into consideration[171] interpretations of the Convention by the ECtHR, remembering that the ECHR forms an integral part of Russian law pursuant to Article 15 of the RF Constitution. Even if in the latest interpretations of the RF Constitutional Court, the RF Constitution and the opinions of that Court prevail over the ECHR and the opinions of the ECtHR,[172] both the Convention and ECtHR jurisprudence are formally "sources of Russian law" (*i.e.*, something to which a court may and should refer in justifying its decisions). The very fact that the ECHR's provisions can constitute grounds for justifying or, eventually, challenging a court decision at higher instances and that each case may potentially fall under the scrutiny of the ECtHR is a kind of sword of Damocles hanging over ordinary judges and, perhaps, cultivating them to respect human rights and freedoms somewhat more than if there were no recourse to any supranational courts whatsoever.

These institutional achievements are evident although certain suspicions remain with the critical observer as to whether references to the jurisprudence of the ECtHR are used by Russian courts merely for decoration and, as such, a pointless ornament for decisions sometimes plainly contradicting the spirit of that jurisprudence. In recent years, this suspicion has grown progressively as the RF Constitutional Court learns to pick up and adroitly combine citations and arguments from ECtHR jurisprudence to create the impression that some ECtHR judgments against Russia even violate the letter and the spirit of the ECHR. Perhaps a more alarming signal is that Russian politicians, the judiciary, and the media are seeking to undermine the authority of the ECtHR through accusations of usurpation of popular sovereignty; to shatter the entire European legal space—associating, in this enterprise, with Euroskeptics and conservative thinkers in Europe. Apart from their theoretical and philosophical weakness, these accusations may sometimes sound quite persuasive and could potentially constitute grounds for fighting the liberal values that buttress the Universal Declaration of Human Rights, the ECHR, and other international (supranational) normative mechanisms for the protection of human rights.

Some human-rights activists and Strasbourg judges—enthused about a European consensus and the universality of human rights—can involuntarily contribute to such a result insofar as they are unwilling to enter into

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170 In needs to be kept in mind that the art of citation does not amount to the art of utilizing such tools properly.

171 However, this modality of the RF Supreme Court's recommendations is quite ambiguous: "*prinimat' vo vnimanie*" is not tantamount to being bound to apply or even to use when justifying decisions.

172 As explained in the Ruling of the RF Constitutional Court (14 July 2015) No.21-P, *op.cit.* note 16.

a discussion on the sources of the binding force of human rights and the limits of their validity, asserting that these rights are absolute and unquestionable. This may lead back to natural-law legal reasoning which, from the standpoint of legal philosophy, sounds less persuasive than the strictly positivist argumentation remaining as the conceptual core of civil-law scholarship. It is noteworthy that some Russian constitutional-law scholars and legal theoreticians have already attempted to incorporate into Russian law ideas of natural law (Elena Lukasheva or the late Sergei Alekseev can be mentioned as outstanding examples).[173] Unfortunately, in trying to escape the stalemate of Vyshinsky's legal positivism, such scholars often fall into the conceptual impasse of legal idealism. This also partly characterizes the views of Zorkin who tries to combine these irreconcilable conceptions: he is positivist when insisting that law cannot exist and survive without the sovereign will of the state, but he falls into idealism when suggesting that the validity of laws depends on the moral expectations of the majority or on some collective moral intuitions.[174] Practically, this contradiction is softened by the implicit presumption of Zorkin that it is his Court which is competent to formulate these expectations and intuitions, the Court being at the same time a part of the sovereign power.

In these indirect debates with the West, the RF Constitutional Court gains the upper hand from the standpoint of legal theory prevailing in Russia which is also supported by the official media. It is no secret that the balancing and proportionality tests applied by the ECtHR frequently lead to different interpretations of the same provisions of the ECHR in different cases. A normal situation from the conventionally accepted view of the role of the judiciary today, this approach is anathema to the first positivism which intends that judges merely be "mouths that pronounce the words of law" (Charles L. Montesquieu). From this perspective, each legal norm[175] should be understood as the word and will of the sovereign (in the case of an international treaty, of several sovereigns coordinating their volition). Thence, in different cases a court may attribute different meanings to the same norm would amount to undermining the principle of legality (*zakonnost'*). Such *gouvernement des juges* is atypical for civil-law countries since it putatively replaces the will of the people with the will of judges. It can

173 See Elena A. Lukasheva, *Pravo, moral', lichnost'* [Law, Morality and Personality] (Nauka, Moscow, 1986); *id.*, *Chelovek, pravo, tsivilizatsiia: normativno-tsennostnoe izmerenie* [Man, Law, Civilization: the Normative and Axiological Dimension] (Nauka, Moscow, 2009); Sergei S. Alekseev, *Samoe sviatoe chto bylo u Boga na zemle* [The Most Sacred of that which God Had on Earth] (Infra-M, Moscow, 1998); and *id.*, *Voskhozhdenie k pravu: poiski i resheniia* [Rising to the Law. Explorations and Decisions] (Norma, Moscow, 2001).

174 For example, Valerii Zorkin, *Konstitutsionno-pravovoe razvitie Rossii* [The Constitutional and Legal Development of Russia] (Norma and Infra-M, Moscow, 2011).

175 Prevailing Russian legal scholarship hardly distinguishes between norms (rules), principles, and standards.

be argued whether military men can have maternity leave[176] or whether prisoners may be allowed to vote,[177] but as a matter of fact the central argument between the RF Constitutional Court and the ECtHR is not about these varying issues but, rather, about what counts as law and how to arrive at the correct interpretation thereof.

These questions were intensively discussed in Western legal scholarship in the last century (and earlier).[178] Even if a certain discord still remains concerning the limits of judicial freedom, this scholarship has elaborated strong arguments against equating the application of the law with logical deduction/subsumption. Different theories may yield different solutions, and unsurprisingly the "first positivism" is by far not the only theory applicable in these debates. For example, if one would follow the realist standpoint and assert with Justice Oliver Holmes that the law is what judges say it is, or if one would adopt the Kelsenian perspective in which the words of law are merely a general framework to be filled in at the discretion of judges in each case, the lawmaking activities of the ECtHR (it is hard to contest that this Court creates new rules, principles, and standards[179]) can be assessed in a different light and will not be seen solely as an encroachment on popular sovereignty.

However, the dominant point of view in Russian jurisprudence still rules out such alternative approaches, or, at least, such approaches are not mentioned in official forums where "limits of concession" or "red lines of sovereignty" are discussed. Remarkably, Zorkin bases his argumentation on these implicit assumptions: law is the will of the sovereign, legal texts must be drafted so as to yield unambiguous answers for every situation, and so on. When challenging the ECtHR's activism, the Chief Justice apparently stands on the platform of the "first positivism" although he admits that law should be based also on morality; that, in certain cases, the collective

176 Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii [Ruling of the RF Constitutional Court] (15 January 2009) No.187-O-O in the case of Konstantin Markin; ECtHR Judgment *Markin v. Russia* (Grand Chamber) (22 March 2012) Application No.30078/06; and Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii [Ruling of the RF Constitutional Court] (6 December 2013) No.27-P, "O proverke konstitustionnosti polozhenii stat'i 11 i punktov 3 i 4 chasti chetvertoi stat'i 392 Grazhdanskogo protsessual'nogo kodeksa v sviazi s zaprosom prezidiuma Leningradskogo okruzhnogo voennogo suda" [On Verifying the Constitutionality of Art.11 and of Points 3 and 4 of Paragraph 4 of Art.392 of the RF Code of Civil Procedure in Connection with an Inquiry of the Presidium of Leningrad District Military Court], *Rossiiskaia gazeta* (18 December 2013) No.6261, in the case of Konstantin Markin.

177 ECtHR Judgment *Anchugov and Gladkov v. Russia* (4 July 2013) applications No.11157/04 and 15162/05; and Ruling of the RF Constitutional Court (19 April 2016) No.12-P in a case about execution of the ECtHR Judgment in *Anchugov and Gladkov v. Russia*.

178 For an overview of this problem in different jurisdictions and legal communities, see Elaine Mak, *Judicial Decision-Making in a Globalized World* (Hart Publishing, Aldershot, UK, 2015).

179 Samantha For example, A. Miko, "Norm Conflict, Fragmentation, and the European Court of Human Rights", 54(3) *Boston College Law Review* (2013), 1351-1383.

morality (as established and interpreted by constitutional judges) should even prevail over statutory law (which, for Zorkin, amounts to "law" generally speaking[180]). Zorkin understands that the old-fashioned state-centered positivism—in the style of Andrei Vyshinsky[181]—no longer is an option for Russian legal scholarship. He came to this understanding as early as in his book on Russian legal positivism published in 1978 which was quite a daring proposition for that time.[182] In his later writings, he remains quite far from faithful to the letter of the law and insists on the necessity of a broad interpretation of laws and of the constitution in line with collective morality. But still Zorkin pays tribute to the sovereign and its will, stubbornly insisting that this will is the supreme source of law.

Shared values or the *acquis communautaire* do not easily fall within legal exegetic logic—if they fall anywhere at all. That is why bringing "European values" to the Russian "legal market"—before changing the conceptual dimension of the latter—will predictably be unlikely to succeed, given that this "market" is thoroughly imbued with positivism. So far, Russia has not been inclined to become a principle-based legal order, evidently favoring a rule-based approach.

3 Valerii Zorkin's Rejoinder to Disproportionate Westernization

The Chief Justice of the RF Constitutional Court has gained a prominent place in Russian intellectual debates due to his frequent public speeches and polemical articles, and many of his views have become emblematic (to recall, *e.g.*, his famous discourses on "limits of concession" or "spiritual buckles"[183]). Zorkin allows himself freedom of public discussion in much wider confines than would be taken as normal for a US Supreme Court Chief Justice or for chief justices in other Western jurisdictions—to the extent that in 2014, the RF Constitutional Court was asked to decide about the admissibility of such engagement by its Chief Justice in public debates. Even though the Court turned down the application of Liudmila Kuzmina—reasoning that Zorkin may express his "scientific, theoretical,

180 The Chief Justice Zorkin has repeatedly insisted on this point, stressing that no rights or freedoms can exist without state endorsement. In his 2005 article, for example, Zorkin wrote that "Rights and freedoms cannot be realized without an effective political power, outside of the state as a political community". Valerii Zorkin, "Verkhovenstvo prava i konstitutsionnoe pravosudie" [The Rule of Law and Constitutional Justice], *Zhurnal rossiiskogo prava* (2005) No.12(108), 30-36, at 31.

181 Zorkin, "Pravo epokhi moderna", *op. cit.* note 24. In this article, Zorkin criticizes this approach as "total legal positivism".

182 Valerii Zorkin, *Pozitivistskaia teoriia prava v Rossii* [The Positivist Theory of Law in Russia] (Izdatel'stvo MGU, Moscow, 1978).

183 This figure of speech is used by Zorkin to substantiate his idea that Russians have traditionally underestimated the law and prioritized morality and religion. Zorkin, "Pravo—i tol'ko pravo", *op.cit.* note 24.

philosophical views about state and law, about the place and role of state and law in contemporary Russia and in the international arena", thereby promoting the "legal enlightenment of the citizenry"[184]—the question remains about the extent to which the Court is bound by the ambivalent philosophy (conservative/liberal, positivist/idealist) which Zorkin apologetically defends in his writings and which patently oozes out of many rulings of that Court. This can be an example of a more general attitude to combine different, perhaps contradictory approaches (tsarist and Soviet, liberal and conservative, *ius*-naturalist and *ius*-positivist, pro-European and anti-European, and so on) so that such a combination would match the expectations of all; this strategy of syncretism being, in some sense, also a prerequisite for successful political survival in the new realities after the collapse of the ideology of Marxism-Leninism.[185]

The Chief Justice's standpoint cannot be labelled as consistently conservative, although, when oscillating between conservatism and liberalism, he frequently tips to the former. He admits that Russian law needs to be modernized but insists that modernization does not necessarily imply Westernization,[186] particularly for Russia, "where traditional morality has a special role".[187] Probably, still under the intellectual influence of the author to whose work he devoted his doctoral thesis,[188] Zorkin is searching for a solution to what he considers the key legal conundrum for Russia: how human rights can be effectively guaranteed and protected in a country with a firm centralization of political power and with the prevalence of a collectivist mentality.

The keen philosophical intuition of the RF Constitutional Court Chairman cannot fail to notice the unbridgeable gap between an authoritarian political regime and the fullest realization of human rights. In his writings, Zorkin tries to strike a reasonable balance between them by insisting on the

184 In response to a complaint filed by Liudmila Kuzmina against Zorkin for his allegedly political activities, the RF Constitutional Court (8 July 2014) (there were no formal proceedings in this case and no file number was attributed to it) decided not to adopt any formal ruling in this matter and rejected the complaint. The response of the RF Constitutional Court was signed by Vice-Chair Ol'ga Khokhriakova. "Konstitutsionnyi Sud RF: vyrazhenie nauchno-teoreticheskikh i filosofsko-pravovykh vzgliadov iavliaetsia politicheskoi deiatel'nost'iu" [The RF Constitutional Court: An Expression of Scientific and Theoretical Views is a Political Actitity] (30 July 2014), available at <http://mhg-monitoring.org/konstitucionnyy-sud-rf-vyrazhenie-nauchno-teoreticheskih-i-filosofsko-pravovyh-vzglyadov-ne>.

185 When discussing contemporary legal theories in his 2006 paper, Zorkin firmly suggested that a pluralist approach is needed to understand the law. Zorkin, "Pravo epokhi moderna", *op.cit.* note 181.

186 Zorkin, "Pravo sily i sila prava", *op.cit.* note 152, 9.

187 Zorkin, "Problemy konstitutsionno-pravovogo razvitiia Rossii", *op.cit.* note 157, 21.

188 Zorkin passionately characterizes the pre-revolutionary Russian legal philosopher Boris Chicherin as an "ideal Russian liberal" and praises his formula "liberal measures and powerful authority" as a formulation of supreme political wisdom for Russia: "liberal conservatism". Zorkin, "Pravo sily i sila prava", *op.cit.* note 152, 26.

specificity of Russia's transitional society. How long this transition would last and to what extent human rights can be limited by an authoritarian regime for the sake of legal modernization of the country and guaranteeing legal security in it—on these dangerous questions, Zorkin remains silent. In a series of recent publications, he repeats that Russia has, so far, not passed the "legal barrier'.[189] This metaphor means that the Russian people are not mature enough for the rule of law because they are unable to appreciate the values of security and order that law brings about. Zorkin seems to be confident that the people (the individuals constituting the people) cannot correctly utilize human rights before passing this "barrier".

For the Chief Justice, the constitution is a "living document", and as between originalism and interpretivism in American constitutional doctrine, he would evidently prefer the latter, potentially more liberal doctrine. Statutory law is unable to cover all the issues of social life, and lawyers have to find other regulatory norms to secure social order. Zorkin's thesis here sounds quite sociological: these norms are to be found in society itself. Disquietingly, he confers priority onto these social norms;[190] sometimes, to the point of affording them priority over national statutory law and international law. In his view, constitutional judges should evaluate the legitimacy (constitutionality) of (statutory or international) norms comparing them with the "living constitution" which is not a formal document promulgated as a constitution but, rather, is what "societal legal consciousness" (*obshchestvennoe pravosoznanie*) holds to be just and unjust. What exactly this metaphysical legal consciousness (*Rechtsbewusstsein*, which is conceptually akin to the *Volksgeist* of the German historicists of the 19th century) is, and how to establish and verify its prescriptions correctly, remains in the penumbra—Zorkin's clarifications here are mostly intuitivist and usually merely appeal to some self-evident truths.

Undertaking below a short analysis of Zorkin's conception, we will not present an apology for this conception. At the same time, criticizing Zorkin's conception, we do not intend to condemn it as erroneous or politically biased which is frequently the case with Western and Russian observers writing about Zorkin's views.[191] Taking for granted that, in the existing political realities, Zorkin—as one of the key political figures in the

189 See, for example, Valerii Zorkin, "Konstitutsionnaia iustitsiia na perekhodnom etape razvitiia Rossii" [Constitutional Justice at the Transitory Stage of Russia's Development], presentation made on 17 May 2016 at the conference "Contemporary Constitutional Justice: Challenges and Problems", St Petersburg.

190 The Chief Justice is critical both of exclusive ("total", in his terms) legal positivism and of international law, which is imbued with the pernicious spirit of globalization. *E.g.*, Zorkin, "Pravo epokhi moderna', *op.cit.* note 24.

191 See, for example, the comments on Zorkin and his strategies in Robert Ahdieh, *Russia's Constitutional Revolution: Legal Consciousness and Transition to Democracy* (Pennsylvanian State University Press, University Park, PA, 1997). See, also, interesting comments in William Pomeranz, "Uneasy Partners: Russia and the European Court of Human Rights", 19(3) *Human Rights Brief* (2012), 17-21.

country—cannot be but supportive of the regime (no matter whether he genuinely wants to be or does not want to be), we will simply leave this political in the parentheses of our analysis and will assess his philosophy on its philosophical merits, this inevitable political bias notwithstanding (but keeping it in mind).[192]

4 Valerii Zorkin's Legal Philosophy

Zorkin's ideas have not changed cardinally over time. His writings are usually imbued with alarmist moods about the dangers of globalization and postmodernism.[193] The Chief Justice begins and ends his allocutions with more or less similar propositions: the world is changing, we are at the crossroads of globalization which "brings colossal instability into our life thereby disclosing the fragility and unsustainability of the contemporary world",[194] uncovering "the abyss from which utterly inhuman archaic monsters enter the world".[195] After all, no one knows what will happen as a result of "turbulently-chaotic globalization"[196] which accelerated in the early 1990s with the collapse of the Soviet Union. Hyperbolically speaking, "a Pandora's Box was then opened, from which have sneaked all the demons of global political destabilization".[197] Among these demons, who are the main foes of "the civilization of law", Zorkin distinguishes "transnational corporations, some family clans",[198] and other cosmopolitan forces which "freely dominate in the world economy and become a kind of masters of the world".[199]

192 Here, our analysis of Zorkin's ideas is selective. In the scope of the present chapter, we do not undertake to provide a detailed description of *all* his writings and public speeches, a task that would rather require research for a separate monograph. Below, we examine what we consider the most representative from the latest ideas and conceptions of the Chief Justice.

193 In Zorkin's narrative, "postmodernism" does not refer to any particular philosophical doctrine or to any specific author (Zorkin cites Jacques Derrida but with laudable tonality and, probably, does not count him among the "postmodernists" whom he blames), but indiscriminately covers all the views that contradict his own social philosophy: multiculturalism, atheism, ethical relativism, legal pluralism, a liberal conception of human rights, and so on. The issue of postmodernism in Zorkin's interpretation will be discussed below.

194 Zorkin, "Pravo sily i sila prava", *op.cit.* note 152, 1.

195 Valerii Zorkin, "Pravo protiv khaosa" [Law *versus* Chaos], presentation made on 24 November 2015 at the International Conference "Strategy of National Development and Tasks of Russian Legal Science", 4.

196 Zorkin, "Pravo sily i sila prava", *op.cit.* note 152, 2.

197 Zorkin, "Pravo—i tol'ko pravo", *op.cit.* note 24.

198 Valerii Zorkin, "Problemy sotsial'noi integratsii v sovremennom mire" [Problems of Social Integration in the Contemporary World], presentation made on 29 September 2014 at the International Conference "Constitutional justice and social integration", 1.

199 Zorkin, "Tsivilizatsiia prava: sovremennyi kontekst", *op.cit.* note 159, 8.

These dark forces endeavor to strip states of their sovereign powers and to replace the Westphalian international order with some kind of cosmopolitan rule which means: replacing the "language of legality" with the "language of justice and injustice", changing legal prescriptions to "interpretations of what is just and what is not".[200] These effects of globalization are fraught with the breakdown of legal regulation and with its replacement by extralegal regulators based on the "individualist morality of human rights". In his paper dating from the mid-2000s, Zorkin affirms that globalization will bring "lawless chaos" to our world[201] and goes so far as to equate globalization, cosmopolitanism, and their proponents to the Nazis, citing the Nazi ideologist Alfred Rosenberg who proposed "launching an offensive on the old notion of the state".[202]

Five years later, at the 2009 Cape Town conference on constitutional justice, Zorkin formulated his main philosophical theses on human rights, looking "to reconcile the duty to guarantee human and civil rights and freedoms with the need to protect national security".[203] Zorkin is still deeply concerned with the fact that "the world is becoming dangerously uniform".[204] In this aspect, he repeats his admonition about the inadmissibility of the predominance of "extralegal reasons"[205] in supranational courts and, trivially, insists that human rights should not be utilized as a pretext for interference in state sovereign powers. In his discussion, it already transpires that these rights are of relative value as they "are not sufficient for the accomplishment of a human's capacity as a rational creature possessed of freedom of will".[206]

Especially disquieting to Zorkin is the prevalence of the liberal doctrine of human rights which is "groundless"[207] because it absolutizes individual freedom, placing it above social solidarity, and unwarrantedly prioritizes minorities and their rights over the majority and their interests.[208] The RF Constitutional Court Chief Justice resolutely disapproves of this liberalism, insisting that what makes us human beings is our "real participation in a

200 Zorkin, "Pravo protiv khaosa", *op.cit.* note 195, 11-12.
201 Valerii Zorkin, "An Apology of the Westphalian System", 3(2) *Russia in Global Affairs* (2004), 29.
202 *Ibid.*, 26.
203 Valerii Zorkin, "Human Rights within the Context of Global Jurisprudence", presentation made on 23 January 2009 at the World Conference on Constitutional Justice, available at <http://www.venice.coe.int/WCCJ/Papers/RUS_Zorkin_E.pdf>. Perhaps the Chief Justice forgets here that cosmopolitan ideas were among the main foes of Nazi ideology.
204 *Ibid.*, 13.
205 *Ibid.*, 2.
206 *Ibid.*, 8.
207 *Ibid.*
208 Valerii Zorkin, "Kak sokhranit' gosudarstvo v epokhu etnosotsial'nogo mnogoobraziia" [How to Preserve the State in an Epoch of Ethnosocial Plurality], *Rossiiskaia gazeta* (13 September 2009) No.5579.

full societal life" so that "we live our lives not for ourselves" but, rather, for society and for fostering its unity.[209] Here he evidently favors communitarianism over individual freedom, bidding farewell to the liberal conception of rights and stepping on the side of the "enemies of the open society" as Karl Popper portrayed some famous philosophers in 1945.[210] Indeed, it is not by chance that Zorkin frequently mentions the wisdom of Plato, Aristotle, and Hobbes. However, the Chairman of the RF Constitutional Court does not draw ultimate conclusions from this collectivist philosophy; rather, suggesting that—in a situation of equality of interests of the individual/society/state—it is up to constitutional courts[211] to decide on the correct balance between social welfare and individual freedom. But he cannot hide his value preferences: "It is security that is always the most fundamental human freedom and absolute imperative […] Human rights are real and valid only provided that there are due guarantees and effective protection secured by a strong state."[212]

Western societies have developed another, more liberal culture of human rights, as Zorkin readily admits. But contemporary Russian society is not fully suited to this culture. The Chief Justice begins his pamphlet in defense of the 2014 Ruling of the RF Constitutional Court No.6-P on the Crimean question[213] with the following pathetic statement:

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209 Valerii Zorkin, "V khaose net morali" [There Is No Morality in Chaos], *Rossiiskaia gazeta* (11 December 2012) No.5958. In an earlier speech, Zorkin insisted on the difference between negative and positive aspects of freedom, suggesting that the former ("freedom from […]", which is the classical idea of rights) is a false ideal, while the latter ("freedom for […]" or the idea of social obligations) is the only authentic account of liberty. He praised real liberty as "a means for raising a human being, for securing him new opportunities for perfection and growth. Freedom is a unity of rights and obligations. Freedom is the happiness […] of being free for Russia". Zorkin, "Put' k svobode", *op.cit.* note 24. The crucial question is apparently about who will decide what helps a human being to become more perfect and to grow and what impedes this. Zorkin reserves this prerogative for the state authorities and does not consider this choice to be a matter of judicial discretion.

210 Karl Popper, *The Open Society and Its Enemies* (Princeton University Press, Princeton, NJ, 2013).

211 Zorkin, "Human Rights within the Context of Global Jurisprudence", *op.cit.* note 203, 19.

212 Constitutional courts are supposed to be "arbiters between the state, on the one hand, and the citizens and society, on the other". Zorkin, "Pravo protiv khaosa", *op.cit.* note 195, 20.

213 Postanovlenie Konstitutsionnogo Suda Rossisikoi Federatsii [Ruling of the RF Constitutional Court] (19 March 2014) No.6-P "Po delu o proverke konstitutsionnosti ne vstupivshego v silu mezhdunarodnogo dogovora mezhdu Rossiiskoi Federatsiei i Respublikoi Krym o priniatii v Rossiiskuiu Federatsiiu Respubliki Krym i obrazovanii v sostave Rossiiskoi Federatsii novykh sub"ektov" [In the Case on the Verification of the Constitutionality of a Treaty Not Yet Having Legal Force Between the Russian Federation and the Republic of Crimea On the Integration of the Republic of Crimea into the Russian Federation and the Creation of New Subjects of the Russian Federation] (*Rossiskaia gazeta* (20 April 2014) No.6335.

> "For hundreds and even thousands of years Russia used to be maintained by supreme spiritual buckles [*skrepy*] that were called differently at different times. Being maintained by these buckles, Russia could be more or less negligent as to legal buckles."[214]

The only way for the country to survive is to be bound by such buckles. However, after the breakdown of Soviet rule, Russia lost these spiritual buckles. It could appear therefrom that Russia should stick to the rule of law and democracy; but, unfortunately, it has not done so. Zorkin supposes that after the collapse of the Soviet Union,[215] Russian society was split into several independent and conflicting strata with disparate ideas about morality and justice.[216] As a result, moral foundations were shattered, and now the country is lacking a due level of societal consensus.[217] Russia has not so far formed an identity allowing for smooth and progressive legal development. This identity is something that "historically predetermined the continued symphony of the peoples of Russia",[218] which formed "the unwritten norms of sound moral regulation which are accepted by the masses and which can fill ineffective statutory regulation".[219] To save the country from disintegration, "united moral regulation" needs to be restored in order to secure law and order in society.[220]

Zorkin utilizes the issue of national identity to stress that, as in many other traditional societies, normative regulation in Russia before the mid-19th century had been based on altruism: the principle of love that provided for spiritual buckles keeping society together.[221] However, after moderniza-

214 Zorkin, "Pravo—i tol'ko pravo", *op.cit.* note 24.

215 For Zorkin, it was not only a political collapse but, also, the end of the "soviet identity" that had maintained social integration after the 1917 Revolution. Zorkin, "Problemy konstitutsionno-pravovogo razvitiia Rossii", *op.cit.* note 157, 8.

216 *Ibid.*, 20.

217 Valerii Zorkin, "Obshchestvennoe doverie i ego rol' v funktsionirovanii pravovoi sistemy" [Social Trust and Its Role in the Working of the Legal System], presentation made on 27 April 2013 at the RF Council of the Federation, 1.

218 *Ibid.*, 18. The conception of symphony has a clear religious and political connotation. It came to medieval Russia from Byzantium, where it signified a coordinated state policy where the Church stands beside the Emperor, helping him secure just governance. It is suggestive that in the same context but in another writing Zorkin explicitly recognizes that the question is about "the Orthodox symphony" and argues that "the Russian symphonic culture engendered by Orthodoxy" lies in the foundation of the Russian constitutional identity. Zorkin, "Tsivilizatsiia prava: sovremennyi kontekst", *op.cit.* note 159, 5.

219 Valerii Zorkin, "Vzaimodeistvie pravovoi sistemy Rossii s pravovym polem ob"edinennoi Evropy" [The Interaction of the Russian Legal System with the Legal Field of a United Europe], presentation made on 16 May 2013 at the St. Petersburg International Legal Forum, 4.

220 *Ibid.*, 12.

221 Zorkin, "Obshchestvennoe doverie i ego rol' v funktsionirovanii pravovoi sistemy", *op.cit.* note 217, 1.

tion started with the reforms of Alexander II, Russian society lost this altruist foundation and began to develop a kind of reasonable egoism which, in Zorkin's description, is a feeling of solidarity expressed in moral ideas about the just and the unjust.[222] This development was interrupted by the 1917 Revolution. Consequently, Russia failed to "jump the legal barrier", *i.e.*, to fully develop this feeling that constitutes an informal mechanism of regulation, on the basis of which written law creates formal mechanisms, the latter always being dependent on informal regulation. This traditionalist argumentation implies that people must first be morally educated. Only thereafter can they be granted full rights and freedoms. In other words, Russia has to find a "formula for cultural identity of the nation".[223]

In this vein, the Chief Justice makes one of his most controversial statements. Criticizing the liberal reforms of the 1860s, a central feature of which was the abolition of serfdom (*krepostnichestvo*) in 1861, he suggested that "serfdom was that spiritual buckle that maintained the unity of the nation",[224] and its abolition was one of the causes of the 1917 Revolution and of subsequent communist rule. Loosening the "collectivist buckle of communitarian morality"[225] by liberal reformers under the guidance of Alexander II was an error. This error resulted in interrupting "historical continuity" and in removing archaic buckles without replacing them with anything new; this error was unbearable for the "unformed (undeveloped) social consciousness".[226] Zorkin's conclusion on the issue of modernization is that reforms are justified only if they contribute to social consensus, but are pernicious if they do not consolidate that consensus and provoke ruptures in the societal system of values and norms.[227] This is true even if those reforms pursue the best goals and objectives such as the abolition of slavery, or—we can unmistakably continue his logic in this way—protection of human rights.

So far, so good: the Chief Justice recognizes that certain societal conventions normally underpin the effectiveness of legal regulation which is evi-

222 *Ibid.*, 5. This old Slavophile idea (love as the constitutive principle of spiritual Russian society that collides with rights as the constitutive principle of rationalist Western societies) is interpreted by Zorkin as a justification for possible limitations on the rights of ethnic and other minorities.

223 *Ibid.*, 9.

224 Zorkin, "Sudebnaia reforma Aleksandra II: uroki dlia Rossii", *op.cit*. note 151, 10.

225 Zorkin, "Vzaimodeistvie pravovoi sistemy Rossii s pravovym polem ob"edinennoi Evropy", *op.cit*. note 219, 5.

226 Zorkin, "Sudebnaia reforma Aleksandra II: uroki dlia Rossii", *op.cit*. note 151, 6-8.

227 *Ibid.*, 9-10.

dent for sociologists.[228] His judgment on the legal backwardness of Russia is more dubious—at least it is not informed by any sociological data. And his argument about serfdom is evidently flawed—at least, it contradicts universally (internationally) accepted approach to human dignity. In any case, Zorkin's narrative is too generalized: he seemingly believes in the existence of an omnipresent coherent web of soft regulation covering the whole of society. From the sociological perspective, however, every community and social group has its own regulative framework which does not necessarily form any consistent and coherent set at the level of "society as a whole". On the contrary, these moral, legal, or religious frameworks usually collide, and it is this collision which forms what we consider societal normative regulation. When Zorkin calls for implementation of social consensus through coherent societal regulation, he evidently overlooks this sociological perspective of legal pluralism, and his belief in "basic ethical values", which can secure social solidarity, is not warranted in this perspective.

Intuitively, the Chief Justice feels the conceptual danger of legal pluralism for his conception and calls for "getting rid of the seductions of postmodernism",[229] which disrupt the normal functioning of the machinery of law. The Chairman of the RF Constitutional Court very generally characterizes postmodernism as a set of ideas with no basic distinctions between good and evil, between justice and injustice, between objectivity and falsity,[230] so that the partisans of postmodernism are unable to recognize the "morally correct priorities".[231] These priorities imply that human rights are protected insofar as they contribute to the "conservation and development of mankind", so that freedom of the individual is possible only when and insofar as "mankind is maintained and freely develops".[232] Everything that causes any detriment to this ultimate goal is considered to be a deviation against this background of "social normativity" and allows for the restriction of human rights.

Predictably, Zorkin is irritated by the "liberally-individualistic interpretation of human rights which contradicts this imperative" and which enables human beings to consider the world as a means for "individual

228 Zorkin cites a number of authorities, including Friedrich Hayek and his idea of spontaneous social orders. However, the suggestion that there are two legal orders: the formal (statutory law) and the informal (traditional law) and that it is the latter that is prevalent (Zorkin, "Pravo epokhi moderna", *op.cit.* note 24), puts Zorkin on a dangerous track of discarding posited law (including posited norms of international law) for the sake of foggy societal ideals. Likening posited law to a ship and traditional law to the sea, Zorkin asserts that pure legal positivism would make the ship sink into the sea (*Ibid*.). He unjustly criticizes Hans Kelsen and his program of purification of legal science from its dependence on facts and moral convictions, missing the entire idea of *Pure Theory of Law* and the decisive role that law can play in modernizing mores and traditions.

229 Zorkin, "Problemy sotsial'noi integratsii v sovremennom mire", *op.cit*. note 198, 3.

230 Zorkin, "Pravo protiv khaosa", *op.cit*. note 195, 10.

231 Zorkin, "Problemy sotsial'noi integratsii v sovremennom mire", *op.cit*. note 198, 3.

232 *Ibid*., 3-5.

prosperity and self-accomplishment". Such liberal convictions are condemned by the Chief Justice as "the philosophy of absolute perversion in the spirit of the Marquis de Sade".[233] In Zorkin's view, the duty of Russian lawyers is to reject the pernicious "liberally-individualistic interpretation of human rights"[234] and to fight against the "propaganda of tolerance and of all-permissiveness which advocates deviations from social normativity".[235]

Zorkin's stances here and elsewhere are overly anti-individualist: he finds that the liberal and democratic interpretation of human rights is inadequate for the sustainable future of mankind.[236] He also resolutely condemns the "coercive democratization"[237] which supposedly works as "terrorism under the flag of democracy and human rights",[238] and criticizes Amnesty International and other human-rights NGOs for claiming that freedom of expression is one of the supreme freedoms, and for thereby suggesting the "priority of rights of any individual and any community over society which legitimizes the degradation of human beings from the level of culture to primitive bestiality".[239] He resolutely rejects what he claims to be the basic principle of "Western liberal culture", according to which human freedom is mainly understood as individual egoism.[240] Drawing disproportional parallels with Napoleon's 1812 invasion, the Chief Justice counts such NGOs and their Russian followers among "Western civilized barbarians" who are invading Russia with the help of "postmodernist informational falsifications".[241]

It is this liberal postmodernism[242] which legitimizes unlimited pluralism of moral and cultural norms thereby bringing chaos into social life.[243] Zorkin warns against the "postmodernist novelties" which undermine mass morality and attempt to replace this morality with the "comprehensive tolerance of all individual norms" resulting in the defeat of the "morally sound majority" of citizens.[244] In this light, Zorkin praises a certain "societal (mass) morality that is rooted in the ethical and religious tradition of the people, in its historical culture, and in its specific mentality".[245]

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233 Zorkin, "Tsivilizatsiia prava: sovremennyi kontekst", *op.cit.* note 159, 9.
234 *Ibid.*, 10.
235 Zorkin, "Problemy konstitutsionno-pravovogo razvitiia Rossii", *op.cit.* note 157, 11.
236 Zorkin, "Problemy sotsial'noi integratsii v sovremennom mire", *op.cit.* note 198, 6.
237 Zorkin, "Pravo protiv khaosa", *op.cit.* note 195, 3.
238 *Ibid.*, 10.
239 *Ibid.*, 15.
240 *Ibid.*, 5.
241 Zorkin, "Pravo—i tol'ko pravo", *op.cit.* note 24, 9.
242 Zorkin probably does not admit that some postmodernist authors may easily come to utterly conservative ideas, and for this reason does not specify that his criticism is directed only against the liberal wing of postmodernism.
243 Zorkin, "Pravo v usloviiakh global'nykh peremen", *op.cit.* note 158, 5.
244 *Ibid.*, 7.
245 Zorkin, "Tsivilizatsiia prava: sovremennyi kontekst", *op.cit.* note 159, 3.

Here again, Zorkin is apparently inconsistent: if "Soviet identity" has gone away, if now we face a deplorable "deterioration of mores", and if no new "Russian identity" has been coined so far, how can this enigmatic morality serve as a criterion of constitutionality and of legal reforms? The theses of what he condemns as "postmodernist philosophy" sound more plausible, at least in this respect: if no authentic and verifiable collective morality can be found in society, then legal regulation does not need to address this morality and can go on with "tolerance and all-permissiveness" with respect to minorities and individuals.

It seems that Zorkin understands these problems, and in other fragments of his writings he concedes that in a society as complex as Russia, morality cannot duly establish supreme values and serve as a criterion of constitutionality. Predictably—like Plato, Aristotle, and many other philosophers before him—Zorkin moves toward elitism (explicitly paying tribute to Pareto and to his theory of elites) and recognizes that it is the legislators and supreme judges who should cure their society from the "deterioration of mores". Curing society, in the Chief Justice's logic, means to impose severe—but predictable and clear—legal regulations on the population. He stresses that "it is not admissible to sacrifice the severity of legal regulation for the sake of making it more flexible",[246] and that, on the contrary, only severe legal regulation can compensate for a "deficit of morality".[247]

In other words, wise legislators and judges (the national elite) should educate their people and restore what their wisdom considers as the correct morality for these people. This is the age-old conservative logic of the children-parents' analogy between the people and their government. Referring to the need for "a grain of sound conservatism",[248] the Chairman of the RF Constitutional Court suggests that during the transitional period, the authorities should carefully protect the Russian people from the false assertions of Western liberal philosophy. Paraphrasing the Russian conservative philosopher Konstantin Leontiev, who in the 19th century issued a call to "freeze" Russia so that the "rotting West" did not infect it,[249] Zorkin also calls for an authoritarianism that would temporarily "freeze" Russia

246 Zorkin, "Pravo v usloviiakh global'nykh peremen", *op.cit.* note 158, 9.

247 Zorkin, "Pravo protiv khaosa", *op.cit.* note 195, 20.

248 Zorkin, "Problemy sotsial'noi integratsii v sovremennom mire", *op.cit.* note 198, 4.

249 Konstantin N. Leontiev, *Vostok, Rossiia i Slavianstvo* [The East, Russia and the Slavic World] (Respublika, Moscow, 1996, first published in 1885), 246. Leontiev is famous for advocating the Byzantine political system based on a Church-State symphony, and for claiming that Byzantium and its cultural heritage are better suited to Russia and are, in many respects, better than Western culture. This attitude and the language used to express it has its roots in the schism in the Christian church and, among other facts, the attack by Western crusaders (on their way to the Holy Land) on Constantinople as noted at the time by the offended Byzantines in terms that echoed in Leontiev's writings. He suggested reshaping Russia according to the Byzantine political and cultural models, thereby reinforcing Russia in its stand against the inevitably hostile West.

—impeding liberalism from penetrating Russia—and, thus, would save it from these maleficent influences.[250]

As are many other grand narratives, Zorkin's is overladen with empty signifiers and hyperbolized images. The Chairman of the RF Constitutional Court abundantly compares society or the state with an organism, implicitly accepting that human beings are nothing but subordinated parts of this organism. For example, "the state, as with every organism, intensely needs a correct blood supply […]. The blood that supplies the state organs with true functionality is the social confidence which is also called legitimacy."[251] What we need then is a "sound society" (which has "immunity" against destructive influences), and the state as a "super-institution that unites all social institutions" within society. Zorkin goes so far as to suggest that "without a sound society there would be no state at all".[252] All this imbues his narrative with the intonations of the *Naturphilosophie* of the 19th century, and of the Russian religious philosophies of the end of that century: the Slavophiles, the Soilers (*pochvenniki*), the monarchists. Zorkin realizes this conceptual peril and tries to stand aloof from the "religiously colored Russian philosophy of the 19th century".[253] But he clearly does not succeed in doing so: Zorkin's vocabulary easily reveals the affinity between his position and that of Russian idealist philosophers of the turn of the 20th century.

Along with these dubious images, in the best traditions of German romanticism, the Chief Justice refers to such supreme emotional values as love: citing Fyodor Tyutchev, a Russian poet and conservative thinker of the 19th century, Zorkin calls on the country to unite through the principle of love.[254] Nothing new as compared with what Ivan Kireevsky, Aleksei Khomiakov, Dostoevsky, Tyutchev and other conservatively minded Russian writers were proposing more than a hundred years ago.[255] Perhaps one can believe that the power of love will eliminate "the opposition between human beings, state and civil society that will thereafter coexist in synergetic unity",[256] but the question remains as to what extent this utopian ideal is relevant for a more or less realist account of society and legal regulation.

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250 Zorkin, "Sudebnaia reforma Aleksandra II: uroki dlia Rossii", *op.cit*. note 151.

251 Zorkin, "Obshchestvennoe doverie i ego rol' v funktsionirovanii pravovoi sistemy", *op.cit*. note 217, 3-4.

252 *Ibid.*, 4.

253 Zorkin, "Problemy sotsial'noi integratsii v sovremennom mire", *op.cit.* note 198, 6.

254 Zorkin, "Obshchestvennoe doverie i ego rol' v funktsionirovanii pravovoi sistemy", *op.cit*. note 217, 17.

255 Richard Pipes, *Russian Conservatism and its Critics: A Study in Political Culture* (Yale University Press, New Haven, CT, 2005). It is interesting to note that Pipes came to the same conclusions on the main point of Russian political history: "weakness of Russian society inevitably led to the growth and assertiveness of autocratic principles" (*ibid*., 185), as Zorkin did in 2014. Zorkin, "Sudebnaia reforma Aleksandra II: uroki dlia Rossii", *op.cit*. note 151.

256 Zorkin, "Pravo v usloviiakh global'nykh peremen", *op.cit.* note 158, 10.

In his works and speeches, the Chief Justice randomly cites Pierre Bourdieu, Jürgen Habermas, and other contemporary Western philosophers, but his sympathies are evidently with Hobbes whom Zorkin highly praises for his realistic description of society; whose construction of a "social compact" he utilizes on many occasions calling for unity and warning against *bellum omnium contra omnes*.[257] It is the state, this mighty Leviathan, that appropriates the power of the majority and may, therefore, dictate any rules to minorities: "In every society there is a majority that is the bearer of general moral values and rules which secure peace and stability in that society […] so that every effective legal normativity should take into account the values and rules of the majority."[258] From this vantage point, it is clear that minorities may not impose their rules and mores on society and should, unconditionally, abide by the regulations set by the state which is the ultimate instance for deciding what—and to what extent—freedoms may be granted to minorities.

These philosophical considerations push the Chief Justice to counteract the "moral imperialism" of the West, pursuing the goal of creating a "worldwide democratic empire […] that would take the place of the state and become the supreme authority".[259] He is confident that this "imperialism" is wrong: every country establishes its own "constitutional identity"; that national courts are better fitted for coining that identity given the cultural particularities and institutional constraints in every country. It is no surprise to see Zorkin's indignation with the fact that some supranational bodies, such as the ECtHR, try to interfere with ethical issues and to universalize their moral views. He seeks to confirm his argument by referring to the unavoidable relativity (sharing, here, the ground of relativism with the postmodernists he so pathetically denounces elsewhere): "the concepts of ought, good and just are substantially different in different socio-cultural areas of the world, and cannot be reduced to some universal paradigms of just law".[260]

Moreover, the very fact that the ECtHR appropriates the right to define universal values in the field of human rights undermines true representative democracy[261] because international judges and their counsel do not enjoy any legitimate popular mandate. Following this line of reasoning, Zorkin equates interventions by the ECtHR in state sovereignty with an

257 For example, Valerii Zorkin, "Verkhovenstvo prava i imperativ bezopasnosti" [The Rule of Law and the Requirement of Safety], *Rossiiskaia gazeta* (16 May 2012) No.5782. Zorkin has maintained an interest in Hobbes and his political ideas over the years: Valerii Zorkin, "Politicheskoe i pravovoe uchenie Tomasa Gobbsa" [The Political and Legal Legacy of Thomas Hobbes], *Sovetskoe gosudarstvo i pravo* (1989) No.6, 111-118.

258 Zorkin, "Pravo protiv khaosa", *op.cit.* note 195, 16.

259 Zorkin, "Verkhovenstvo prava i imperativ bezopasnosti", *op.cit.* note 257.

260 Zorkin, "Pravo sily i sila prava", *op.cit.* note 152, 3.

261 Zorkin, "Vzaimodeistvie pravovoi sistemy Rossii s pravovym polem ob"edinennoi Evropy", *op.cit*. note 219, 10.

encroachment on popular sovereignty.[262] He insists that there should be no supranational judicial instance pretending to possess "super-knowledge" and, therefore, the final say on the protection of rights and freedoms.[263]

These pretentions on the part of the ECtHR create the danger that "certain individual ideas about values, human rights and about their violations will be represented as universal solutions although these ideas are elaborated in a narrow circle of experts whose position stands in flagrant contradiction to the ideas and values of other social groups".[264] This makes Russia fiercely protective of its constitutional identity,[265] and the Chief Justice has persistently repeated that—by participating in treaties and conventions—Russia never delegated any part of its sovereignty and maintains the sovereign right to final decisions on human rights.[266] It follows that implementation of international law and of the judgments of supranational courts in Russia should be based on a "national specificity which expresses itself in the particular societal structure of values and norms, and foremost in societal morality".[267]

Zorkin's exceptionalism and Eurosceptic logic might be persuasive and even attractive for certain conservative mindsets. Perhaps he does not miss the point when he asserts that "many forces in Europe are crying out for the cultural and social plenitude of national sovereignty".[268] However, the philosophical foundations of this logic are questionable, at least in three dimensions.

First, Zorkin's holism cannot be accepted without further clarification: the thesis about the prevalence of the whole (the collective) over the individual has been well known since Plato and even earlier; but it is inevitably used to lead to an apology for elitism and autocracy. This was the case for Hobbes, Hegel, and many other idealist thinkers. Zorkin explicitly gravitates in the same direction, entrusting the state with the task of moral education of the citizenry and endorsing authoritarian rule in Russia until this education bears fruit. The basic philosophical question from this point of view is whether this holist philosophy is compatible with the idea of human rights which have historically appeared as *individual* freedoms and which have served to save individuality from the tyranny of the majority, of the

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262 Valerii Zorkin, "Problemy realizatsii Konventsii o pravakh cheloveka" [Problems of Implementing the ECHR], presentation made on 22 October 2015 at the International Conference "Ameliorating National Mechanisms for the Effective Implementation of the ECHR", 3.

263 Valerii Zorkin, "Polozhenie i perspektivy konstitutsionnogo pravosudia" [The Situation and the Perspectives of Constitutional Justice], presentation made on 17 October 2013 at the International Conference "State and Perspectives of Constitutional Justice", 20.

264 Zorkin, "Vzaimodeistvie pravovoi sistemy Rossii s pravovym polem ob"edinennoi Evropy", *op.cit*. note 219, 11.

265 Zorkin, "Problemy realizatsii Konventsii o pravakh cheloveka", *op.cit*. note 262261, 1.

266 Zorkin, "Pravo sily i sila prava", *op.cit.* note 152, 13-14.

267 Zorkin, "Tsivilizatsiia prava: sovremennyi kontekst", *op.cit.* note 159, 3.

268 Zorkin, "Problemy konstitutsionno-pravovogo razvitiia Rossii", *op.cit.* note 157, 18.

state, of elites, and of the clergy (representing the interests of the Supreme Being). This question remains unanswered, and the Chief Justice never hints that he is aware of the philosophical pitfalls of appealing to solidarity—such appeals, in the last resort, may justify the worst violations of individual freedoms for the sake of maintaining social integrity.

Second, Zorkin develops his conception of human rights on foundations that are pretty much obsolete. His normative ideal is a consistent and full legal system, with texts that provide answers to each question and rule out possible discretion. When he regrets "legally vague formulations in international law which are grey zones providing leeway for turbulence and chaos",[269] the Chief Justice apparently does not conceive the problems of indeterminacy and defeasibility in law that were discussed in the 20th century by such prominent legal philosophers as H.L.A. Hart. Zorkin hopes that "coherent legal formalization of the basic principles of the UN would exclude legal collisions and arbitrary chaotic interpretations".[270] However, this hope is based on the oversimplified conception of the "first positivism" and ignores the difference between rules and principles: the latter, as argued by Ronald Dworkin,[271] conceptually cannot be formalized and never works in an "all or nothing" way. The Chief Justice apparently follows an outdated legal dogma that equates the process of interpretation with finding the "original intention of the legislator"[272] and, therefore, believes in a "correct interpretation of the law, or interpretation of legal norms in accordance with the letter and the spirit of the law".[273] However, asserting such a thesis would normally require tackling the basic philosophical and theoretical questions which are involved in such key legal issues as determinacy, consistency or predictability of law and of its interpretation, also in light of Zorkin's ideas about primacy of unofficial (traditional) law over official (statutory) law. So far, the Chairman of the RF Constitutional Court has not taken this analytical step, at least not in his publications and public speeches.

Third, Zorkin is too optimistic when he considers reconciling exegetic legal philosophy (equating law with the sovereign's will) with the idea of the primacy of collective morality over statutory and international law. If the validity (not effectiveness!) of law is dependent on its congruence with that morality, then the sovereign's will is legally binding only insofar as it matches collective moral intuitions. In other words, there should be a superior instance that stands above the sovereign and decides which of

269 Zorkin, "Pravo v usloviiakh global'nykh peremen", *op.cit.* note 158, 8.
270 Zorkin, "Pravo protiv khaosa", *op.cit.* note 195, 21.
271 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, Cambridge, MA, 1977).
272 Zorkin, "Polozhenie i perspektivy konstitutsionnogo pravosudia", *op.cit.* note 263, 9.
273 Zorkin, "Pravo—i tol'ko pravo", *op.cit.* note 24.

his enactments can be approved or invalidated.[274] Evidently, that instance cannot be bound by sovereign will since it is precisely that very will which is checked in this case. Normally, this instance should not form part of the sovereign (the state) whose enactments are assessed; and in this light, an international court would logically be justified more than a national court (even a constitutional one). Invalidating state positive enactments, this instance (be it a constitutional or a supranational court) addresses certain societal conventions that delimit what counts as "extreme injustice" (Gustav Radbruch) beyond which these enactments cease to be legal. Making the choice in favor of collective or individual morality, of traditional or informal ethics, of religious or secular values, and in many other respects remains the issue of each member of society. Presuming that there is only one correct morality—for example, the one that prioritizes certain values of the traditional family, traditional religion, and the like—Zorkin seems to be intolerant toward competing moral conceptions that may prioritize the innovative over the traditional, the individual choice over the collective interest, freedom over stability and security, and so on.

Conclusion

Not only Russia but, also, other countries are affected by the globalization threatening, metaphorically speaking, to sweep away not only interstate frontiers but, also, states themselves. Transnational and international legal regulation makes state legal systems step back in a number of important fields: along with human-rights law, one could also mention *ius mercatoria*, environmental law, and so on. Within some regional blocs such as the EU, state legal systems are retreating in many other directions, ceding priority to regional or supranational law. The Council of Europe, the EU, and national governments strategically seek to establish their own sovereign interpretation of basic concepts in the legal domain. Furthermore, with regard to fundamental rights themselves, conflicts are inherent in their construction, with rights-claims of one individual coming up against those made by another or by a collectivity. Given that the major task of high courts is to decide on a balance between competing rights-claims, these courts are required to pay close attention to developments in other legal systems, measuring the future justification of their decisions in open discussion forums—one of which should be the ECtHR.

274 Implicitly, Zorkin reserves this place for his Court, but he dares not pronounce that the RF Constitutional Court stands above the sovereign political authorities. However, his position in 1993 against Yeltsin's coup is emblematic of this implicit presumption.

From the aspect of legal philosophy, two key points are important to understand in this approach: that of human rights and that of sovereignty. The Russian exceptionalist understanding of these two key points can serve as a litmus paper for the contemporary Russian international policy and its "living" constitutional order. The ideas set forth by Valerii Zorkin are highly illustrative of the philosophical background of Russian policies toward the ECtHR. These ideas, pragmatically, lead to conservative conclusions in what concerns balancing between the freedom of individual choice and the value of national tradition, with the evident proclivity toward this latter. As will be demonstrated in the following Chapters of the present volume, this proclivity is apparent in Russian judicial practice touching on such susceptible matters as sovereignty, religious freedoms and the rights of sexual minorities.

3 Conservatism in Russia and Sovereignty in Human Rights[275]

Foreword

Examining the narratives of the Chief Justice Valerii Zorkin in the previous Chapter, we have established a number of philosophical (and at the same time ideological, political, and conceptual) orienteers around which these narratives are organized. In contemporary Russian legal and political debates, these narratives invariably hinge on such concepts as sovereignty, human rights, rule of law and democracy. Sovereignty often is used as a powerful argument which allows the overruling of international humanitarian standards and the formal constitutional guarantees of human rights. This conflict between sovereignty and human rights also recurs in other countries, and many legal scholars are demanding the revision or even abandonment of the concept of sovereignty as incompatible with the concept of human rights.

In Russia, this conflict is aggravated by some characteristic features of the traditional mentality favoring statism and collective interests over individual ones, and by the state building a "power vertical" subordinating regional and other particularistic interests to the central power. These features and policies are studied in the present Chapter in the context of the Slavophile-Westernizer philosophical divide and its contemporary repercussions. These repercussions are echoed in isolationist and authoritarian policies which, in 2006, led to their amalgamation in the concept of "sovereign democracy". This concept is considered in the present Chapter as a recurrence of the Russian conservative tradition. Even though, in its literal meaning, the concept has been abandoned by its author and supporters, most of its ideas remain on the cusp of official political discourse reproducing the pivotal axes of Russian political philosophy of the 19th century. This analysis allows us to trace the link between official narratives about Russia's distinct identity, the specific understanding of democracy and a larger philosophical background against which are discussed the limits of protection of human and civil rights. This background will be important for our analysis of the rights of minorities in the following chapters and crucial in explaining how this conceptual background can justify the imposition of constraints on minorities' rights.

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275 The first version of this Chapter was published in 39(1) *Review of Central and East European Law* (2014), 1-40. The present Chapter is an updated version of that work.

Introduction

The celebrated phrase—"*predel ustupchivosti*" (the limit of compromise)—used in a 2010 polemic by the Chief Justice of the RF Constitutional Court, Valerii Zorkin, against the European Court of Human Rights[276] demarcates one of the key trends in Russian legal thought in the 2000s with regard to relations between the Russian authorities and supranational organizations in particular and international law in general. Zorkin argues Russia should decide on its own whether or not to cooperate with international courts and agencies—to take their values and principles in consideration as she sees fit—because Russia enjoys sovereignty immunity from any external pressure in issues such as human rights or democratization.[277] This isolationist strategy was explicitly based on the so-called Westphalian concept of sovereignty to which Zorkin had dedicated his "apology-piece" in 2006.[278]

Curiously, in a December 2012 speech delivered to the Congress of Russian Judges, Zorkin softened his argumentation: *i.e.*, acknowledging that sovereignty cannot outweigh human rights and calling for a new concept of sovereignty compatible with the idea of human rights. While he takes care to stress that "the participation of Russia in various international conventions and treaties does not imply refusing or abandoning the principle of state sovereignty (in favor of so-called soft sovereignty and other doctrines which are popular nowadays)", the Chief Justice went on to argue that "in a globalized world […] we no longer can orientate ourselves to the older Westphalian model of sovereignty […]". He envisages creating a new "legal concept of national sovereignty based on formal equality" and defending it "in all the international forums where decisions important for Russia are taken".[279] It remains uncertain what exactly the content of this new model of sovereignty will be;[280] yet there is little doubt that it will affect—and indeed, that it already has begun to affect—judicial practice in politically charged cases in Russia connected with human rights.

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276 Zorkin, "Predel ustupchivosti", *op.cit.* note 24.

277 "The limit of our compromise is the protection of our sovereignty, of our national institutions and our national interests […] If someone imposes an external "guidance" over the legal situation in our country ignoring the historical, cultural, and social situation, then we need to correct such 'guides' [*dirizhery*]. Sometimes, in a very resolute manner […] Russia shall fight for both protection of its sovereignty and for careful handling with the European Convention, safeguarding the latter from inadequate and dubious decisions" (*ibid*).

278 Zorkin, *op.cit.* note 24.

279 Valerii Zorkin, "Konstitutsionno-pravovye problemy sudebnoi sistemy RF" [Constitutional and Legal Problems of the Judicial System of the RF], (18 December 2012), available at <http://rapsinews.ru/judicial_analyst/20121218/265821471.html#ixzz2PToA6OFO>.

280 Characterizing Zorkin's position, Professor Bowring states that "his speeches and articles make frequent reference to "sovereignty" in the special sense given to it by the Putin regime". Bill Bowring, *Laws, Rights and Ideology in Russia. Landmarks in the Destiny of a Great Power* (Routledge, London, 2013), 7.

In this Chapter, this model will be analyzed against the backdrop of another political-philosophical scheme. This specific scheme can be traced back to its formulation, several years ago, under the title "sovereign democracy" which "arose as a label for the governing team's thinking about Russia's path of political modernization".[281] In this context, it will be important for us, first, to examine whether there are any normative restrictions in Russian constitutional law preventing implementation of this idea, and to consider how the Russian judiciary and politicians might use it in their reasoning.[282] To understand the philosophical background of the problem, we then will address the controversy between the Slavophiles and the Westernizers which reveals the main *pros* and *contras* for the Russian supporters of the (conservative) isolationist policy which forms the central element of the theory of sovereign democracy. In this way, we will be in a position to analyze: (a) the traditional concept of state sovereignty which has been accepted by a number of Russian senior judges; (b) some of the challenges to this concept as well as reactions thereto which have been expressed in the concept of "sovereign democracy", followed by (c) a consideration of philosophical theories underpinning the particular attitude to sovereignty and human rights in Russia.

As an example of the interest in such research, one can refer to Anton Burkov's line of reasoning. He finds that for Russia "the major problem with the application of the Convention [the ECHR] in the domestic legal system is ignorance on the part of those who had to operate the instrument".[283] This fact can be explained through "a lack of familiarity with the Convention mechanism of human rights protection".[284] However, why does one ignore it and lack familiarity with it? Burkov points to the "unwillingness of the judiciary, particularly of the Supreme Court, to alter their own and other courts' jurisprudence"[285] and, finally, to the fact that "the Russian Federation has not clearly decided what place judgments of the ECtHR should occupy within its legal system".[286] A careful analysis of these cases concludes that the impact (if any) was in fact reduced to supporting argumentation rendering decisions which already had ripened on the political level (or on the highest level of judicial policies). Burkov masterfully distinguished several levels of the use of ECtHR case law in argumentation of

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281 Patrick McGovern and John P. Willerton, "Democracy Building Russian Style: Sovereignty, the State, and a Fledgling Civil Society" (18-22 March 2009), 23, available at <http://wpsa.research.pdx.edu/meet/2012/willerton.pdf>.

282 Our analysis here will be limited to several landmark cases of the RF Constitutional Court and relevant key rulings of the RF Supreme Court's Presidium. A comprehensiveness analysis of Russian case-law in this issue requires an independent research project.

283 Anton Burkov, "Russia" in Leonard Hammer and Frank Emmert (eds.), *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe* (Eleven Publishers, The Hague, 2012), 418.

284 *Ibid.*, 420.

285 *Ibid.*, 459.

286 *Ibid.*, 458.

Russian courts: (1) when judges completely ignore or react with hostility to the case law of the ECtHR; (2) when judges very briefly mention it but do not analyze the arguments; (3) when judges briefly state that the "party's reference to the Convention is unfounded" without giving reasons to such a conclusion; (4) when judges base their decisions on the case law of the ECtHR although "this happens quite rarely".[287] In our opinion, the primary reasons for such unwillingness and indecision needs to be sought in a conceptual dimension.

The word "sovereignty" is a powerful one working as an active force for social and political development. As Louis Henkin argued in 1999: "the meaning of sovereignty is confused and its uses are various, some of them unworthy, some destructive of human values […] its application to modern states has inevitably brought distortion and confusion."[288] In fact, in Western legal doctrine, international law has not always been accepted as a tool which can bind states in the exercise of their political power. According to traditional positivist legal doctrine, there is no higher political entity above the sovereign state. For this reason, John Austin—the founding father of legal positivism—was reluctant to consider international law as "law properly so called" (insomuch as law is identified only with the commands of sovereign states) and agreed to accept it only as "law' in a figurative sense.[289]

Whether international law has binding force on national policy, whether this force derives from the free choice of the concerned state or is mandatory and imposes absolute obligations on states—are debates which form one of the focal points in 20th century legal theory.[290] These issues especially are pertinent in such legal matters as human rights and democracy: if the state is the only agency which creates law, it (or, in reality, the discretion of its agents) therefore must stand above the law. No legal limits for state activities logically can be inferred in the framework of this approach to law. As a result, the discourse on human rights and democracy can serve as an ideological camouflage for various political games where the power-holders (or their opponents) may play this card.[291] Only the superiority of international law and the monist model of the relationship between international

287 *Ibid.*, 457.

288 Louis Henkin, "That Is Word: Sovereignty, and Globalization, and Human Rights, Et Cetera", 68(1) *Fordham Law Review* (1999), 1-14, at 1-2.

289 The version to John Austin's 1832 work to which reference is made here is: *The Province of Jurisprudence Determined* (Cambridge University Press, Cambridge, 1995).

290 See a brilliant summary made half a century ago by Hans Kelsen, *Principles of International Law* (Holt, Rinehart and Winston, New York, NY, 1967). See, also, André Nollkaemper, "Rethinking the Supremacy of International Law", 65(1) *Zeitschrift für öffentliches Recht* (2010), 65-85.

291 This is a wide-spread opinion of legal positivists. A noteworthy example of one the most prominent thinkers of this philosophical trend is Hans Kelsen and his opus: *What Is Justice: Justice, Law, and Politics in the Mirror of Science* (University of California Press, Berkeley, CA, 1957).

and domestic law constitute an effective mechanism for the legal protection of individual liberties against an omnipotent state as has been argued persuasively by Hans Kelsen in a number of different works.[292]

With regard to these issues, Russia represents a particular case for studying the connection between the conceptualization of sovereignty and the practical steps taken by politicians and lawmakers in the field of human rights and democratic institutions.[293] This is because while in the Western legal tradition, the accent in a liberal democracy as a system generally is placed on the protection of individual liberty,[294] references in Russian political debates to "genuine" (antique, medieval) democracy place the emphasis on the well-being of the polity—not of its individual members.[295] From this perspective, democracy also can be viewed as an instrument for protection of national rather than individual interests. This is the main postulate of the theory of "sovereign democracy" as analyzed below, voiced by numerous influential Russian politicians (and also judges).

As the reader undoubtedly will know, the 1648 treaty of Westphalia marked the beginning of the contemporary doctrine of state sovereignty as an absolute unrestricted power. Already in the 16th century, Jean Bodin had defined "sovereignty" as: "la puissance absolue et perpétuelle d'une République" ("the absolute and perpetual power of the state"). The sovereign is the one who exercises such power; the sovereign has the right to arbitrarily decide any domestic issue. This understanding continues to form the dominant doctrine in the Russian theory of international law; in this regard, very few things have changed since the 19th century.[296] To be sure, this tradi-

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292 See Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen* (Cambridge University Press, Cambridge, 2010).

293 Naturally, it not only is Russia which is confronting these issues in a changing world. While the focus of our attention here is on the Russian problem, it should not be mistaken for an intent to ignore similar problems in the US or EU (which, nevertheless, are not as acute as those in Russia owing to differing political and legal contexts and, also, to [somewhat] different cultural mindsets). For the sake of brevity in this work, we will not engage in a comparative analysis of the impact which various concepts of sovereignty can have on lawmaking and politics in other countries.

294 This accent on individual liberty was conspicuously made in 1859 by John Stuart Mill in his treatise *On Liberty* (J.W. Parker and Son, London, 1859). On the varying approaches to democracy see David Held, *Models of Democracy* (Polity Press, Cambridge, 2006, 3rd ed.).

295 A classic distinction between the ancient and the modern conceptions of democracy was introduced in the early 19th century by Benjamin Constant in his: "The Liberty of the Ancients Compared with that of the Moderns" (first published in French in 1819), in *Benjamin Constant's Political Writings* (Cambridge University Press, Cambridge, 1988, Biancamaria Fontana transl.).

296 See the conclusions drawn by Maria M. Fedorova, "Sovereignty as a Political-Philosophical Category of Modernity", 52(1) *Russian Social Science Review* (2011), 29-43. See, also, the general review of the development of the notion of sovereignty by Dieter Grimm in his *Souveränität. Herkunft und Zukunft eines Schlüsselbegriffs* (Berlin University Press, Berlin, 2009). A comprehensive analysis of Russian theories of international law can be found in Lauri Mälksoo, "The History of International Legal Theory in Russia: A Civilizational Dialogue with Europe", 19(1) *European Journal of International Law* (2008), 211-232.

tional concept also continues to hold sway in the theory of international law worldwide.[297] But a fundamental difference in most other jurisdictions is that some important signs point to changes in the attitudes of Western lawyers, there, *vis-à-vis* this concept.[298] Nowadays, a number of theoreticians claim the end has arrived of the would-be monopoly of the nation-state on sovereignty.[299] They argue that the necessary connection between state and "Westphalian sovereignty" is no longer relevant in the contemporary world. Human rights, global security, trade and commerce, and many other important social fields are regulated and protected at the global level; as a result, particular national states are bound with the international standards (rules, principles) in these fields and cannot simply do whatever they please with human rights—even with recourse to the argument of sovereignty.[300]

1 Russian Law Faces a Choice: International Principles or National Sovereignty

The idea of "the deconstruction of sovereignty" has been discussed by Günter Teubner and others under the rubric of "globalization" which implies that there is a tendency towards a growing interconnection and interdependence among all countries and societies in the world; this interconnection is supposed to result in the merger of all the national societies

297 The isolationist legal policy of the US and other countries toward the international law is a subject for another study where different contexts and the underlying reasons are to be examined. For a general theoretical perspective see, *e.g.*, Stephane Beaulac, "The Social Power of Bodin's "Sovereignty" and International Law", 4(1) *Melbourne Journal of International Law* (2003), 1-28.

298 See Stephen D. Krasner, "Problematic Sovereignty," in Stephen D. Krasner (ed.), *Problematic Sovereignty: Contested Rules and Political Responsibilities* (Columbia University Press, New York, NY, 2001), 1-24; Ineke Boerefijn and Jenny E. Goldschmidt (eds.), *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flinterman* (Intersentia, Mortsel, Belgium, 2008); and Utsav Gandhi, "State Sovereignty as a Major Hurdle to Human Rights" (17 March 2013), available at <http://ssrn.com/abstract=2234573>. While this process of change also can be observed in modern-day Russian legal theory, for political, legal and philosophical reasons it is developing much slower in Russia as we shall investigate below.

299 See Saskia Sassen, *Losing Control: Sovereignty in an Age of Globalization* (Colombia University Press, New York, NY, 1996); William Twining, *Globalization and Legal Theory* (Cambridge University Press, Cambridge, 2000); Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (Butterworths, London, 2002); and John Agnew, *Globalization and Sovereignty* (Rowman and Littelfield, New York, NY, 2009).

300 That is why it was *ex ante* impossible to persuade most Russian lawyers and politicians that the sovereignty argument does not constitute a defense against preventive use of force in the Kosovo case aimed at protecting human rights. Cf. the analysis of the different arguments in Eric Alan Heinze, "Human Rights in the Discourse on Sovereignty: The United States, Russia and NATO's Intervention in Kosovo" (24-27 March 2002), available at <http://isanet.ccit.arizona.edu/noarchive/heinze.html>.

into a single, "global village".[301] A key question in the case of Russia is: does Russia form a part of this globalized world? If so, will it therefore share common standards and principles with the rest of the international community? Or can one still consider the national state as an independent actor freely deciding if (and to what extent) it will be subject to international law, and to dismiss the globalization discussion because of its ideological nature? The answers to these questions are crucial for shaping internal legal policies—especially in the domain of human rights where the "the general principles of law recognized by civilized nations" (to cite Art.38(1) of the Statute of the International Court of Justice) often are the only defense against unjust and disproportional legal norms wielded by a state.

The formal provisions of post-1991 Russian law yield an ambiguous response to this dilemma. The correlation between state law and international law seems to be clearly stated in Article 15 of the 1993 RF Constitution:

> "The commonly recognized principles and norms of international law and international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty of the Russian Federation stipulates rules other than those stipulated by Russian law, the rules of the international treaty shall apply."

Yet, as clear as that may be upon a first reading, upon reflection one can observe a discrepancy between two policies set forth in Article 15: (1) not only treaties but, also, *principles* and norms of the international law are incorporated into the legal system of Russia. At the same time, pursuant to the literal text (2): *only treaties* have priority in the case of conflicts with state law. The question thus arises: if international principles and norms form component parts of the Russian legal system, what place do they occupy in the normative hierarchy of Russia's legal order?[302] What is the source of their binding force: merely discretionary recognition by state or part of an objective international legal order? There is an even more important issue with practical implications: can these international principles and

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301 Günter Teubner, "Global Bukovina: Legal Pluralism in the World Society", in Gunter Teubner (ed.), *Global Law Without a State* (Ashgate Publishing, Furnham, UK, 1997), 3-28; and Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", 30(3) *Sydney Law Review* (2008), 375-411. Cf. on the theoretical aspect of the globalization discussion: Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, Cambridge, 2012); and Mikhail Antonov, "In the Quest of Global Legal Pluralism", in Aulis Aarnio *et al.* (eds.), *Positivität, Normativität und Institutionalität des Rechts. Festschrift für Werner Krawietz zum 80. Geburtstag* (Duncker und Humblot, Berlin, 2013), 15-30.

302 For a discussion at length on this topic, see Gennady Danilenko, "Implementation of International Law in CIS States: Theory and Practice", 1(10) *European Journal of International Law* (1999), 51-69. The late Professor Danilenko argued that Russia is under "an obligation to give direct domestic effect to decisions of international bodies, including the European Court of Human Rights" (*ibid.*, 68).

norms overrule norms of domestic law and principles (formulated by the judiciary) in the case of a conflict?

The discourses of political and legal practitioners in Russia reveal a propensity for the first option which implies the dualist concept of international order: the binding force of norms of international law depends on their recognition, by the authorities, of the particular state concerned. In some way, this question had already been posed in the USSR. Article 29 of the 1977 Constitution[303] provided a similar statement that the USSR shall fulfill "the obligations arising from the generally recognized principles and rules of international law, and from international treaties signed by the USSR". But this statement did not signify a real incorporation of international law into the law of the USSR; it remained mainly "paper law' without almost any impact on adjudication in Soviet courts.[304] The formal inclusion of this phrase into the new 1993 RF Constitution is symptomatic of the continuity of the legal traditions from prior decades.[305] After, as before, the end of the Soviet Union, the imperative international norms of human rights and other norms of *ius cogens* have had no serious impact on domestic legal practices. The USSR followed these norms (for example, in the case of granting permission for Soviet Jews to emigrate) only as a kind of random "trump card"—played when it needed to negotiate oil contracts or other material issues with the West.

Nowadays, the policies of Russia in this sphere likewise are oscillating: having oil and gas resources and getting a good price for them, Russia's political leaders are tempted to ignore Western moralizing about legal values. In order to join the WTO, the Russian authorities needed to concede to some "Western values"—or, at least, to refrain from violating them during the negotiating sessions. (This situation is evidently more or less common not only for Russia but, also, for China and a number of other countries.) While claiming Russia's fidelity to human rights, Russian authorities have felt free to dismiss any criticism connected with its legislation dealing with LGBT and "foreign agents", for example, in which the Russian Federation clearly follows a different understanding of human rights than the ECtHR and humanitarian agencies worldwide.

In his late 2013 state-of-the-nation address (*poslanie*) to the Russian Parliament, Vladimir Putin reiterated his conservative stances about "traditional values"; he characteristically chided the West for treating good and evil alike when promoting human rights worldwide. The President was furious that:

303 Konstitutsiia (Osnovnoi zakon) Soiuza Sovetskikh Sotsialisticheskikh Respublik [Constitution (The Basic Law) of the Union of the Soviet Socialist Republics] (signed 7 October 1977), *Vedomosti Verkhovnogo Soveta SSSR* No.41 item 617. See the English translation in Feldbrugge, *The Constitutions of the USSR and the Union Republics*, *op.cit.* note 110.

304 However, Tarja Långström has argued that Soviet courts also "were able to invoke treaties" in her *Transformation in Russia and International Law* (Brill Academic Publishers, Leiden & Boston, MA, 2003), 361.

305 *Ibid.*, 345ff.

> "[…] strangely as it might seem, nowadays they demand that good and evil be treated as being equal although these concepts are opposites to one another. Such destruction of the traditional values "from above" not only involves negative consequences for societies but, also, essentially is antidemocratic, as this policy is conducted being basing on some abstract and metaphysical ideas which contradict the will of the majority who do not accept such change and revision."[306]

From this perspective, Putin praised Russia for its "great history and culture which are far removed from the sexless and fruitless tolerance". One of his main messages in this address seemed to be a call "to defend international law through insistence on respect toward national sovereignty" which means protecting "traditional values", "the traditional family and real [*podlinnaia*] human life, not only material but, rather, the spiritual one […]".[307] Evidently, this rhetoric forms a part of the ideological background for the continued suppression of LGBT and other "untraditional" practices contrary to the international human-rights law.

It is not surprising that—when facing criticism against unjust laws and court decisions—some Russian lawyers are tempted to look for a defense against such criticism in the traditional concept of sovereignty as an absolute, unrestricted power which is incompatible with the idea of the objectivity of international law.[308] The practical underpinnings of this defense are easily traceable, as this position provides the justification for virtually unlimited public interventions into individual liberties: "any scrutiny of international human rights without the permission of the sovereign could arguably constitute a violation of sovereignty by its "invasion" of the sovereign's *domaine réservé*".[309] From this point of view, there seem to be no limits to sovereign power in the traditional concept of sovereignty under which sovereignty is defined as unaccountable. Here, one can recall the remarkable characterization which Martti Koskenniemi gave in 2006 to the traditional, 19th century theory of sovereignty: "especially useful for diplo-

306 "Poslanie Prezidenta Federal'nomu Sobraniiu" [The Address of the President to the Federal Assembly] (12 December 2013), available at <http://www.kremlin.ru/news/19825>.

307 *Ibid.*

308 The typical justification of strong federalism in the relations between the Federation and minorities with references to the sovereignty argument was advocated in 2003 by one of the Justices of the Constitutional Court, Vladimir Iaroslavtsev, in his address "Constitutional Court of the Russian Federation and Protection of Minorities", Conference of the Constitutional Court of Andorra, "La protecció de les minories i els Tribunals Constitucionals" (3 October 2003), available at <http://www.tribunalconstitucional.ad/docs/10aniversari/J-RUSSIAN.pdf>. In spite of the clear wording of Art.69 of the Constitution guaranteeing the rights of indigenous peoples in accordance with the *universally recognized principles and norms of international law and international treaties*, Justice Iaroslavtsev stresses that these rights can be restricted with reference to sovereignty of Russia (even where no such exemption is provided either by the Constitution, referring only to international principles and norms, or by these principles and norms themselves).

309 Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law", 84(4) *The American Journal of International Law* (1990), 869.

mats and practitioners, not least because it seemed to offer such compelling rhetoric for the justification of most varied kinds of State action".[310] It is this concept of sovereignty which can be attractive as a tool for legitimizing the disciplinary power of the state,[311] seen as thus being independent of endorsement by international law and being immune to any and all criticism "from abroad".

In its turn, it is this "immunization" which leads to legitimizing the discretionary power of members of the executive and of the judiciary who, thus, feel themselves empowered to decide themselves on the "limits of compromise" concerning human rights. These limits are to be defined by Russian judges when deciding which human rights are to be protected (and defining what the content of the protected rights should be) and, also, by politicians when deciding whether the people are "ripe" enough to have human rights (not only basic but, also, political and cultural ones).[312] This means counter-weighing internationally recognized values of democracy and human rights against the value of national sovereignty, and it this latter concept which often turns out to have more weight in court battles in Russia than the former.

Louis Henkin characterized this style of argumentation in 1999 as follows: "And so, state sovereignty at the end of the twentieth century—and at the beginning of the twenty-first—can be summarized as: "sovereignty means "leave us alone". Sovereignty is: "we will engage in a minimal amount of cooperation, if we as sovereign states consent.' Sovereignty is subject to some "creeping" international human rights, to the extent sovereign nations consent."[313] This argument has been echoed by Prime Minister Dmitry Medvedev: "[...] we never transferred so much of Russia's sovereignty as to allow any international court or foreign tribunal to render decisions that would change our national law."[314]

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310 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, Cambridge & New York, NY, 2006), 89.

311 Cf. a postmodernist analysis of sovereignty as a disciplinary mechanism of state power in Cynthia Weber, *Simulating Sovereignty. Intervention, the State and the Symbolic Exchange* (Cambridge University Press, Cambridge, 1995).

312 An allusion to the words of the main ideologist of sovereign democracy, Vladislav Surkov, who—in his speech to the Center for Preparation of the Staff of United Russia (7 February 2006)—asserted that the people are not prepared "to live under the conditions of the contemporary democracy". Vladislav Surkov, "Suverenitet: eto politicheskii simptom konkurentosposobnosti" [Sovereignty is a Political Equivalent of Ability to Compete], in Nikita Garadzha (ed.), *Suverenitet* (Evropa, Moscow, 2006), 46.

313 Henkin, *op.cit.* note 288, 5.

314 Dmitry Medvedev, "Neobkhodimo sokratit' chislo obrashchenii rossiian v mezhdunarodnye sudy" [It is necessary to reduce the quantity of applications of the Russian citizens to international courts] (4 February 2010), available at <http://grani.ru/Politics/Russia/m.174350.html>; translation cited according to Andrei Susarov, "The Constitution of the Russian Federation or the European Court of Human Rights?", *Russian Survey* (August 2011), available at <http://www.russian-survey.com/main/47-the-constitution-of-the-russian-federation-or-the-european-court-of-human-rights>.

2 European Human-Rights Law from the Perspective of Russian Courts

In their literal form, the provisions of the 1993 Russian Constitution seem to be more favorable to international law than were those contained in the 1977 Soviet Basic Law, and Russian jurisprudence initially has been more open in this perspective. A 2003 Decree of the Plenum of the RF Supreme Court[315] clearly stated that judges have to apply both sources (*istochniki*) of international law and the jurisprudence of international courts.[316] Unfortunately, the effect of the Supreme Court's 2003 Decree had been but ideological in nature, and Russian judges continue to apply such jurisprudence only as a supplement to the applicable rules of domestic Russian law. The same effect seems to characterize the "window dressing" argumentation in a 2013 Decree where the Supreme Court has explained how Russian judges are to deal with ECtHR jurisprudence.[317]

It is not surprising given that even if Russian courts are formally required to refer to international law and particularly to ECtHR doctrine, most references in Russian court decisions have been rhetorical in nature and have been employed as "additional argumentation in support of the conclusions based on the applicable constitutional provisions".[318] However, unlike the 2003 Decree, the 2013 Supreme Court Decree views ECtHR jurisprudence only as complementary to domestic Russian legislation and treaties:[319] "legal positions" (*pravovye pozitsii*) of the European Court need to be taken into consideration (*uchityvaiutsia*) when applying Russian legislation and treaties of the Russian Federation in the courts of general jurisdiction.

315 Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii [Ruling of the Plenum of the RF Supreme Court] (10 October 2003) No.5, "O primenenii sudami obshchei iurisdiktsii obshchepriznannykh printsipov i norm mezhdunarodnogo prava i mezhdunarodnykh dogovorov Rossiiskoi Federatsii" [On the Application by Courts of General Jurisdiction of the Generally Recognized Principles and Norms of the International Law and the International Treaties of the Russian Federation], *Biulleten' Verkhovnogo Suda RF* (2003) No.12. An English text of this Resolution is available at <http://www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=6801>.

316 This interpretation was provided by the Supreme Court in points 10&11 of its 2003 Decree with a view to ECtHR jurisprudence.

317 Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii [Ruling of the Plenum of the RF Supreme Court] (27 June 2013) No.21, "O primenenii sudami obshchei iurisdiktsii Konventsii o zashite prav cheloveka i osnovnykh svobod ot 4 noiabria1950 i protokolov k nei" [On the Application by the Courts of General Jurisdiction of the Convention on Human Rights and Fundamental Freedoms as of 4 November 1950, and of the protocols thereto], *Biulleten' Verkhovnogo Suda RF* (2013) No.8.

318 Danilenko, *op.cit*. note 302, 62.

319 Point 2 of the 2013 Decree deals with the binding force of ECtHR judgments; points 3&4 respectively treat the complementarity of ECtHR judgments to domestic Russian legislation and treaties. In point 11 of the 2003 Decree, the Court had stressed that "the European Convention on Human Rights has its own mechanism, including the obligatory jurisdiction of the European Court" which implied that judgments of this Court "are binding on all the state authorities of the Russian Federation, inclusive of the courts".

While the nuance of this may not be easily perceptible, it nevertheless is quite important. In a 2007 RF Constitutional Court Ruling[320] and in the 2003 Supreme Court Decree, ECtHR jurisprudence was deemed to be an independent source of law: enjoying priority over domestic legislation and directly transplanting ECHR rules and principles into the Russian legal system. But, in the 2013 Supreme Court Decree, this jurisprudence now only is characterized as "subsidiary" (*subsidiarnyi*) to the provisions of domestic Russian legislation and international treaties—as an instrument for enhancing their interpretation. This logic of "window dressing" of court decisions is well illustrated in Russian case law.[321]

Such logic seems to be prefigured in the reservations which Russia made when limiting the binding force of the jurisprudence of the ECtHR only to judgments awarded against Russia. In Article 1 of the 1998 ratification instrument,[322] Russia made a reservation that

> "The Russian Federation, in keeping with Article 46 of the Convention acknowledges ipso facto and without a special agreement the jurisdiction of the European Court of Human Rights to be binding regarding the issues of interpretation and application of the Convention and Protocols thereto in cases of supposed violation by the Russian Federation of the provisions of those treaties when a supposed violation has taken place after their entry into effect regarding the Russian Federation."

320 Para.2.1. of Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii [Ruling of the RF Constitutional Court] (5 February 2007) No.2-P, "O proverke konstitustionnosti statei 16, 20, 112, 336, 376, 377, 380, 381, 382, 383, 387, 388, 389 Grazhdanskogo protsessual'nogo kodeksa Rossiiskoi Federatsii v sviazi s zaprosom Kabineta Ministrov Respubliki Tatarstan, zhalobami OAO 'Nizhnekamskneftekhim' i OAO 'Khakasenergo', a takzhe zhalobami riada grazhdan" [On Verifying the Constitutionality of Arts.16, 20, 112, 336, 376, 377, 380, 381, 382, 383, 387, 388, 389 of the RF Civil Procedure Code in Connection with the Inquiry of the Cabinet of Ministers of Tatarstan Republic, the Complaints of OAO "Nizhnekamskneftekhim" and OAO "Khakasenergo", and the Complaints of Some Citizens], *Rossiiskaia gazeta* (14 February 2007) No.4294. See Kirill Koroteev, "Judicial Review in the Russian Supreme Court and Constitutional Court: Struggling for Jurisdictional Powers Instead of Protecting Human Rights", in William Simons (ed.), *East European Faces of Law and Society: Values and Practices* (Brill Nijhoff, Leiden, 2014), 221-250.

321 In English, see the most comprehensive account of how Russian judges cite the doctrine of the ECtHR by Anton Burkov, *The Impact of the European Convention on Human Rights on Russian Law: Legislation and Application in 1996-2006* (Ibidem-Verlag, Stuttgart & Hannover, 2007). In this last perspective, a notable exception must be made only for the doctrine of the Constitutional Court several decisions of which have been influenced by the jurisprudence of the ECtHR. See William B. Simons, "Russia's Constitutional Court and a Decade of Hard Cases: A Postscript", 28(3-4) *Review of Central and East European Law* (2003), 655-678. See, also, William B. Simons and Rilka O. Dragneva, "Rights, Contracts, and Constitutional Courts: The Experience of Russia", in Ferdinand Feldbrugge and William B. Simons (eds.), *Human Rights in Russia and Eastern Europe: Essays in Honor of Ger P. van den Berg* (Brill, The Hague, London, Boston, 2002), 35-63.

322 Federal'nyi zakon [Federal Law] (30 March 1998) No.54-FZ "O ratifikatsii Konventsii o zazhite prav cheloveka i osnovnykh svobod i Protokolov k nei" [On Ratifying the ECHR and the Protocols Thereto], *SZRF* (1998) No.14 item 1514.

To wit: only those judgments are binding in which Russian legislation has been involved and has been evaluated by the ECtHR. Judgments of the ECtHR against other members of the Council of Europe, formally, have no binding force or effect on Russia.

From this perspective, the "other" jurisprudence of the ECtHR can be viewed as a tool for better interpreting Russian laws in light of the ECHR but not as a source of law itself. This logically means that opinions of the ECtHR, regarding Russian legislation, will not be privileged in any way *vis-à-vis* opinions of the Russian courts—especially of the RF Constitutional Court. This implies that there needs to be one more instance (the RF Constitutional Court) which decides on the conformity of these judgments, as confirmed the RF Constitutional Court in its 2013 Ruling in the *Markin 2* case.[323] This solution has been lauded by Putin as "exceptionally correct from the legal point of view"; the judges have been praised by the President for "the ruling [in *Markin 2*] in which you, in fact, protected the supreme status of our Constitution and proposed an algorithm of actions in situations when a judgment of the ECtHR contradicts the rules of our Constitution".[324]

In its 2013 *Markin 2* Ruling, the RF Constitutional Court likewise stated that judgments of the ECtHR, interpreting provisions of the ECHR,

> "[…] like the Convention, to the extent that they interpret, in accordance with generally recognized principles and norms of international law, the content of the rights and freedoms enshrined by the Convention, are an integral part of the Russian legal system, and for that reason must be taken into consideration by the federal legislator when regulating social relations and by the law-enforcement agencies when applying the corresponding norms of law".[325]

This formulation of the RF Constitutional Court's Ruling does not confirm the interpretation of Anton Burkov who finds that that "the entire ECtHR case law was admitted as a source of Russian law" through the jurisprudence of the RF Constitutional Court,[326] so that all the ECtHR judgments are compulsory insomuch as "recognized as sources of Russian law and law enforcement practice, thus, they must be taken into account when cases are considered by national courts".[327]

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323 Ruling of the RF Constitutional Court (6 December 2013) No.27-P, *op.cit.* note 176.

324 "Vstrecha V.V. Putina s sud'iami Konstitutsionnogo suda" (12 December 2013) [Vladimir Putin meets Judges of the Constitutional Court], available at <http://www.kremlin.ru/news/19832>. See, also, Vladimir Churov and Boris Ebzeev, "Reshenie ESPCH po delu "respublikanskaia partiia Rossii protiv Rossii' ili utrachennye illuzii" [Judgment of the ECtHR in the Case of "the Republican Party of Russia v. Russia" or Lost Illusions], *Konstitutsionnoe i munitsipal'noe pravo* (2011) No.12, 2-11; and Aleksandr Kokotov, "Nasushchnye voprosy regulirovaniia deiatel'nosti Konstitutsionnogo Suda Rossiiskoi Federatsii [Actual Issues of Regulation of the Activity of the Constitutional Court of the Russian Federation], *Rossiiskii iuridicheskii zhurnal* (2012) No.2, 20-27.

325 Ruling of the RF Constitutional Court (6 December 2013) No.27-P, *op.cit.* note 176.

326 Burkov, *op.cit.* note 321, 415.

327 *Ibid.*, 418.

First, these judgments assumed to have legal effect not *per se* but, rather, as manifestations of international law (and the margin of appreciation of this link between international and constitutional law belongs to the RF Constitutional Court as it reasoned in the 2013 *Markin 2* case).[328]

Second, "taking into account" may imply different extents of binding force and does not necessarily signify "an obligation of a court to apply" or a "compulsory effect".[329] This opinion is confirmed by the recent jurisprudence of the RF Constitutional Court and by Chief Justice Zorkin who is confident that ECtHR judgments have "only subsidiary character, and relations between the ECtHR and highest national judicial organs cannot be regarded as one-way street".[330] However, both opinions (about the necessary mediatory role of the RF Constitutional Court and about the direct effect of ECtHR jurisprudence) are not wholly mutually incompatible: rather, they reflect two different aspects of the situation: what "Is" and what "Ought to Be".[331]

One of the reasons for this change, in our opinion, is that adjudication in most Russia courts, in many regards, is still shaped according to the old syllogistic model: the role of a judge is to subsume the facts of the case under an ideal model given in a positive norm so as to render a judgment as a logical sequence thereof.[332] This syllogistic framework leaves little room for balancing principles, values, or the reasons for doing so, especially in the lower courts—let alone leave room for comparisons of domestic and international law. The latter, *i.e.*, comparisons of domestic and international law, is something which formally is required of judges of the courts of general jurisdiction under the 2003 Decree but for which the judges are neither trained

328 *Op.cit.* note 176.

329 See Sergey Golubok and Kirill Koroteev, "Judgment of the RF Constitutional Court on Supervisory Review in Civil Proceedings: Denial of Justice, Denial of Europe", 7(3) *Human Rights Law Review* (2007), 619-632.

330 See the interview with Valerii Zorkin (December 2008), available at <http://www.consultant.ru/law/interview/Zorkin/>. For another position (about the binding effect of all ECtHR "legal positions" in one of the works of a retired justice of the RF Constitutional Court, see Nikolai Bondar', "Konventsional'naia iurisdiktsiia Evropeiskogo suda po pravam cheloveka v sootnoshenii s competentsiei Konstitutsionnogo Suda Rossiiskoi Federatsii" [Conventional Jurisdiction of the ECtHR as Compared with the Competence of the RF Constitutional Court], *Zhurnal rossiiskogo prava* (2006) No.6, 113-127. See, also, Aleksei Laptev and Mariia Filatova, "K voprosu o statuse pravovykh pozitsii Evropeiskogo suda po pravam cheloveka i o roli Konstitutsioonogo Suda Rossiiskoi Federatsii v ego opredelenii" [On Question of the Status of Legal Positions of the ECtHR and the RF Constitutional Court's Role in Defining this Status], 1(80) *Sravnitel'noe konstitutsionnoe obozrenie* (2011), 124-156; and Aidar Sultanov, *Evropeiskie pravovye standarty, uroki istorii i pravoprimenitel'naia praktika* [European Legal Standards, the Lessons of History and Law Enforcement Practice] (Statut, Moscow, 2012), 268-293.

331 This intellectual opposition between descriptive statements about "what is" and normative statements about "what ought to be"—known as Hume's law—was first formulated by David Hume in his *Treatise on Human Nature* (John Noon, Cheapside, 1739).

332 See, *e.g.*, the characterization of this "syllogistic and non-problematic style of judicial writing" in Russia by Alexander Vereshchagin, *Judicial Law-Making in Post-Soviet Russia* (Routledge, New York, NY, 2007), 236.

nor fully motivated so that they end up following the general understanding of judicial functions which still dominates Russian legal theory. According to such understanding, this function is reduced to applying the traditional subsumption method in jurisprudence which relies on legal logic so as to derive the solution of a case from the law which proclaims the sovereign will.[333]

Similarly to most of the constitutions of Western democratic states, lawmaking in Russia is conceived (pursuant to the Constitution) as one of the inalienable prerogatives of the sovereign people (whose will is represented by parliament and elected officials). From the perspective of contemporary Russian legal doctrine, it implies that only the sovereign people can adopt legal rules—immediately, via a referendum, or thorough the intermediary of an elected parliament.[334] If foreign actors (including organizations of the international community such as the ECtHR) were to impose binding legal rules from the outside (or, otherwise, undermine the validity of Russian legislation), it would be regarded by this doctrine as an unlawful encroachment on the sovereign rights of the people. Thus, for many Russian lawyers (including judges), the very possibility of influencing national lawmaking and law-enforcement constitutes a threat to the existence of the state. From this standpoint, skepticism towards international courts has widened in post-Soviet Russia. It is symptomatic that a retired, activist Justice of the Constitutional Court, Tatiana Morshchakova, stated in 2007 that "[u]nfortu-

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333 A typical understanding can be found in a work of the Chief Justice of the RF Supreme Court Viacheslav Lebedev, *Sudebnaia vlast' v sovremennoi Rossii: problemy stanovleniia i razvitiia* [Judicial Power in Contemporary Russia: Problems of Formation and Development] (Lan', St. Petersburg, 2001). Professor Shvarts of St Petersburg State University has remarked that:

> "[…] understanding of the very nature of judicial power and of its limits, functions and prerogatives will change. Taking into consideration legal positions of the European Court will inevitably enforce changes in the civil procedure, as such "taking into consideration' is impossible within the framework of the traditional procedural forms".

Mikhail Shvarts, "K voprosu o predmete sudebnoi deiatel'nosti v grazhdanskom sudoproizvodstve v sovremennykh usloviiakh" [On the Question of the Object of Judicial Activity in Civil Procedure Under Contemporary Conditions], in Tamara Abova *et al.* (eds.), *Kontseptsiia razvitiia sudebnoi sistemy i sistemy dobrovol'nogo i prinuditel'nogo ispolneniia reshenii KS RF, sudov obshchei iurisdiktsii, arbitrazhnykh, treteiskikh sudov i Evropeiskogo suda po pravam cheloveka* [The Conception of Development of the Court System and of the System of Voluntary and Compulsory Execution of Decisions of the RF Constitutional Court, Courts of General Jurisdiction, Arbitrazh Tribunals, Arbitration Courts and the ECtHR] (Iuridicheskii Tsentr, Krasnodar, St. Petersburg, 2007), 252.

334 See, *e.g.*, a work of a former Chief Justice of the RF Constitutional Court, Marat Baglai, *Konstitutsionnoe pravo Rossii* [Constitutional Law of Russia], (Norma, Moscow, 2007, 6th ed.), 121-126. It is appropriate to note here that after the adoption of the Russian Constitution through a referendum of 12 December 1993, no other referenda have since been held in Russia. In the present work, we are unable to provide a conclusive opinion as to why similar constitutional texts about the sovereignty of people in the Russian and the Western constitutions provoke different reactions in the respective jurisdictions and legal communities; such a task would constitute a separate comparative research project.

nately, our country is moving into collision with a politicization of judicial decisions […] undermining trust in the international judicial system".[335]

In particular in recent years, the debates about barring international courts from intruding into the sovereign affairs of Russia have been marked by several controversies between the ECtHR, the Constitutional Court and the Supreme Court of Russia. The sovereignty argument played a major role in the 2012 landmark *Markin* case where the Russian government insisted that "[b]y assessing Russia's legislation, the Court would encroach upon the sovereign powers of the Parliament and the Constitutional Court"[336] even if the subject matter of this case was about the seemingly minor issue of parental leave for military personnel. Likewise, the sovereignty "card" has been played by Russian authorities as the *prima facie* reason for opposing the US Magnitsky Act; deemed to be an encroachment on sovereignty of the Russian state by imposing sanctions against RF officials in retaliation for alleged legal lapses in dealing with Magnitsky whereby the adoption of Russian children by US citizens was banned in order to protect Russian national sovereignty.[337]

3 The Nature of International Law in the Light of the Russian Constitution and Its Interpretations

In the 2013 *Mass Meetings* case,[338] the Court already has implied that international standards (at least, those in the field of political democracy) are not binding on Russia and that the ECtHR "does not have, as its task, the standardization of all the systems which exist in Europe" (para. 2.2.). The issue of the universality of human rights had been argued intensively before

335 Cited in Bill Bowring, "Russia and Human Rights: Incompatible Opposites?", 1(2) *Gottingen Journal of International Law* (2009), 51.

336 *Markin v. Russia*, *op.cit.* note 176, para. 85.

337 HR 6156-112th Congress: Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 19 July 2012, available at <http://www.govtrack.us/congress/bills/112/hr6156>. And a reply of the Russian authorities: Federal'nyi zakon [Federal Law] (28 December 2012) No.272-FZ, "O merakh vozdeistviia na lits, prichastnykh k narusheniiam osnovopolagaiushchikh prav i svobod grazhdan Rossiiskoi Federatsii" [On Measures to Influence Those Who Are Connected with Violation of Fundamental Rights and Liberties of Russian Citizens], *SZRF* (31 December 2012) No.53 item 7597.

338 Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii [Ruling of the RF Constitutional Court] (14 February 2013) No.4-P, "O proverke konstitustionnosti Federal'nogo zakona "O vnesenii izmenenii v Kodeks Rossiiskoi Federatsii ob administrativnykh pravonarusheniiakh i Federal'nyi zakon "O sobraniiakh, mitingakh, demonstratsiiakh, shestviiakh i piketirovaniiakh" v sviazi s zaprosom gruppy deputatov Gosudarstvennoi Dumy Rossiiskoi Federatsii i zhaloboi grazhdanina E.V. Savenko" [On Verifying the Constitutionality of the Federal law "On Amending the RF Code of Administrative Offenses and the Federal Law "On Gatherings, Meetings, Demonstrations, Parades and Pickets" in connection with the inquiry of a group of deputies of the RF State *Duma* and the Compliant of Citizen E.V. Savenko], *Rossiiskaia gazeta* (27 February 2013) No.6018.

by the court, *e.g.*, in a 2007 case dealing with the prohibition against burying terrorists[339] where worldwide humanitarian standards had to cede to concerns of national security and sovereignty. This 2007 RF Constitutional Court decision was controversial: three justices of the Constitutional Court disagreed with the majority view and, in their dissenting opinions,[340] insisted that the majority's opinion was a manifest contradiction to the very idea of human rights: Justice Kononov argued that this opinion was "absolutely immoral—reflecting the most uncivilized, barbaric and base views of previous generations". The final page of the story was written in 2013 when the RF Constitutional Court's decision was overruled by the ECtHR. In its judgment,[341] the Strasbourg Court accused the RF Constitutional Court of misinterpretation of standards of a democratic society (paras. 221-238).

Surprisingly, this ECtHR judgment has not yet drawn much attention from Russian lawyers and politicians (putatively, because the main complaint against Russia—concerning the allegedly unlawful killing of the Chechen leader Maskhadov—was turned down), although it was the first time that the Strasbourg Court has overruled a "positive" ruling (*postanovlenie*) of the RF Constitutional Court where the latter had rendered a substantial interpretation on the constitutionality of a RF federal law. In *Markin* and other cases where conflicts in the interpretation of laws have arisen between the ECtHR and the RF Constitutional Court, the Strasbourg Court dealt with "negative" judgments (*opredeleniia*) in which the RF Constitutional Court had dismissed petitions without substantiating its opinion.

In December 2013, the RF Constitutional Court considered another petition of Konstantin Markin concerning execution of the 2010 ECtHR judgment where the Strasbourg Court had overruled the opinion of the Constitutional Court from 2009 year. In January 2013, the Leningrad District Military Court had submitted an inquiry to the RF Constitutional Court asking whether it should implement the ECtHR judgment which is contrary to the position of the RF Constitutional Court and, therefore (in the opinion of the Military Court), to the RF Constitution. On the one hand, the Constitutional Court evaded formulating a direct reply to the Military Court's inquiry by dismissing it on procedural grounds (reasoning, that the question only would be ripe after the Military Court had rendered a judgment and Markin had filed a complaint with the Constitutional Court). On the other hand, in its December 2013 ruling, the RF Constitutional Court expressly has forbidden Russian courts from implementing allegedly unconstitutional judgments of the ECtHR and, also, has barred these courts

339 Ruling of the RF Constitutional Court (28 June 2007) No.8-P, *op.cit.* note 23.

340 The Court includes nineteen judges, three of whom disagreed with the majority of fifteen judges (one of the judges being absent). The Dissenting Opinions *(osobye mneniia)* of Justices Kononov, Gadzhiev, and Ebzeev have been published separately at *Vestnik Konstitutsionnogo Suda RF* (2007) No.4.

341 ECtHR Judgment *Maskhadova and Others v. Russia* (6 June 2013) Application No.18071/05, Dissenting Opinions of Justices Dedov and Hajiyev.

from assessing the constitutionality of Russian legislation which is applied in such cases.[342]

This notwithstanding, the very fact of the ECtHR's intervention in issues which already have been adjudicated by the RF Constitutional Court cannot but lead to irritation among the members of this latter Court, let alone the Russian legal community and society at large. The level of this irritation was, nonetheless, different as we have shown in the beginning of this Chapter in describing two positions of the Court's Chief Justice. The position which Valerii Zorkin articulated in 2013[343] seems to support this vigilant attitude towards the jurisprudence of the ECtHR—increasingly suspected by some parts of Russian society of endangering Russian national security. Confirming that Russia will abide by the Human Rights Convention, by other international treaties and by the jurisprudence of the ECtHR, the Chief Justice also has insisted that:

> "At the same time, the Russian state shall have instruments to exercise influence on the decisions of such jurisdictional organizations which concern the legal system of Russia and which are in some way connected with its sovereignty."[344]

342 Para.3.1, Ruling the RF Constitutional Court (6 December 2013) No.27-P, *op.cit.* note 176. Here, the RF Constitutional Court additionally confirmed its triumph over the RF Supreme Court in their long-lasting struggle about the direct applicability of the RF Constitution. Prior to 16 April 2013, the Supreme Court had instructed its lower-level (common jurisdiction) courts to apply directly the RF Constitution where these courts had found that a federal law (or a presidential edict) contradicted the Constitution and to refrain from applying such legislation or edicts (points (b), (v), (g), para.2, Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii [Ruling of the Plenum of the RF Supreme Court] (31 October 1995) No.8, "O nekotorykh voprosakh primeneniia sudami Konstitutsii Rossiiskoi Federatsii pri osushchestvlenii pravosudiia" [On Some Questions Pertaining Application of the RF Constitution by Courts when Administering Justice], *Rossiiskaia gazeta* (28 December 1995) No.247. In a 1998 Ruling, the Constitutional Court had condemned this practice reasoning that no court can abstain from applying legislation unless such legislation has been deemed unconstitutional by the Constitutional Court. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii [Ruling of the RF Constitutional Court] (16 June 1998) No.19-P, "O tolkovanii otdel'nykh polozhenii statei 125, 126 i 127 Konstitutsii Rossiiskoi Federatsii" [On Interpreting Some Provisions of Arts.125, 126 and 127 of the RF Constitution], *SZRF* (1998) No.25 item 3004. This discrepancy between two jurisdictions has lasted 15 years until the Supreme Court abandoned its position and deleted the controversial points from its Ruling. See Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii [Ruling of the Plenum of the RF Supreme Court] (16 April 2013) No.9, "O vnesenii izmenenii v Postanovlenie Verkhovnogo Suda Rossiiskoi Federatsii (31 October 1995) No.8, 'O nekotorykh voprosakh primeneniia sudami Konstitutsii Rossiiskoi Federatsii pri osushchestvlenii pravosudiia'" [On Amending a Ruling of the Presidium of the Supreme Court No.8 of 31 October 1995 "On Some Questions Pertaining to the Application of the RF Constitution by Courts when Administering Justice"], *Rossiiskaia gazeta* (24 April 2013) No.89.

343 Zorkin, *op.cit.* note 279.

344 Zorkin, *op.cit.* note 279, 8. Such calls for communication between the European and the national jurisdictions also have been suggested by some European lawyers. See Anthea Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law", 60(1) *International and Comparative Law Quarterly* (2011), 57-92.

The authoritarian and isolationist trends in Russian internal policy have been used (going back to Soviet times) to favor such argumentation in order to defend Russia against "Western moral imperialism".[345]

This official rhetoric meets some constraints in the text of the 1993 RF Constitution. So, the supremacy of international standards in human rights can be found in Article 17: human rights in Russia are recognized and ensured "according to the generally recognized principles and norms of international law". Nonetheless, for some observers, this reference to international law appears to be a mere statement of policy.[346] A strictly formalist reading of Article 15 of the Constitution can lead one to the following conclusion: only the treaties to which the state has ceded its sovereign will are binding upon the Russian judiciary, the parliament and the government; the general norms and principles of international law which have not been ratified are not deemed to be a source of international law[347] and only will have persuasive or informative effect.[348] From this perspective, one can conclude that the standards of human rights protection and the principles of democracy—in certain circumstances—can be abandoned for the sake

345 See Derek Averre, "Sovereign Democracy and Russia's Relations with the European Union", 15(2) *Demokratizatsiya* (2007), 173-190.

346 *E.g.*, it was stated almost twenty years ago that, with respect to the implementation of international human rights in Russia, Art.15 of the Constitution seems "to be more theory than practice". "Report on the Conformity of the Legal Order of the Russian Federation with the Council of Europe Standards, 15 *Human Rights Law Journal* (1994), 249-250. See, also, Jonathan Weiler, *Human Rights in Russia: A Darker Side of Reform* (Lynne Rienner Publishers, Boulder, CO, 2004); and Anna Politkovskaya, *Putin's Russia* (Harvill Press, London, 2004).

347 Art.22 of the RF law on international treaties contains an "indirect protection of sovereignty' clause:

> "If an international treaty contains rules requiring the change of individual provisions of the Constitution of the Russian Federation, the decision concerning consent to its binding nature for the Russian Federation shall be possible in the form of a Federal Law only after making the respective amendments to the Constitution of the Russian Federation or a revision of its provisions in the established procedure."

Federal'nyi zakon [Federal Law] "O mezhdunarodnykh dogovorakh Rossiiskoi Federatsii" [On International Treaties of the Russian Federation] (15 July 1995) No.101-FZ, *SZRF* (1995) No.96 item 2756. See, also, Bogdan Leonidovich Zimnenko, *International Law and the Russian Legal System* (Eleven Publications, Utrecht, 2007, W.E. Butler, ed., transl. introd.), 80ff. (in Russian: Bogdan Leonidovich Zimnenko, *Mezhdunarodnoe pravo i pravovaia sistema Rossii. Obshchaia chast'* (Statut, Moscow, 2010), 63ff.).

348 In order to stress that the jurisprudence of the Strasbourg Court does not have binding force in Russia, some Russian lawyers propose to treat ECtHR's judgments as a "persuasive" or "informative" precedent [*ubezhdaiushchii, informatsionnyi pretsedent*]: Aleksandr Bonner, "Sudebnyi pretstedent v rossiiskoi pravovoi sisteme" [Judicial Precedent in the Russian Legal System], 3 *Rossiiskii ezhegodnik grazhdanskogo i arbitrazhnogo protsessa* (2004), 151-161; and Igor' Iastrzhembskii, "Sovremennoe ponimanie sushchnosti sudebnogo pretsedenta" [A Contemporary Understanding of the Nature of Judicial Precedent], LXIII(1) *Lex Russica* (2010), 353-354. See, also, Kirill Koroteev, "Are Russian Courts Capable of Creating Precedents? Overcoming Inconsistency in Case Law", 38(3-4) *Review of Central and East European Law* (2013), 341-362.

of the protection of sovereignty under Article 4 of the Constitution.[349] This conclusion is confirmed by Article 55(3) of the Constitution which provides that individual rights and freedoms may be restricted in order to protect the foundations of the constitutional system, the security of the country, or the security of the government.[350] Article 2 of the Constitution—pursuant to which human rights are declared to be the highest priority (as the "supreme value" [*vysshaia tsennost'*] (Art.2, RF Constitution) in Russia—provides a defense against such a reading, although the text of Article 2 does not define the scope of the protected human rights.

Does this Article refer only to those mentioned in ratified treaties, or those which are internationally recognized, or even those which can be classified as "natural rights" and are not fixed in any treaty or convention? There are two main approaches to this problem in Russian international-law scholarship.

The *first* approach preserves the force of the sovereignty argument, as ratification implies that state concedes the application of an international treaty on its territory. The *second* is problematic in view of the aforementioned ambiguities of the Constitution, which does not explicitly restate what shall be the balance between the concerns of human rights and those of sovereignty. At first glance, the *second* reading may seem favorable to universal humanitarian standards. Nonetheless, in the consequent logic of its implementation, it also can result in discarding "internationally recognized human rights": putting them aside in order to give way to the "natural rights" found by courts in domestic traditional values and patterns.

A clear example of this latter approach can be seen in the attitude of the courts to gays and lesbians who allegedly are being prosecuted for expressing their opinions. As we shall show below, these prosecution stands in contradiction to international standards of human rights. Yet, in Russia such prosecutions are justified from both theoretical and practical standpoints with reference not only to the traditional family, gender roles, and religious commands but, also, to the sovereignty argument: to defend Russian society

349 "The sovereignty of the Russian Federation shall cover the whole of its territory. The Constitution of the Russian Federation and federal laws shall have supremacy in the whole territory of the Russian Federation." Konstitutsiia Rossiiskoi Federatsii (25 December 1993) (as amended), *SZRF* (2009) No.4 item 445.

350 "The rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defense of the country and security of the State." (*ibid.*)
Naturally, such limitation clauses are formulated also in other Constitutions; see an overview in Roza Pati, "Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective", 23(1) *Berkeley Journal of International Law* (2005), 223-280. But a key question remains: why does such a limitation on rights seem to work in other jurisdictions somewhat differently than in Russia? This question requires a special comparative research which we are unable to undertake within the framework of the present chapter.

from the West.[351] The ECtHR's 2010 decision[352] in *Alekseyev*—in which the ECtHR unanimously found Convention violations in the restrictions which had been imposed by Moscow authorities on gay-rights marches—has had virtually no effect on Russian legal practice.[353] The argumentation of the ECtHR has been overruled with references (see argumentation in the cases cited below) to cultural traditions of the Russian people which is sovereign and, therefore, can impose its values upon those stemming from international law.[354]

4 The Philosophical Background of Discussions on Sovereign Democracy

If one looks carefully at the theoretical underpinning of the official Russian attitude to human rights, one can observe an outline of certain traditions of legal thinking which have been interiorized at the very basic levels of culture and, also, naturally during legal education. Discussing the official position on the sovereignty issue in Russia in their 2009 work, McGovern and Willerton find the main sources of this posture in "the Russian politi-

351 A noteworthy theoretical analysis of the conflict between the ideology of natural rights and that of the liberal human rights can be found in Gret Haller, *Human Rights Without Democracy?: Reconciling Freedom With Equality* (Berghahn Books, Oxford, 2012). See, also, Alexander Dmitrenko, "Natural Law or Liberalism? Gay Rights in the New Eastern Europe" (2001), available at <https://tspace.library.utoronto.ca/bitstream/1807/15216/1/MQ63077.pdf>; and Cai Wilkinson, "Putting Traditional Values into Practice: Russia's Anti-Gay Laws", 138 *Russian Analytical Digest* (2013), 5-7.

352 ECtHR Judgment *Nikolay Alekseyev v. Russia* (21 October 2010) Applications No.4916/07, 25924/08 and 14599/09.

353 Characteristically, in dismissing Aleskeyev's petition in 2013, based on the jurisprudence of the ECtHR in the 2010 case of this petitioner (*op.cit.* note 352), in para. 2.2. of its ruling, the RF Constitutional Court held that this ECtHR judgment is not binding as far as it does not preclude the Constitutional Court from "the necessity to define on the basis of balancing of the competing constitutional values […] limits for realization of rights and freedoms by such persons [*i.e.*, gays] so that they do not violate the rights and freedoms belonging to other people". Opredelenie Konstitutsionnogo Suda Rossiiskoi Federatsii [Statement of the RF Constitutional Court] (24 October 2013) No.1718-O, "Ob otkaze v priniatii k rassmotreniiu zhaloby grazhdanina N.A. Alekseeva na narushenie ego konstitutsionnykh prav stat'ei 7.1 Zakona Sankt-Peterburga "Ob administrativnykh pravonarusheniiakh v Sankt-Peterburge" [About the Denial to Accept for Consideration a Complaint of Citizen N.A. Alekseev About Violation of his Constitutional Rights by Article 7.1. of St Petersburg Law "On Administrative Offenses in St. Petersburg"], available at <http://base.garant.ru/70524914/>.

354 Here we shall not enter into a detailed account of case law in Russia on this matter, indicating only selected judicial cases which we argue should serve as examples of this attitude: *e.g.*, the Decision of the Gagarinskii District Court of Moscow (20 July 2010) No.2-2415/2010, *Alekseev v. Ministry of Justice* (about the registration of "The Movement for Equality of Marriage"); and the Decision of Arkhangelsk Regional Court (22 May 2011) No.3-0025, *Vinnichenko v. the Arkhangelsk Council of Deputies* (about the illegality of the regional law prohibiting gay propaganda). The decisions have not been officially published but are available at <http://судебныерешения.рф>.

cal philosophical tradition emphasizing statism, collectivism, and national sovereignty that has long differentiated the country's political outlook and experience from that of many Western countries".[355]

This conclusion leaves one with an ambiguous impression. On the one hand, the disregard of differences in *Weltanschauung* can be cited as one of the main reasons for the failure of Western attempts to accomplish a *mission civilisatrice* aimed at educating Russians to respect the values of democracy, freedom, and individual liberties without noticing that these values are perceived somewhat differently in Russia. On the other hand, such a difference should not be overestimated since Russian history also shows strong tendencies towards democracy and self-government which can be compared (yet, *nota bene*: not identified!) with Western European ones.[356]

In arguing that there is some specificity in the Russian culture of legal thinking, we do not share the dubious conservative conclusions that Russians do not have the mentality needed for understanding the social value of law. According to the famous diction of Alexander Herzen:

> "The legal insecurity that has hung over our people from the time immemorial has been a kind of school for them. The scandalous injustice of one half of the laws taught them to hate the other half; they submit only to force. Complete inequality before the law has killed any respect they may have had for legality. Whatever his station, the Russian evades or violates the law wherever he can do so with impunity; the government does exactly the same thing." [357]

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355 McGovern and Willerton, *op.cit*. note 281, 3. As such, this approach to the issue is fruitful even if we cannot share the characterization of the Russian mentality as "decidedly traditional, and in many regards undemocratic" (*ibid*., 17), as a "collectivist mindset" (*ibid*., 26). This mentality is much richer and more diverse than has been suggested by McGovern and Willerton; it also can be characterized by references to the intellectual legacy of Chicherin, Gradovsky, Kavelin and other Russian liberals. Cf. the classic work by Andrzej Walicki, *Legal Philosophies of Russian Liberalism* (University of Notre Dame, Notre Dame, IN, 1992). From a historical standpoint, one also can trace the common roots of Eastern and Western European legal cultures; see, *e.g.*, Mikhail Antonov, "Du droit byzantin aux pandectistes allemands: convergences de l'Europe occidentale et de la Russie", in Anna Karuso (ed.), *Identita del Mediterraneo: elementi russi* (AM&D Edizioni, Cagliari, 2012), 253-263.

356 See Nicholas S. Timasheff, "Free Institutions and Struggle for Freedom in Russian History", 35(1) *Review of Central* and *East European Law* (2010), 7-25; and F.J.M. Feldbrugge's introduction to this piece: "Nicholas Timasheff's Views on the Role of Freedom in Russian History", 35(1) *Review of Central* and *East European Law* (2010), 1-5.

357 Alexander Herzen, "O razvitii revoliutsionnykh idei v Rossii" [On the Development of Revolutionary Ideas in Russia] (first published in 1869), in Alexander Herzen, *Sobranie sochinenii v 30 tomakh*, Vol. 7 (Moscow, 1956), 121. See an interesting analysis of the alleged legal nihilism of the Russians in Kathryn Hendley, "Who Are the Legal Nihilists in Russia?", 28(2) *Post-Soviet Affairs* (2012), 149-186, where Professor Hendley writes that "legal nihilism is an inescapable feature of Russian legal culture" (*ibid*., 179). There are even more resolute statements in Western scholarship; see, *e.g.*, Jessica C. Wilson, "Russia's Cultural Aversion to the Rule of Law", 2(2) *Columbia Journal of European Law* (2008), 195ff.

The first proposal (a particular mentality) does not necessarily involve the second (legal nihilism). In spite of all the intricacies of the historical development (the Tartar yoke, the tsarist autocracy, or communist rule), on the whole Russia belongs to the continental legal tradition of Western civilization.[358] The difference is nevertheless perceptible, and as Bill Bowring has argued: "there is a distinctively Russian tradition of thought and argument about human rights".[359] This tradition is not to be found at the level of a mystical *Volksgeist* but, rather, in the manner in which students are taught law; the way in which judges and law-enforcement officers are instructed to find, protect and enforce the law.[360]

Historically, this *Weltanschauung* has been expressed in philosophical ideas about a religio-mystical unity between society and individuality, in "the eternal conflict between the instinct of statehood's power and the instinct of freedom and sincerity of the people".[361] As Berdyaev wrote in his 1937 tome, one result of these ideas can be seen in the unhappy experiment with Russian Communism pretending to carry out the traditional Russian values of *Sobornost'* or communitarianism (the mystic idea of religious integration of an individual into the collective spirituality).

The emphasis on the collectivity—superposing individuality—often has been mentioned as one of the key elements of Russian culture. This cultural peculiarity is seen as promoting egalitarian values and community fellowship. For Margaret Mead, it is in shifting away from an emphasis on the solitary communicant to one on the congregational experience of community.[362] For Russian ideal-realist philosophy, this shift does not lead to the annihilation of individuality for the sake of universality; yet, ideally, it does aim at a fuller development of the personality which only can exist as a part of the totality (the people, the Church, the rural community (*mir* [world]), etc.). The gap between this ideal dimension and the historical reality of the domination of the collective over the individual for Nikolai Berdyaev, Vladimir Soloviev and many other Russian intellectuals is explained by Orthodox religiosity: justifying individual existence solely

358 Even if one can legitimately argue that in the case of Russia we deal with a kind of transitory, hybrid or mixed system combining Western elements with those of different legal traditions. On this problem see Esin Örücü, *Mixed Legal Systems at New Frontiers* (Wildy, Simmonds & Hill Publishing, London, 2010).

359 Bowring, *op.cit.* note 335, 238. See, also, Bill Bowring, "Rejected Organs? The Efficacy of Legal Transplantation, and the Ends of Human Rights in the Russian Federation", in Esin Örücü (ed.), *Judicial Comparativism in Human Rights Cases* (UKNCCL, BIICL, London, 2003), 159-182.

360 Cf. the thoughtful examination of the particularities of the Eastern European legal mentality and of the connection between this mentality and judicial practices in Justice Kühn's *The Judiciary in Central and Eastern Europe, op.cit.* note 122.

361 Nicolai Berdyaev, *The Origin of Russian Communism* (G. Bles, London, 1937), 15.

362 Margaret Mead, "Soviet Attitudes toward Authority. An Interdisciplinary Approach to Soviet Character", in M. Mead, J. Rickman and G. Gorer, *Russian Culture* (Bergbahn Books, Oxford, 2002, first published in 1951), 96.

in the eschatological perspective of salvation. In turn, this is possible only through collective action.[363]

This philosophical hypothesis of the union between the social and the individual easily could divert Russian thinkers from the "western" model of democracy, the main function of which is to check (to reign in where necessary) behavior of government *vis-à-vis* the individual. The idea of the spiritual union of the people and government is undergirded by the "antique model" of democracy where state (polity) and people should work as in a "symphony" (the old Byzantine idea[364] penetrated into Russia in the early Middle Ages) to safeguard the totality from disintegration.[365] The organic relationship between the people and the government presupposes that they are spiritually united to accomplish a "national idea" (*natsional'naia ideia*, another powerful slogan in the vocabulary of the Russian conservators from Sergei Uvarov, Ivan Ilyin to Vladimir Putin[366]), this national idea being to uphold collective concern for national sovereignty in the guise of "sovereign democracy".

Two major stages can be identified in discussions about sovereignty in Russia. The first is connected with the "failing" model of federalism introduced in the 1993 Constitution.[367] The Constitutional Court, step-by-

363 Cf. Charalambos Vlachoutsicos, "Russian Communitarianism: An Invisible Fist in the Transformation Process of Russia", *Working Paper* No.192 presented at the William Davidson Institute of the University of Michigan Business School (28-28 September 1997), available at <http://wdi.umich.edu/files/publications/workingpapers/wp192.pdf>.

364 "The concept of Byzantine symphony characterizes a political theory in which the power of secular government is combined with the spiritual authority of the church." Cristian Romocea, *Church and State: Religious Nationalism and State Identification in Post-communist Romania* (Continuum International, London, 2011), 78.

365 Cf. on this trend in the Russian legal philosophy Mikhail Antonov, *Istoriia russkoi pravovoi mysli* [History of the Russian Legal Thought] (Vysshaia shkola ekonomiki, St. Petersburg, 2012), 94-106.

366 On the advantages of this symbiosis of ideas for the official ideology see Vladimir Solov'ev, *Putin: putevoditel' dlia neravnodushnikh* [Putin: A Guide for the Not-Indifferent] (Eksmo, Moscow, 2008). (This contemporary author is a namesake of the great Russian philosopher of the end of 19th century and should not be confused with him.)

367 Many Western observers have noticed that the attempts of the federal government to restore the integrity of Russia resulted in the shrinking of activity of democratic institutes and the protection of human rights. *E.g.*, Cameron Ross argues that Russia's weak and asymmetrical form of federalism has played a major role in thwarting the consolidation of democracy. Federalism and democratization in Russia exist in contradiction rather than harmony. Cameron Ross, *Federalism and Democratization in Russia* (Manchester University Press, Manchester, 2002). On the role of the Constitutional Court in balancing strong federalism and liberal democracy see Edward Morgan-Jones, *Constitutional Bargaining in Russia: Institutions and Uncertainty* (Routledge, Abingdon, UK, 2010). These remarks are partly correct as centralization reforms often involve "Blood and Iron" (*Eisen und Blut*, the title of the famous 1862 speech of German Chancellor Otto von Bismarck about the unification of the German territories). But federalism and democracy are far from being incompatible and, rather, can imply one other as it has been shown by Alexis de Tocqueville in his *Democracy in America* (University of Chicago Press, Chicago, IL, 2000, first published in French in 1835 as *De la Démocratie en Amérique*).

step, has dismantled the concept of shared sovereignty (formerly supposed to belong both to the federation and to its members[368]), overturning the differently formulated sovereignty clauses in regional Russian constitutions (*konstitutsii* and *ustavy*). These steps of the Court were accompanied by centralization reforms launched by Putin during the term of his first presidency (2000-2004).[369] Once the "integrity" of the country was restored in mid-2000 (to wit: breakaway movements in the Russian regions being suppressed[370]), the debates took another direction; this time, about the limits of independence of Russia in the sphere of international law and inside international organizations (the UN, WTO, etc.). The controversies between Russia and European institutions (PACE, the ECtHR, etc.) in such politically engaged cases as those of YUKOS, the Chechen and the Georgian campaigns, and the Magnitsky affair led to a reassessment of the attitude of Russian politicians and senior judges towards international human-rights standards. The criticism was not against the standards as such but, rather, against the "irresponsible behavior" (*bezotvetstvennoe povedenie*) of international organizations.[371] This criticism was not directed against "the International"; rather, its target has been "the Western" with its pretensions of supplanting the International. Independence from Western influence was seen, in this context, as the basic precondition for the "normal" development of Russia (in the sense of a development which would be congruent with certain cultural norms inherent to Russian civilization).

368 This conception was expressly fixed in the 1992 Federal Compact which symbolically mentioned "*sovereign* republics included into the Russian Federation". Dogovor o razgranichenii predmetov vedenia mezhdu federal'nymi organami gosudarstvennoi vlasti Rossiiskoi federatsii i ogranami vlasti suverennykh respublik v sostave Rossiiskoi Federatsii [Treaty on Delimitation of Competence Between Federal State Authorities of the Russian Federation and Authorities of Sovereign Republics-Members of the Russian Federation] (31 March, 1992), in *Federativnyi Dogovor. Dokumenty. Kommentarii* (Respublika, Moscow, 1992) (not an official publication).

369 On this first stage see Mikhail Antonov, "Theoretical Issues of Sovereignty in Russia and Russian Law", 37(1) *Review of Central and East European Law* (2012), 95-113.

370 One of the latest echoes of this fight is the introduction of criminal liability for separatist propaganda which provides up to three years of imprisonment for "inciting publicly to acts aimed at violating the territorial integrity of the Russian Federation". Art.280.1, RF Criminal Code, introduced on the basis of Federal'nyi zakon [Federal Law] (28 December 2013) No.433-FZ, "O vnesenii izmeneniia v Ugolovnyi kodeks Rossiiskoi Federatsii" [On Amending the RF Criminal Code], *Rossiiskaia gazeta* (30 December 2013) No.295.

371 See Sinikukka Saari, *Promoting Democracy and Human Rights in Russia* (Routledge, London and New York, NY, 2009).

The main ideologist of this idea was Vladislav Surkov who, in 2006,[372] was deputy head of the Administration of the then Russian President, Vladimir Putin. The rhetoric around sovereign democracy was developed by Surkov with reference to the set of ideas introduced in 1990s by the neo-conservative Francis Fukuyama.[373] The most impressive contribution to the debates was made by Surkov during a 2006 Round Table[374] where—in referring to the Slavophile ideas ("The Russian people must develop themselves organically, must have a total representation of themselves")—he called for a "sovereign democracy" which "appeals to the dignity of the Russian people and the Russian nation in general".[375] This conception was laid down in a collection of articles[376] in which Surkov and other authors insisted that Russia has a special vocation to protect its national specificity (*natsional'naia osobennost'*) against Western nihilism.[377]

In a 2006 speech,[378] Surkov posited "sovereign democracy" as a societal structure where the supreme power belongs to the Russian nation which is entirely independent of the external (that is: Western) forces. There are

372 On 27 December 2011, Surkov was appointed RF Deputy Prime Minister, from which post he resigned on 8 May 2013. Since 20 September 2013, he has been the RF President's aide (*pomoshchnik*) for Abkhazia and South Ossetia. Although Surkov sometimes is regarded in the West as a "gray cardinal" of Putin's administration (Steve Gutterman, "Russia's Putin Brings "Grey Cardinal' Surkov Back to the Kremlin", *Reuters* (20 September 2013), available at <http://www.reuters.com/article/2013/09/20/us-russia-surkov-idUSBRE98J0VK20130920>), we draw our attention to his conception not for its own sake but, rather, since it seems to us to be representative of the ideas of Putin's circle and of Putin himself (who carefully abstains from philosophical debates). It is in this line that we seek to characterize the "sovereign democracy" conception in the prism of Putin's latest speeches.

373 Francis Fukuyama, *The End of History and the Last Man* (Free Press, New York, NY, 1992); and *id.*, *The Great Disruption: Human Nature and the Reconstitution of Social Order* (Free Press, New York, NY, 1999).

374 Round Table "Suverennoe gosudarstvo v usloviiakh globalizatsii: demokratiia i natsional'naia identichnost'" [The Sovereign State in the Conditions of Globalization: Democracy and National Identity] (30 August 2006). The discussion is available at Ekaternia Dobryinina, "Prishli k golasiiu" [Arriving at Agreement], *Rossiiskaia gazeta* (9 September 2006), available at <http://www.rg.ru/2006/09/06/diskussia.html>.

375 *Ibid.*

376 Andranik Migranian, Viacheslav Nikonov, Dmitrii Orlov, Mikhail Rogozhnikov, and Vladislav Surkov, *Suverennaia demokratiia: ot idei k doktrine* [Sovereign Democracy: From Idea to Doctrine] (Evropa, Moscow, 2006).

377 For interesting reflections on these debates viewed from the perspective of the Slavophile philosophy see Andrei Okara, "Reprivatizatsiia budushchego. Suverennaia demokratiia: ot poiskov novoi russkoi idei k missii korporatsii ZAO Rossiia" [Reprivatization of the Future. Sovereign Democracy: From the Search for a New National Idea to the Mission of the Corporation Russia Inc.], *Rossiiskaia politika* (2007) No.1, 85-95. An abridged English version is Andrei Okara, "Sovereign Democracy: A New Russian Idea or a PR Project?", 5(3) *Russia in Global Affairs* (2007), 8-20, available at <http://eng.globalaffairs.ru/number/n_9123>.

378 Surkov, *op.cit*. note 312.

three basic conceptual premises of sovereign democracy: (a) sovereignty legally prevails over (liberal) democracy; (b) one can correctly balance the sovereign rights of the state with individual human rights because there is an "organic relationship" between the people and the government, and because an individual is nothing more than a part of the collective; and (c) the democratic tradition need not be introduced to Russia from abroad but, rather, will be found in the Russian thousand-year culture of statehood which is based on the communitarian traditions. Individual interests cannot stand above societal ones; in the case of a conflict, the rights of (certain) individuals can be sacrificed on the altar of national, collective rights (*i.e.*, the rights of the people/nation to be sovereign: politically, economically, helper culturally and in many other aspects).

The main political conclusion of this doctrine is the connection between maintaining state sovereignty and the preservation of state control, including the introduction of a strong state ideology to insulate political power from international criticism.[379] Russia must move toward democracy cautiously, under the permanent parental control of the government.[380] It is questionable whether this political concept undermines the universal idea of democracy,[381] and whether there are any universalities in the multicultural postmodern world. But such a question would redirect us to vast philosophical debates which are beyond the scope of this work. In the context of the present Chapter, it should suffice to highlight the main

379 This ideology underpins Federal Law (20 July 2012) No.121 imposing restrictions on activities of Russian NGOs funded from abroad and, for this reason, considered to be "foreign agents". The opinion of the ECtHR in *Assotsiatsiya NGO Golos and Others v. Russia* (Application No.41055/12) and the reaction of the Russian authorities remain to be seen. In the same vein is Putin's rhetoric in favor of "deoffshorization", *i.e.*, the compulsory repatriation of capital deposited by Russian businesspeople in foreign banks; a survey of private transactions is still proposed under the pretext of the protection of sovereignty. "Poslanie Prezidenta Federal'nomu Sobraniiu" [The Address of the President to the Federal Assembly] (12 December 2012), available at <http://eng.kremlin.ru/transcripts/4739>. The list of basic values for the development of Russia that Putin outlines in this Address, is demonstrative of the ideas which we are discussing in this chapter:

> "The ruling parties, governments and presidents may change but the core of the state and society, the continuity of national development, sovereignty and the freedoms of the people must remain intact."

The sequence is emblematic: 1) state; 2) nation; 3) sovereignty; and 4) freedoms of people. This list leaves no room for individual liberties and human rights—let alone for democracy.

380 From the general line of this rhetoric, it follows that this task is entrusted only to the federal government (not regional or municipal), so that "sovereign democracy is nothing more than democracy under the authorities' supervision". Vladimir Ryzhkov, "Sovereignty vs. Democracy?", *Russia in Global Affairs* (2005) No.4, 101-112, at 104.

381 Michael McFaul, "Sovereign Democracy and Shrinking Political Space", 14(2) *Russian Business Watch* (2006).

philosophical implication of this position: collective interest takes precedent over individual interests.[382]

In a 2007 lecture held in the Russian Academy of Sciences,[383] Surkov tried to connect these ideas them with the conceptions of Russian conservative philosophers (such as Nikolai Berdyaev or Ivan Ilyin). Surkov stressed a "holistic cultural mentality" of the Russians suggesting three political requirements: (a) "political unity though centralization of governmental competences"; (b) "idealization of the means of political struggle": and (c) "personification of political institutes". On this base Surkov concluded that "many people think that a powerful political center is a guarantee of the integrity of Russia—in the territorial, spiritual and other senses". The political implications of this philosophy for contemporary Russia are self-evident: "The integrative activity of President Putin is successful and widely approved exactly since it is guided by the Russian mentality, respect for Russian political culture and by a love of Russia". So, "the conception of sovereign democracy matches the best the Russian political culture [...], legitimizes centralization […] and interprets policy of President Putin".[384] Sovereign democracy was actively discussed for several months: from the summer of 2006 through autumn of the following year.[385] The last important discussion took place in September 2007 at the Faculty of Philosophy of St Petersburg State University where philosophers ruthlessly derided the discrepancies and paradoxes of sovereign democracy.[386] Already in 2006, Dmitry Medvedev had posited that "if you take the word "democracy" and start attaching qualifiers to it, that would seem a little odd"[387] while, in the

382 This in no way is a new idea. This implication was common for many thinkers, from Plato and Aristotle to Hegel and Marx, who were labeled by Karl Popper as "enemies of the open society". See Karl Popper, *The Open Society and Its Enemies*, in 2 vol. (Princeton University Press, Princeton, NJ, 1971). A successful parallel between "sovereign democracy" and the conservative ideas of Francois Guizot and Karl Schmitt is drawn in Ivan Krastev, "Russia as the 'Other Europe'", *Russia in Global Affairs* (2007) No.4, 66-78.

383 Vladislav Surkov, "Russkaia politicheskaia kul'tura. Vzgliad iz utopii" [Russian Political Culture. A View from Utopia], *Russ.ru* (8 June 2007), available at <http://www.russ.ru/pole/Russkaya-politicheskaya-kul-tura.-Vzglyad-iz-utopii>.

384 *Ibid.*

385 The remnants of this theory can be found at the site of the "Center for the Investigation of the Problems of Sovereign Democracy" (Chelyabinsk State University) created at that time (the site was last updated in 2009), available at <http://www.sd.csu.ru/>.

386 "O diskussii vokrug poniatiia "suverennaia demokratiia'" [On the Discussion Surrounding the Concept of Sovereign Democracy], *Politex* (2007) No.3, 268-302.

387 Dmitry Medvedev, "Dlia protsvetaniia vsekh nuzhno uchityvat' interesy kazhdogo" [For the Commonweal, All Need to Take into Account the Interests of Each], *Ekspert* (2006) No.28, available at <http://expert.ru/expert/2006/28/medvedev/>.

same year, Constitutional Court Chief Justice Valerii Zorkin suggested that this idea was a confused form of constitutionalism.[388]

This philosophical critique (almost all the philosophers were united in their deep skepticism toward this conception) was echoed by the President Putin. Although Vladimir Putin did not expressly take a stance on Surkov's conception, he seemed indirectly to support the ideological and philosophical basis on which his assistant had constructed the idea of sovereign democracy.[389] So, in his 2005 annual address to the Russian parliament, Putin emphasized that Russia needed to find its own path in building a "democratic, free and just society and state".[390] Seven years later, the attraction of this line of thinking for President Putin still seemed strong: in February 2012, he again referred to the idea "to reanimate the state, [and] restore popular sovereignty which is the basis of true democracy".[391]

388 "Legally, in our Constitution, nothing is written other than Russia is a democratic and sovereign state. Consequently, Russian democracy is sovereign, and Russian sovereignty is democratic. Any other interpretation of the Constitution is confusing. So, do we need to apply any qualifiers to democracy?" Speech of Valerii Zorkin at the Round Table "The Sovereign State in the Conditions of Globalization: Democracy and National Identity" (30 August 2006), *op.cit.* note 374. The position of the RF Constitutional Court's President is nonetheless ambivalent, and Bill Bowring comments that "Surkov and his circle have strongly influenced senior figures in the judiciary, especially Valerii Zorkin". Bowring, *op.cit.* note 280, 7. See, also, his analysis of the debate surrounding sovereign democracy (*ibid.*, 197ff.).

389 See an analysis of this rhetoric in Viatcheslav Morozov, "Modernizing Sovereign Democracy? Russian Political Thinking and the Future of the Reset", *PONARS Eurasia Policy Memo* (2010), available at <http://www.gwu.edu/~ieresgwu/assets/docs/pepm_130.pdf>.

390 In this Address, Putin set out the new program as follows:

> "Russia will decide itself how it can implement the principles of freedom and democracy, taking into account its historical, geopolitical and other specificities. As a sovereign state, Russia can and will independently establish for itself the time-frame and conditions for moving along this path […] And this is why we will keep moving forward, taking into account our own internal circumstances and certainly relying on the law, on constitutional guarantees."

The translation is from Ryzhkov, *op.cit.* note 380, 102. Commenting on President Putin's 2005 Address to the RF Parliament, the influential Russian conservative political philosopher Tret'iakov remarked that "sovereign (and just) democracy of Russia is the linguistic and essential formula of Putin's political philosophy, which is not fixed *expressis verbis* in the Address, but factually is omnipresent in it". Vitalii Tret'iakov, "Suverennaia demokratiia. O politicheskoi filosofii Vladimira Putina" [Sovereign Democracy. On Vladimir Putin's Political Philosophy], in Leonid Poliakov (ed.), *PRO suverennuiu demokratiiu* [PRO Sovereign Democracy] (Evropa, Moscow, 2007), 9.

391 Vladimir Putin, "Demokratia i kachestvo gosudarstva" [Democracy and the Quality of State], *Kommersant* (6 February 2012) No. 20/П (4805), available at <http://www.kommersant.ru/doc/1866753>.

In September 2013, Putin outlined a major program of national ideology.[392] Even if he, yet again, chose not to refer explicitly to the idea of "sovereign democracy", his speech was very well attuned to it as the citations below will illustrate. Putin expressed his anxiety about the fact of "objective pressure of globalization on the national identity [of Russia]", accusing "quasi-colonial elites" (Khodorkovskii and other oligarchs) of impeding Russians from elaborating a national idea with the intention "to better steal assets and transfer them abroad". Transplanting Western legal ideologies to Russia has turned out to be fruitless as "such attempts to civilize Russia have not been accepted by the overwhelming majority of its population insomuch as in our national character we have a tendency to independence, to sovereignty in spiritual, ideological and international [*vneshnepoliticheskii suverenitet*] affairs". He put the West on notice that "the sovereignty, independence and integrity of Russia are absolute [*bezuslovny*], no one is allowed to cross these "red lines"", and criticized it as follows:

> "The Euro-Atlantic countries […] have abandoned their roots, inclusive of the Christian values which form the basis of the Western civilization. This has resulted in a denial of moral principles and of any traditional identity: national, cultural, religious and even sexual, in a policy which equates a family full of children to a one-sex marriage, a belief in God to a belief in Satan […] One aggressively tries to impose this model upon everyone, upon the entire world. I am convinced that this is a direct way to degradation and primitivization, to a profound demographic and moral crisis."[393]

5 The Roots of Exceptionalism in Russian Social Philosophy

In these theses, we find a striking affinity to the Russian conservators of the 19th century whose ideas we will describe below to finally compare them with the neo-conservatism of Putin and his circle.

First of all, is this paternalist attitude to democracy preprogrammed by the Russian intellectual tradition, as some Western authors have asserted?[394]

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392 "Vystuplenie Vladimira Putina na zasedanii kluba 'Valdai'" [Vladimir Putin's Speech at the Conference of the "Valdai" Club], *Rossiiskaia gazeta* (19 September 2013), available at <http://www.rg.ru/2013/09/19/stenogramma-site.html>.

393 *Ibid.*

394 For an example of such rhetoric see Timothy J. Colton and Michael McFaul, "Are Russians Undemocratic?", *Carnegie Endowment Working Papers* (June 2001) No.20, available at <http://carnegieendowment.org/files/20ColtonMcFaul.pdf>. One also could construct a banal syllogism from the assertion that every people merits its government, to the fact of autocracy of the most Russian governments which allegedly attests the proclivity of Russians for authoritarianism, with the premature conclusion that Russians do not merit true democracy. It is paradoxical but quite explicable that neo-conservatives from two opposite sides (Western and Russian) arrive at the same point. See Surkov, *op.cit.* note 312, on the unpreparedness of the Russians for democracy.

We do not think so since there always were (and still are) different trends in this tradition in Russia. Many controversies can be seen as evidence of our assertion; taking one of the preeminent examples, we will address the Slavophiles-Westernizers debates.[395] The Westernizers (liberals and revolutionary democrats) insisted on modernization through "westernization" believing that Russian and Western civilizations have common tasks to accomplish. During those 19th century discussions, they insisted that the universal standards of political and legal organization of society are similar (though not identical) for the both. Landmark Westernizers have included Piotr Chaadaev, Aleksander Herzen, Timofei Granovsky, Konstantin Kavelin and numerous others who believed that Western civilization reveals universal values of cultural (political, legal, etc.) development in relation to which Russia has just fallen behind and needs to catch up the West.[396] For contemporary Russian legal thought, this means that Russia need not painfully fight for the particularity of its development and that it can catch up with Western intellectual tradition, in particular, accepting common standards of human rights.[397]

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395 Cf. an attempt to construct the consequent development of Russian history throughout this divide in Esther Kingston-Mann, *In Search of the True West: Culture, Economics and Problems of Russian Development* (Princeton University Press, Princeton, NJ, 1999). We limit our analysis here to the main conflicting principles of these two schools which are reproduced in the debates about sovereign democracy. It does not amount to asserting that Russian political thought did not reveal other aspects of the understanding of human rights and democracy. See Anastasia Tumanova and Roman Kiselev, *Prava cheloveka v pravovoi mysli i zakonotvorchestve Rossiiskoi imperii vtoroi poloviny XIX – nachala XX veka* [Human Rights in the Political Thought and Lawmaking of the Russian Empire from the Second Half of the 19th to the Beginning of the 20th Century] (Vysshaa shkola ekonomiki, Moscow, 2011).

396 Andrzej Walicki, *The Slavophile Controversy: History of a Conservative Utopia in Nineteenth-Century Russia* (Clarendon Press, Oxford, 1975); and Isaiah Berlin, *Russian Thinkers* (Penguin Books Ltd, London, 1978), 117ff. For a German-language discussion on Russian "backwardness", see Manfred Hildermeier, "Das Privileg der Rückständigkeit. Anmerkungen zum Wandel einer Interpretationsfigur der Neueren Russischen Geschichte", 244(3) *Historische Zeitschrift* (Jun. 1987), 557-603; *id.*, "Osteuropa als Gegenstand vergleichender Geschichte", in G. Budde, S. Conrad, and O. Janz (eds.), *Transnationale Geschichte Themen, Tendenzen, Theorien* (Vandenhoeck und Ruprecht, Göttingen, 2006, 2nd ed.), 117-113; and Carsten Goehrke, *Russland: Eine Strukturgeschichte* (Neue Zürcher Zeitung Verlag, Zürich & Berlin, 2010), 302-322. On some implications of this backwardness for the contemporary legal theory in Russia see Michail Antonow, "Unser schwerer Weg zum Recht: Grundprobleme der modernen theoretischen Rechtswissenschaft in Russland", 38(1) *Rechtstheorie* (2007), 1-12.

397 For an interesting sociological survey which demonstrates this Slavophiles-Westernizers divide in the mentality of the Russian politicians see William Zimmerman, "Slavophiles and Westernizers Redux: Contemporary Russian Elite Perspectives", 21(3) *Post-Soviet Affairs* (2005), 183-209. Similar sociological data also are reported in the research of the Russian scholars Leonid Blekher and Georgi Liubarskii, *Glavnyi russkii spor: ot zapadnikov i slavianofilov do globalizma i novogo srednevekoviia* [The Principal Russian Controversy: From Westernizers and Slavophiles to Globalization and the New Middle Ages], (Akademicheskii Proekt, Moscow, 2003).

Slavophiles have espoused a theory wherein modernization is not necessarily connected to Westernization. Such Slavophiles as Aleksei Khomiakov (1804-1860) or Aleksandr Solzhenitsyn (1918-2008) were attempting to embrace a new Russian identity: Russia represents a unique civilization and need not stick to ideas which are alien to the traditional mentality and culture of its people.[398] They were persuaded that European civilization is permeated by a struggle among egoistic individuals. On the contrary, Russian society was founded on the collectivist principle of the commune (*obshchina*) united by the common interests of its members. The similarity with the ideals which the Bolsheviks sought to realize in Soviet Russia is striking and has been noticed by some Russian and Western intellectuals.[399] The social communitarian credo of Slavophiles was formulated by a prominent 19th century Slavophile author, Ivan Kireevskii, which he distinguished from Western political ideals:

> "In the West we find a dichotomy of the state, a dichotomy of estates, a dichotomy of society, a dichotomy of familial rights and duties, a dichotomy of morals and emotions […] We find in Russia, in contrast, a predominant striving for wholeness of being, both external and inner, social and individual [...] There one finds the precariousness of individual autonomy, here the strength of family and social ties."[400]

The Slavophile ideal was—and still is—one of the integrity of society and of individuality, whereas European civilization and its political forms were—and still are usually—perceived as fragmented and individualistic. The Slavophiles did not deny the value of democracy as such (finding its ideal type in medieval Russia: *e.g.*, the *Veche* in Novgorod[401]); rather, they challenged the individualist concept of liberal democracy developed in the West. The image of a commune (*obshchina*) suggested in 1852 by Konstantin Aksakov, one of the leaders of the Slavophiles, could be seen as a conceptual presentiment of "sovereign democracy" described one and a half centuries later by Surkov:

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398 See Vasily Zenkovsky, *A History of Russian Philosophy* (Routledge & Kegan Paul Ltd., New York, NY, 1953), 185ff.; and Peter Truscott, *Russia First: Breaking with the West* (I. B. Tauris, London, 1997).

399 *E.g.*, George Guins "East and West in Soviet Ideology", 8(4) *Russian Review* (1949), 271-283; Peter Duncan, *Russian Messianism: Third Rome, Revolution, Communism and After* (Routledge, London, 2000); and Richard Sakwa, *Communism in Russia: An Interpretative Essay* (Palgrave Macmillan, Basingstoke, 2010).

400 Ivan Kireevsky, "On the Nature of European Culture and on Its Relationship to Russian Culture" (first published in Russian in 1852 under the title "O kharaktere prosveshcheniia Evropy i ego otnoshenii k prosveshcheniiu v Rossii"), in Boris Jakim and Robert Bird (eds.), *On Spiritual Unity: A Slavophile Reader* in *Esalen-Lindisfarne Library of Russian Philosophy* (Lindisfarne Books, Hudson, New York, NY, 1998), 229.

401 See Ferdinand Feldbrugge, *Law in Medieval Russia* (Martinus Nijhoff Publishers, Leiden, 2008).

> "A commune is a union of the people, who have renounced their egoism, their individuality, and who express their common accord […], in the commune the individual is not lost, but renounces his exclusiveness in favor of the general accord—and there arises the noble phenomenon of harmonious, joint existence of rational beings; there arises a brotherhood, a commune—a triumph of human spirit."[402]

Building such a brotherhood (*bratstvo*) requires suppression of egoistic individualism inherent to members of the commune, and their mobilization into a "common accord" (*soglasie*). Evidently, neither liberal democracy's protection of the minority against the majority, nor human rights defending the individual from the collective correspond to this project, so that new political forms are needed instead of those developed by the "decayed West" (*zagnivaiushchii Zapad*). It should be noted that Aksakov's position was not only anti-Western but, also, revealed evident anti-democratic and anti-legal stances. "The West developed legality insofar it felt a lack of moral truth […] In the West, human soul is perishing […] consciousness is substituted by laws and internal motives: by regulations", democratic order is necessarily laic and uniquely is a product of Western religious individualism.[403] And he draws his famous conclusion about the lack of need for any guarantees against the abuses of rights by government:

> "Some would say that either the people or the government can betray each other and we need a guarantee. No need in guarantees! A guarantee is evil! There is no Good where one needs a guarantee; if a life is not based on Good and stands only with the help of evil, let it better be destroyed! […] All the power resides in moral conviction. And this treasure is in Russia."[404]

It is not that we insist the new rhetoric of sovereign democracy entirely repeats the old conservative schemes of the Slavophiles. This argument would be an evident oversimplification of the problem. *Nil sub sole novum*, and this is true also for political ideologies. But these ideologies never grow in an empty space and, almost always, are loosely rooted in previous debates. In our opinion, this is the case of sovereign democracy: it has deep roots in the Russian traditionalist philosophy (both religious and secular) from the end of the 19th century which, thereby, transmits an old intellectual tradition into contemporary political debates.

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402 Cited in Nicholas Riasanovsky, *Russia and the West in the Teaching of the Slavophiles: A Study of Romantic Ideology* (Harvard University Press, Cambridge, MA, 1952), 135.

403 Konstantin Aksakov, "Raznye otdel'nye zapiski" [Various Dispersed Notes], in Konstantin Aksakov, *Polnoe sobranie sochinenii v 3 tomakh* (Tipografiia Bakhmet'eva, Moscow, 1861), Vol.1, 625ff.

404 Konstantin Aksakov, "Ob osnovnykh nachalakh Russkoi istorii" [On the Principles of Russian History], in *ibid.*, 9-10.

An analysis of the philosophical quality of the concept of sovereign democracy has not been our task here; neither has our goal been to criticize isolationist/traditionalist ideologies. Our objective has been, rather, to show that a careful examination of the political rhetoric in Russia requires transcending (though not completely abandoning) the usual explanatory schemes formulated in terms of interplay of political (economical, corporate, etc.) interests and the re-translation of the Soviet ideological legacy.[405] An investigation into the philosophical dimension of this rhetoric aids in revealing—and, thereby, helping one to appreciate—a larger hidden cultural framework into which this rhetoric can be inscribed, regardless of whether or not the political actors concerned have been aware of this framework. Today, Surkov's conception is generally regarded as obsolete. But his "sovereign democracy" shows an inheritance from the past of philosophical ideas in current Russian political discourse.

Conclusion

This brief analysis draws several parallels between the reasoning of the Slavophiles and that of modern Russian conservatives on the issues of democracy and human rights.[406] Both have condemned Western democracy and liberalism for their lack of spirituality and accentuated individualism,

405 Richard Sakwa argues that in Putin's Russia, "a modified form of neo-Slavophilism predominates, no longer so much concerned with the development of a Slavic identity but focused on Russia's autonomous development in partnership with the West but reasserting its great power status". Richard Sakwa, *Russian Politics and Society* (Routledge, New York, NY, 2008, 4th ed.), 280. On the interrelation between the ideas of Slavophiles and of the modern Russian conservators see also Judith Devlin, *Slavophiles and Commissars: Enemies of Democracy in Modern Russia* (St. Martin's Press, New York, NY, 1999).

406 We admit that that the contemporary Russian conservative ideologists around Putin are not fully aware of this connection with the Slavophiles or fail to understand all its implications (like those formulated by Aksakov (see footnotes 403 and 404 above)). After President Putin's Fall 2013 Valdai Speech (*op.cit*. note 392), political analysts intensively began analyze this connection. *E.g.*, the right-wing political analyst Anatoly Stepanov in his 2013 on-line publication "*Ideologiia razvitiia nevozmozhna bez opory na traditsiiu*" [An Ideology of Development Is Impossible Without Reliance on Tradition], available at <http://ruskline.ru/analitika/2013/10/16/ideologiya_razvitiya_nevozmozhna_bez_opory_na_tradiciyu/>, in which characterized this speech as "a prologue to formulation of a state ideology" and offered thirteen "postulates" explaining why this new state ideology must necessarily be based on the philosophical tradition of the Slavophiles and other Russian conservative thinkers of the 19th century.
In his remarks, Stepanov even came up with a proposal to create a Slavophile party ("a neo-Slavophile popular movement") based precisely on the theses of Putin's Valdai Speech. A Round Table was held in Moscow, on 15 October 2013, where this proposal was accepted and "the participants of the Round Table found it necessary to inform the RF President Vladimir Putin about their intention to set up a popular movement which will be able to help the President to carry out his objectives", available at <http://ruskline.ru/news_rl/2013/10/18/sozdat_dvizhenie_russkih_tradicionalistov/>.

and stress the priority of the collective over the individual. Human rights in this perspective cannot gain the upper hand over state laws. These laws take their origin in popular national sovereignty and express the will of the people. At the same time, the pedigree of international law is obscure and suspected of being influenced by alien powers. This way of thinking stands in contrast to the constitutional provisions on the priority of human rights and of international law over domestic laws (Arts.15, 17, RF Constitution). However, the imperfect formulation of the Russian Constitution allows the judiciary frequently to circumvent these formulations by using them—and the principles of international law—as redundant plethoric arguments.

The conception of sovereign democracy by Surkov is not widely discussed these days, the author himself has abandoned it, and Kremlin ideologists seem to be reluctant to restate this conception. Nevertheless, one can conclude that the emergence of this concept was not an accident and that it can be considered as a recurrence of Russian conservatism. During the last two centuries, similar concepts often have been used in state propaganda. In imperial Russia, it was the case of the celebrated formula first used in 1833) by Count Uvarov "*Pravoslavie, Samoderzhavie, Narodnost'*" (Orthodoxy, Autocracy and Popular Democracy[407]). This became one of the cornerstones of official Imperial ideology legitimizing the autocracy through references to Russian communitarian traditions. It also was the case of the "Soviet (also socialist) democracy"; this legitimized the dictatorship of the proletariat and, in fact, the authoritarian (sometimes even totalitarian) rule of the Communist Party in Soviet Russia. "Sovereign democracy", therefore, should not be seen as an "invention" but, rather, as a "reinvention" of a model of official political discourse.

The reiteration of this idea of a "democracy à la russe" by political leaders and senior judges (with or without reference to sovereign democracy) conveys several ideological messages to Russians and to Russian officials and lawyers, in particular, about the correlation between individual and collective rights. One can discern three principal messages among them.

The *first* says that the sources of sovereignty are found in state power itself—not in society or in the international community. This message is translated by a simple syllogism: given that the Russian people are the only bearer of sovereignty (Art.3, RF Constitution), and given that the people do not realize their will directly (except during elections and referenda) and, rather, delegate its realization to the government, it follows that the govern-

407 The usual translation of "*narodnost'*" is "nationality". Cf. Nikolay Riasanovsky, *Russian Identities: A Historical Survey* (Oxford University Press, Oxford, 2005), 132. In our view, this not the best translation: it conveys a connotation which, in the European political literature, refers to a substantially different set of ideas. For its founding fathers—the Russian romantic writers—the term "*narodnost'*" referred to the traditions of the self-government of the Russian peasantry. These traditions are in natural unison with the Russian autocratic regime, and this unison is legitimized by the Orthodox religiosity. This was the main message of *narodnost'* in Uvarov's formula. To note additionally that in Russian, the term "nationality" is literally transferred by the word "*natsional'nost*'."

ment is entitled (on behalf of the people) to take any and all measures to protect the people's and national (these aspects are rarely differentiated in Russian political discourse) sovereignty indispensable for survival of the people. Therefore, no international courts or agencies are allowed to interfere with the activities of the government or to criticize them—even where these interventions or criticisms might be based on humanitarian or other applicable standards.

Second, the "correct" way of thinking about sovereignty allows the Russian state and society to survive in the international community which is friendly only in appearance but which, in reality, is a conglomerate of envious states and corporations seeking to take hold of the national resources belonging to the Russian people, thus depriving it of its sovereignty.[408] The main function of the state, therefore, is to detect the ideological dangers coming from the West in the guise of the liberal rhetoric for "idealization of pseudo-objective values" and to deflect these dangers through resolute dismissal of all the malevolent criticism of Russia coming from the West. Human rights and democracy are a mere pretext for the West to interfere in Russian internal affairs and to take control over its sovereignty.

Fear of social and political unpredictability, and traditional communitarianism help to create an atmosphere favorable to the isolationism predicated by contemporary Russian officials as "a separate way of development" (*osobyi put' razvitiia*) for Russia. In this light, the protection of sovereignty at any cost easily can be justified as *conditio sine qua non* for the survival of the Russian people. One readily can imagine that such historical experience has contributed to what Besançon describes as the formation of a "spirit of misadventure in the public sphere" in contemporary Russian culture[409] which results in mistrust of any kind of political discourse—including that revolving around democracy or human rights. Given this traditional inertia of Russians in political issues, the government sees itself able to act independently of public opinion as long as Russians are not "ripe" enough to be widely engaged in political deliberation. While such assertions undoubtedly are highly questionable, they can—at least, partly—explain the objectives of the "mobilization strategy" employed by the current authorities to urge Russian intellectuals to be vigilant towards Western values. If there is *some* mistrust in the great narratives about human rights among *some* Russians, the rhetoric about sovereignty should be able to increase the numbers of those who experience this distrust and reinforce the legitimacy of the authorities, otherwise challenged by their Western critics.

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408 Ivan Krastev notes that "[f]or the Kremlin, sovereignty means capacity. It implies economic independence, military strength and cultural identity". Krastev, *op.cit.* note 382, 72.

409 Alain Besançon, *Ubennyi Tsarevich: Russkaia kul'tura i natsional'noe soznanie: zakon i ego narushenie* [The Dead Prince: Russian Culture and the National Consciousness, The Law and Its Transgression] (MIK, Moscow 1999, translation of his 1967 work *Le Tsarévitch immolé*), 208. Besançon means here the tendency of Russians to explain all their misadventures by referring to the unjust political regimes.

Thirdly, the West is proceeding in the wrong direction: admitting the paradigm of globalization where sovereignty loses its importance. Abandoning sovereignty in favor of softer international regulation would lead to the rule of transnational corporations and (in fact both local and foreign) oligarchs. Russia will not follow this new paradigm since it does not conform to the Constitution and the laws of Russia (they are clearly based on the Westphalian model of sovereignty) and is destructive—in opinion of the isolationists around Putin—for Russian society. This old idea of the "decaying West" offered by the Slavophiles and appreciated by the Soviet regime ('decaying capitalism") also plays its role in dismissing the globalization arguments ("it can be true for the decayed West but not for Russia which keeps faithful to its traditions"). The globalization dangers might come true if Russia engaged itself in cosmopolitan culture and would admit the universality of democratic or humanitarian standards, destroying thereby its national uniqueness. These arguments—reiterated by Putin and other contemporary, conservative politicians—already had been developed in the 19th century.

In these three messages,[410] sovereignty mostly is understood as external independence, that is, the integrity and autonomy of the state as regards other states and the international community. In these discussions about "untouchable sovereignty", no distinction is made among the sovereignty of a people, of a nation, of a state; as shown in this and other Chapters of the present volume, sovereignty is uncritically used in all messages for the same ideological purpose: to underscore the prevalence of public interest The "sovereignty debates" are not separated from the question about a monist/dualist foundation of the legal order; ideas about the priority of international law easily being seen as a threat to sovereignty.

Unfortunately, a good deal of current Western literature concerning "human rights, the ECtHR and Russia" problem is full of trivial conclusions constantly reiterating similar findings: Russia is backward in protection of human rights; it does not want to reform its legal system in full conformity with the ECtHR jurisprudence; it is regrettable because Russia will not become a democratic state and will not fully assure its citizens' rights. Doubtlessly, there are many grains of truth in this criticism, but the discussion more and more looks like a dialogue of the Deaf and the Dumb: "you must comply with our standards"; "we do not take them for gospel-truths *because* […]"; "but you must comply despite your backwardness". This Western rigidity leads the discussion down a dead-end alleyway. Not surprisingly, this deafness to the "because" argument of Russian authorities becomes increasingly irritating for them, motivating them to seek for kindred spirits among authoritarian regimes.

410 For an analysis of this rhetoric see Dmitrii Orlov, "The New Russian Age and Sovereign Democracy", 46(5) *Russian Politics and Law* (2008), 72-76; and Andrei Kokoshin, "Real Sovereignty and Sovereign Democracy", *Russia in Global Affairs* (2006) No.4, 105-118.

As we have endeavored to demonstrate in this Chapter, Russian political philosophy often has stressed that Russia follows its own path of development which does not coincide with the Western one, so that one can outline continuity of this logic from the Slavophiles in 19th century to the Putin's circle in the 21st century. The official ideology makes more and more references to Russian conservative philosophers of the 19th-20th centuries, or to such influential Russian writers as Dostoevsky or Solzhenitsyn whose stances were overtly anti-Western, or to the dogma of the Russian Orthodox Church. The fact is that human-rights violations are alleged to be violated in Russia more often than elsewhere in Europe, and this naturally is regrettable. But there seems to be almost no theoretical and practical effect in the repeated lamentations about alleged violations of human rights and democratic standards in Russia and in the banal conjurations to respect them.[411] It would be extremely useful for Western politicians to look at the situation in the same optic in which it is seen by the Russian authorities, to discern the "red lines" within which the government is ready to effectively cooperate with the West, and to employ the language understandable for the Russian political elite.[412]

Here, along with the usual technical comparison of the ECtHR jurisprudence (and the underpinning values) with the national policies and laws (and the values that stand behind them), two more aspects are of importance.

First, it will be necessary to understand more fully the way in which the Russian authorities legally interpret the status of their country. This interpretation is based on a certain paradigm of international law where states are sovereign actors deciding on their own and without any external pressure.

Second, to more fully appreciate the philosophical backgrounds through which the Russian authorities interpret legal (and other) values and build up their reasoning about human rights. This background is rather conservative and tends to protect the alleged "uniqueness" of national development from the threats of globalization.

Of course, neither aspect is specific only to Russia; both also are reiterated by conservatively-minded philosophers and politicians in the West although contexts (historical and cultural backgrounds, terminology and conceptions) necessarily differ. Studying this Russian intellectual context

411 A caveat should be added here: it does not follow from our thesis that these aspects must be accounted for, that they are correct or that a "Russian understanding" of human rights and democracy must outweigh the Western one.

412 It is remarkable that some Western authors call upon their colleagues "to abandon their American-centric view of Russia and recognize the reality of Russian law and democracy today". Witney Cale, "Through the Russian Looking Glass: The Development of a Russian Rule of Law and Democracy", 7(2) *Loyola University Chicago International Law Review* (2009), 129. Professor Hendley criticizes those scholars who "approach Russia as if it was a *tabula rasa*, disregarding what existed on paper as well as prevailing legal culture". Kathryn Hendley, "Assessing the Rule of Law in Russia", 14(2) *Cardozo Journal of International and Comparative Law* (2006), 353.

should yield interesting results both for scientific conceptualization and, also, for an improved practical implementation of human-rights standards in Russia.

From this standpoint, there is no way one can predict the future development of human rights and democracy in Russia nor can one undeniably qualify the position of the Russian authorities as anti-humanitarian; in contravention of the standards of democracy.[413] As Vladimir Bibikhin, a contemporary Russian philosopher of law, insisted at the beginning of the 2000s: Russian legal consciousness continually tends to create a modern democratic society of the European type and, at the same time, pushes it away.[414] This contradiction reflects the tension between the formalist and decisionist elements of Russian law and is discernible in the debates about sovereignty, democracy, and human rights in Russia which we have endeavored to characterize in the present Chapter. In the following Chapter, we will look closer at this link against the backdrop of the case law on protecting sexual minorities. This would help to determine whether there is a necessary pragmatic connection between the conservatism of Russian law and the conception of sovereignty which is one of the intellectual foundations of Russian law.

413 Some observers notice that "the strong Russian stating imperatives should not obscure the democratic potential that continued into the Putin-Medvedev period". McGovern and Willerton, *op.cit.* note 281, 5.

414 Cf. Vladimir Bibikhin, *Filosofiia prava* [Philosophy of Law] (MGU, Moscow, 2001); and Gadis Gadzhiev, *Ontologiia prava* [Ontology of Law] (INFRA-M, Moscow, 2012).

4 Religion, Sexual Minorities, and the Rule of Law in Russia: Mutual Challenges[415]

Foreword

This Chapter continues to analyze the cultural constraints in the Russian legal system imposed by the prevailing social philosophy on the application of law. This philosophy is characterized by a significant degree of religious conservatism and communitarianism. In Russia, as elsewhere, the religious conservatism is predictably opposed to sexual minorities and to those who want to defend or justify them. An analysis of the case law allows one to conclude that religious conceptions have a strong impact on decision-making in Russian courts. Referring to these conceptions, judges can sometimes overrule provisions of the Russian Constitution and the laws formally granting protection and guarantees to sexual minorities. This situation can be explained by the prevailing social philosophy, which promotes conservative values and emphasizes collective interests. The main tenets of this philosophy and their practical consequences for the perception of human rights, democracy and sovereignty in Russian law have been studied in the preceding Chapter. In the present Chapter we will demonstrate that this conservative social philosophy and social-communitarian morality are based on religious patterns still shaping the mindsets and attitudes of many Russians. These attitudes cannot be ignored by judges and other actors in the Russian legal system who, to some extent, are subject to the general perception of what is just, acceptable, and reasonable in society, and are factually bound by this perception. This perspective shows the tension between the formalist element of Russian law (the requirement of legality as the inviolable observance of the statutory law) and the decisionist element (mandating judges to go beyond statutory law to meet the expectations of the political authorities or of the general public, or both). This and the following Chapters will illustrate how the "law in minds" (examined in the three previous Chapters) is transformed into "law in action", and how the link between religious and philosophical creeds of judges and their decision-making practically works.

415 The first version of this Chapter was published in 2019 in 7(2) *Journal of Law, Religion and State* (2019), 152-183. The present Chapter is an updated version of that work.

Introduction

The Russian Constitution resolutely prohibits any discrimination (Art.19), including based on sexual orientation, and solemnly proclaims that Russia is a secular state where religion and the state are separate (Art.14). After the adoption of the Constitution in 1993, however, certain anti-liberal developments took place in Russian society and among the Russian political establishment. For example, in 2013, the year after the *Pussy Riot* case,[416] the Russian parliament adopted a series of laws setting out to protect the feelings of religious believers. These laws provide statutory protection for believers against performances, statements, or any other actions that could insult their religious creeds and predispositions. The consequence is that non-believers and believers of "non-traditional" confessions have to accept the religious dogmas of the prevailing confessions (of the Russian Orthodox Church (the ROC) first and foremost) as a part of their country's legal order.[417]

This 2013 legislation brought more indeterminacy to the Russian legal order as it turned out that the religious feelings and creeds of quite a large number of people do not fit the country's so-called "traditional values". The official secularity of the state was also called into question because of the evident propensity of the state toward a limited number of religions. Only the major religious denominations (including the ROC, the mainstream Muslim and Jewish congregations, Catholics, and some other so-called historical Christian denominations) profited from these amendments, while other religious groups suffered not only from being "non-traditional" but, also, from differing from traditional Russian mindset which, therefore, put them at risk of being classified as "extremist".

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416 Prigovor Khoroshevskogo raionnogo suda Moskvy (17 August 2012) po delu No.1-170/12 po obvineniiu Tolokonnikovoi N.A., Alekhinoi M.V., Samutsevitch E.S. v sovershenii prestupleniia, predusmotrennogo chast'iu 2 stat'i 213 UK RF [Verdict of the Khoroshevo District Court of Moscow (17 August 2012) in the case No.1-170/12 on the indictment of Tolokonnikova N.A., Alekhina M.V., Samutsevitch E.S. on charges of committing a crime under para.2 of Art. 213 of the RF Criminal Code], available at <http://судебныерешения.рф/bsr/case/3738990>. For a short analysis of the argumentation behind the verdict, see Mikhail Antonov, "Beyond Formalism: Sociological Argumentation in the 'Pussy Riot' Case", 1 *Revista Critica de Derecho Canonico Pluriconfesional* (2014), 15-25.

417 One controversial case that was recently heard by a justice of the peace in the Stavropol *Krai* concerned the right of atheists to claim that God did not exist. In 2016, a Russian blogger named Viktor Krasnov was indicted for insulting the feelings of religious believers after posting on the Russian social network *VKontakte* a claim that there was no God and that the Bible was nothing but a book of Jewish fairytales. The case was closed in 2017 because of the statute of limitations, but it prompted heated discussions about the rights of atheists to publicly express their opinion. See "Chuvstva veruiushchikh mogut sverit' s Konstitutsiei" [The Feelings of Believers Can Be Verified Againt the Backdrop of the Constitution], *Kommersant* (14 March 2006), available at <https://www.kommersant.ru/doc/2937009>.

A 2017 case involving the banning of the Jehovah's Witnesses as an extremist organization by the Russian Supreme Court[418] illustrates this hidden discrimination. The main argument for shutting down the Jehovah's Witnesses in Russia was their alleged extremism, understood as their claim to being the holders of supreme religious truth and of knowing the only path to salvation. Theoretically, this understanding of "religious extremism" applies to almost any religious denomination. What, in fact, makes a denomination "extremist"—in the eyes of Russian judges—is that its religious creed does not fit the conceptions of the ROC. The same logic, as we will argue in the present Chapter, may apply not only to religious but, also, to other minorities. Sexual minorities represent a paradigmatic case of such ambivalent attitude to "normal" and "abnormal" from the standpoint of the ROC and other traditional religions which stand up together with the ROC in this respect.

These 2013 amendments brought into sharper relief the normative conflict between two groups of values: the traditional (conservative) values largely promoting the creeds of historical religious denominations and liberal values prohibiting limitations of rights based on discrimination grounded in sexual orientation for example. Due to their basic religious conceptions, the traditional denominations (Russian Orthodox Christianity, Islam, Judaism, and Buddhism which—according to the Preamble to the 1997 Law on Freedom of Conscience and Religious Associations[419]—constitute "an integral part of the historical heritage of the peoples of Russia") are hostile toward sexual minorities to the extent that, frequently, there are open or latent conflicts between believers and sexual minorities especially in such

418 The ruling that banned the Jehovah's Witnesses in Russia was adopted by the RF Supreme Court on 20 April 2017 in case No.AKPI 17-238 (the full text in Russian is available at <http://www.jw-org.info/2017/05/tekst-reshenija-verhovnogo-suda-o-likvidacii-Svidetelej-Iegovy.html>. This ruling was upheld by the Appellate Collegium of the RF Supreme Court on 17 July 2017, available at <http://vsrf.ru/stor_pdf.php?id=1564706>, and on 16 August 2017, the RF Ministry of Justice put the Jehovah's Witnesses on its list of extremist organizations.

419 Russian translation available at <http://www2.stetson.edu/~psteeves/relnews/freedomofconscienceeng.html>. See, also, Lauren B. Homer and W. Cole Durham, Jr., "Russia's 1997 Law on Freedom of Conscience and Religious Associations: An Analytical Appraisal", 12(1) *Emory International Law Review* (1998), 101-246. The 1997 law is rather retrograde in that it worsened the position of minority religions as compared with the regulations in the RSFSR Law on Freedom of Religious Creeds.

sensitive areas as education, adoption, and marriage.[420] The 2013 legislation tipped the scales in favor of traditional denominations as religious feelings (stemming from "traditional" religious creeds and beliefs) have become a legitimate object of statutory protection. This added to the complexity involved in finding a judicial balance between these conservative values and liberal values (including freedom and equality) and emphasized the question of the justification of judicial choice between different values and principles. Over the last few years, the case law in Russia clearly has tended to support conservative values, thereby marking a departure from the liberal principles enshrined in the 1993 Constitution.

Some observers claim that court decisions in Russia are politically predetermined and that judges, in fact, have no choice but to follow the line of the ruling party.[421] This might be at least partly true, but we are unaware of any empirical data confirming an overwhelming political bias in Russian court decisions. Perhaps such a bias can be found in some high-profile cases, but these relatively rare cases do not suffice to make a judgment about the entire court system. Even if there are some politically motivated (high-profile) cases, it appears that there are relatively few of these, and in the most cases the judges are not bound by any political instructions.[422] Although there is no way to deny that judges might have pragmatic inclinations to abide by state ideologies and policies, and to decide cases accordingly, this is a natural strategy for professional survival/success in authoritarian countries. At the same time, given the impact of tradition and religion on culture, it should come as no surprise that many judges are in favor of the doctrines of Russia's major religious denominations and are opposed to sexual minorities. Not to mention the influence of public opinion which, for the most part, is conservative and which, predictably, exerts

420 According to 2017 polls conducted by the Pew Research Center, 85% of Russians consider homosexuality morally wrong. See "Religious Belief and National Belonging in Central and Eastern Europe", *pewforum.org* (10 May 2017), available at <http://www.pewforum.org/2017/05/10/religious-belief-and-national-belonging-in-central-and-eastern-europe/?utm_source=Pew+Research+Center&utm_campaign=efff8a5e05-EMAIL_CAMPAIGN_2017_05_10&utm_medium=email&utm_term=0_3e953b9b70-efff8a5e05-400288249>. One can reasonably expect there to be a similar percentage of antigay attitudes among Russian judges. The government does not necessarily need to inspire repressive attitudes towards sexual minorities among Russian judges as these attitudes are already programmed by the prevailing conservative culture.

421 Authors claiming that political machinations are behind certain court decisions usually support their finding not with facts but rather with guesswork. See, for example, John B. Dunlop, "The Russian Orthodox Church as an 'Empire-Saving Institution'", in Michael Bourdeaux (ed.), *The Politics of Religion in Russia and the New States of Eurasia* (M.E. Sharpe, New York, NY, 1995), 15-40.

422 In her recent book, Professor Hendley justly remarks that politicized cases in Russian law "actually amount to a drop in the bucket" and argues that "careful observation of the routine behaviour of individuals, firms, and institutions reveal more about the role of law in Russian life than do sensational cases". See Hendley, *Everyday Law in Russia*, *op.cit*. note 47, 2.

a rather strong influence on judges. This conservative attitude to sexual minorities has become one of the major points of controversy in relations between Russia and the West concerning human rights[423]—and it is exactly this aspect which draws our attention.[424]

In this Chapter, we examine the dichotomy that exists between formal legal texts (the Constitution, ratified treaties, and other legal acts that establish liberal and anti-discrimination rules and principles) and the factual situation where the state owes no small part of its legitimacy to adherence to so-called "traditional values" and to support of the ROC and other conservative forces. For a variety of historical reasons, these "traditional values" in Russia are, for the most part, based on the religious patterns of the major religious denominations which are, by definition, conservative in sexual matters. Furthermore, in recent years the government has readily utilized the slogan "traditional values" in its anti-Western and anti-globalist rhetoric, reinforcing its support from the conservatively minded masses.[425] In turn, this predictably leads to conflicts and discrepancies with supranational institutions and, in particular, with the ECtHR.[426] In these conflicts, the Russian state plays the "constitutional identity" card which, in the case of LGBT rights, means that these rights are trumped by concern for protecting the prevailing communitarian culture. This communitarianism, in turn, is historically rooted in religious traditions and culture, which inevitably

423 See, for example, Alexander Kondakov, "Heteronormativity of the Russian Legal Discourse: The Silencing, Lack, and Absence of Homosexual Subjects in Law and Policies", 4(1) *Oñati Journal of Emergent Socio-Legal Studies* (2010), 4-23; and Aidar Sultanov, *Zashchita svobody sovesti cherez prizmu postanovlenii Evropeiskogo suda po pravam cheloveka* [The Protection of Freedom of Consciousness Through the Prism of Rulings of the ECtHR] (Statut, Moscow, 2013).

424 This is not only the case in Russia, as similar tendencies can be seen in other countries. For debates about the influence of religious beliefs on the decision-making of US judges, see Scott C. Idleman, "The Role of Religious Values in Judicial Decision Making", 68(2) *Indiana Law Journal* (1993), 433-487; Wendell L. Griffen, "The Case for Religious Values in Judicial Decision-Making", 81(2) *Marquette Law Review* (1998), 513-521; Gregory C. Sisk *et al.*, "Searching for the Soul of Judicial Decision Making: An Empirical Study of Religious Freedom Decisions", 65(3) *Ohio State Law Journal* (2004), 421-614; Stephen M. Feldman, "Empiricism, Religion, and Judicial Decision-making", 15(1) *William & Mary Bill of Rights Journal* (2006), 43-57; Brian H. Bornstein and Monica K. Miller, "Does a Judge's Religion Influence Decision Making?", *Court Review: The Journal of the American Judges Association* (2009), 112-115; and Kermit V. Lipez, "Is There a Place for Religion in Judicial Decision-Making?", 31(1) *Touro Law Review* (2015), 133-148.

425 On the role of "traditional values" in human-rights narratives in general, see Jacob W.F. Sundberg, "Human Rights and Traditional Values", in Peter Wahlgren (ed.), *Human Rights: Their Limitations and Proliferation* (Stockholm Institute for Scandinavian Law, Stockholm, 2010), 125-154. For an analysis of Russia's political objectives in protecting "traditional values", see, for example, Melissa Hooper, "Russia's 'Traditional Values' Leadership", *humanrightsfirst.org* (1 June 2016), available at <http://www.humanrightsfirst.org/sites/default/files/Melisssa%20Report.pdf>.

426 On the role of the Russian Orthodox Church in the evolution of conservative and anti-liberal polemics against liberal freedoms and against the ECtHR, see Kristina Stoeckl, *The Russian Orthodox Church and Human Rights* (Routledge, London and New York, NY, 2014).

leads to a confrontation between this domestic conservative culture and the liberal culture transplanted from the West and embodied in the RF Constitution.

1 Contestation of Rights through Religion

The balance between the societal values rooted in religious traditions and the liberal values enshrined in the laws that protect minorities against the arbitrary rule of the majority can be a litmus test for determining the extent to which there is rule of law in Russia.[427] Can minorities claim full judicial protection of their rights guaranteed by the Constitution and international treaties despite these rights contravening established patterns rooted in the prevailing religious paradigms or in so-called "traditional values"? Court practice in Russia, including the case law of the RF Constitutional Court, is rather ambiguous about this question and suggests a negative response.

Similar problems exist in other countries with a relatively strong influence of religious traditions on social life and mindsets. While adhering to international standards for the protection of minorities and ratifying the corresponding treaties, quite a few countries may in reality be unwilling to extend the full scope of such protection to some minorities that are stigmatized in public opinion. Guaranteeing rights for such stigmatized minorities is, therefore, also a practical choice for the government in democratic countries—doing so could undermine its legitimacy and result in a loss of popular support which might mean lost elections. It comes as no surprise that traditionalist narratives are gaining popularity in political forums in Western societies and can be used as trumps in political strategies. There are plenty of discussions about the rise of populism in Europe, the United States, and elsewhere which, sometimes, has prompted liberal parties to accept anti-liberal policies as a part of their election strategies. This choice

427 A strict reading of the rule of law principle would mean that politicized justice, in even a few cases, would mean that there is no rule of law. A soft reading would claim that an insignificant number of politically motivated decisions is present in every legal system and does not undermine the overall intergrity of legal system, unless this number reaches a certain treshhold. For the purposes of this Chapter the matter of politicized justice does not have primordial significance. In terms of cause and effect, the conservative predispositions of the Russian population seem to be the cause, while the populist strategy of the Russian authorities to align their policies and ideological narratives with these predispositions and to garner popular support is, rather, the effect.
For some interesting observations by one of Russia's leading sociologists, see Igor Kon, "Homophobia as a Litmus Test of Russian Democracy", 48(2) *Sociological Research* (2009), 43-64. In a broader perspective, one can consider this issue in light of different strategies of Russian modernization. See, for example, Marianna Muravieva, "Traditsionnye tsennosti i sovremennye sem'i: pravovye podkhody k traditsii i modernu v sovremennoi Rossii" [Traditional Values and Contemorary Families: Legal Approaches to Tradition and Modernism in Contemporary Russia], 12(4) *Zhurnal issledovanii sotsial'noi politiki* (2014), 625-640.

is relevant not only for democratic countries where the outspoken support of minorities can lead to lost elections but, also, for authoritarian countries whose governments are, to a certain extent, dependent upon various conservative groups (the army, the clergy, etc.).

In Hungary, Poland, and elsewhere, these narratives are progressively gaining the upper hand and are challenging the established "European consensus" on sexual non-discrimination through the conservative Catholic morality prevailing in these countries. The same is happening in Russia where the conservative Orthodox culture is actively supporting antigay attitudes and opposes any attempts to grant more rights to sexual minorities or even to implement the rights that are already established in statutory law.[428] The statutory texts are insufficient, for an adequate assessment of the nuances and limits of this balance, as the issue of the accommodation and protection of religious feelings concerns underlying social conventions that have been historically formed and that may hold sway over the mindsets not only of ordinary people but, also, of legislators and judges.

To understand these conventions, one can analyze that part of Russian law regulating the rights of sexual minorities from the standpoint of the prevailing social philosophy in Russia which has been analyzed in the previous Chapter. This can unveil, partly, the axiological background (*i.e.*, the system of societal values) underpinning the legal regulation of sexual minority rights in the Russian Federation. The "prevailing philosophy" is understood as that which is promoted by the official media and in the discourse of political leaders[429] and, according to sociological surveys, shared by the majority

428 There have been no sociological surveys among the Russian judiciary about their attitude toward different religions, and one can hardly expect judges to be straightforward on this point. Formally, state and religion are separate in Russia, and judges must render their decisions based only on laws, excluding any subjectivity and prejudice. But the facts are different. The Orthodox communitarian culture finds many proponents among the Russian judiciary and inspires in them a repressive approach to sexual minorities. For example, Constitutional Court Justice Nikolai Bondar' wrote in 2013 that "the Russian Constitution contains a sort of genetic (sociocultural) code of the multinational people of Russia" and that the LGBT culture does not fit this code. Nikolai Bondar', "Bukva i dukh rossiiskoi Konstitutsii: 20-letnii opyt garmonizatsii v svete konstitutsionnogo pravosudiia" [The Letter and Spirit of the Russian Constitution: Twenty Years of Harmonization in the Light of Constitutional Justice], *Zhurnal rossiiskogo prava* (2013) No.11, 5-17, at 9. For elaborations on this point by another RF Constitutional Court Justice, see Mikhail Kleandrov, "Mozhet li sud'ia byt' veruiushchim?" [May a Judge Be a Believer?], *Pravosudie v Vostochnoi Sibiri* (2003) No.4(12). On the legalist and conservative values and attitudes of Russian judges, see Vadim Volkov and Arina Dmitrieva, "Rossiiskie sud'i kak professional'naia gruppa: tsennosti i normy" [Russian Judges As a Professional Group: Values and Norms], in Vadim Volkov (ed.), *Kak sud'i prinimaiut resheniia: empiricheskie issledovaniia prava* [How Judges Make Decisions: An Empirical Research of Law] (Statut, Moscow, 2012), 128-155.

429 A short analysis of the structure of this discourse is aptly provided in Michael Urban, *Cultures of Power in Post-Communist Russia: An Analysis of Elite Political Discourse* (Cambridge University Press, Cambridge, 2010).

of the population.[430] (It is a separate question whether this philosophy is shared because it is officially promoted or it is officially promoted because it is supported by the masses[431] which we will not discuss in this Chapter.)

After the above-mentioned 2012*Pussy Riot* case, legislation was enacted the following year establishing criminal liability for anyone convicted of insulting the feelings of believers or promoting LGBT ideology which resulted in an indirect limitation of basic constitutional freedoms (primarily the freedoms of conscience and of expression), while also calling into question the principle of equality before the law.[432] This has given rise to debates in Russian scholarly literature on the limits of moral regulation and the interplay between religion and law. Later legislation only confirms this interplay between legal norms and their societal background, and especially the so-called *Yarovaia* package of amendments in 2016[433] which drew a distinction between "normal" religious cults and those "non-traditional" religious practices that potentially can lead to the propagation of terrorist ideologies. In the following sections, we will briefly scrutinize these developments, revealing their philosophical and historical background.

2 Traditional Values versus Posited Legal Rules in Court

Historically, traditions in Russia have been formed (at least concerning issues such as family, sexuality, and gender) under the strong influence of the Russian Orthodox Church,[434] certainly as far as the Christian part

430 Sociological surveys seem to confirm that the authorities' homophobic policy is in line with popular moods. According to polls by the Levada Center, 77% of Russians supported the so-called gay propaganda law (which, as will be shown later, has a wider scope of regulation) in March 2015, as compared with 67% in February 2013. See "Nevidimoe bolshinstvo" [The Invisible Majority], *levada.ru* (5 May 2015), available at <http://www.levada.ru/15-05-2015/nevidimoe-menshinstvo-k-probleme-gomofobii-v-rossii>.

431 For an interesting sociological explanation of how xenophobia in Russia is used by different groups to promote the philosophy of solidarity, see Vladimir Mukomel', "Ksenofobiia kak osnova solidarnosti" [Xenophobia as a Ground of Solidarity], *Vestnik obshchestvennogo mneniia* (2013) Nos.3-4, 63-69.

432 See, for example, Alexander Kondakov, "Same-Sex Marriages inside the Closet: Deconstruction of Subjects of Gay and Lesbian Discourses in Russia", *Oñati Socio-Legal Series* (2011) No.1, available at <http://ssrn.com/abstract=1737357>.

433 Federal Law No.374-FZ (6 July 2016) and Federal Law No.375-FZ (6 July 2016) established new anti-terrorism and anti-extremism measures. In particular, these laws treat as "extremist" and prohibit such missionary activities (sermons, proselytism, etc.) that might undermine traditional family values or prompt citizens to disobey the statutory law. For an overview, see "Overview of the Package of Changes into a Number of Laws of the Russian Federation Designed to Provide for Additional Measures to Counteract Terrorism", International Center for Not-for-Profit Law (21 July 2016), available at <http://www.icnl.org/research/library/files/Russia/Yarovaya.pdf>.

434 The same assertion about the decisive religious influence can be made about Russia's second major denomination, Islam, which is the major religion in the Caucasus and in the Volga region where it has had a significant influence on local cultures.

of the population is concerned.[435] This influence is reflected in, *e.g.*, the Russian medieval collection of customary guidelines called the *Domostroi* (Household) where family issues are dealt with from a religious standpoint (even if this religiosity differed, substantially, from the canonical Russian Orthodox Christianity).[436] Later texts contained ethical and, at the same time, legal (insofar as they were backed by organized coercion) prescriptions of appropriate behavior. Gender roles and patterns of sexual behavior were prescribed in an imperative manner, with zero tolerance towards non-traditional sexual orientations which still has repercussions to this day.[437]

The Westernization project undertaken by Peter the Great in the 18th century sought, *inter alia*, to westernize Russian traditionalist culture. This was, perhaps, one of the rationales for Peter's reforming the Orthodox Church in 1721, when the Church became one of the governmental ministries (the Holy Synod) headed by the Emperor.[438] But if this great Russian reformer succeeded in his plans to change the Russian mentality, it was only at the highest strata of Russian society. The majority of the population (the peasantry, the clergy, the lower gentry, merchants) maintained their behavioral standards and mental outlooks, often being opposed to the westernized morality and law imposed by the upper classes. For many Russian historians and philosophers, the 1917 Revolution is seen as a result of the clash between the Western values propagated by the highest classes and the traditionalist values imbued with evident religious connotations supported by the middle and lower classes.[439]

After the 1917 Revolution, there was little substantial change in the official attitude towards "non-traditional" sexuality and gender in the long term.[440] The Soviets similarly persecuted homosexuals and banned feminism from public discourse, maintaining, *e.g.*, criminal liability for homosexual intercourse. Nowadays, the issue of homosexuality has become a

435 According to 2017 polls conducted by the Pew Research Center, 71% of Russians consider themselves Orthodox Christians, 10% are Muslims, and 4% belong to other religious denominations. See "Religious Belief and National Belonging in Central and Eastern Europe", *op.cit.* note 420.

436 Carolyn Pouncy, *The Domostroi: Rules for Russian Households in the Time of Ivan the Terrible* (

437 Peter Barta, *Gender and Sexuality in Russian Civilization* (Routledge, London, 2001).

438 James Cracraft, *The Church Reform of Peter the Great* (Stanford University Press, Stanford, CA, 1971).

439 The most comprehensive interpretation of the Revolution from this point of view can be found in the work of Nicolas Berdyaev, *The Origin of Russian Communism*, (Paperback, Ann Arbor, MI, 1960, R.M. French transl.).

440 The unfortunate experiments with marriage and family construction in the first years of Soviet Russia are worth a brief mention here: Lynn D. Wardle, "The 'Withering Away' of Marriage: Some Lessons from the Bolshevik Family Law Reforms in Russia, 1917-1926", 4(2) *The Georgetown Journal of Law and Public Policy* (2004), 469-521, but they were abandoned in the mid-1920s and had no significant impact on Soviet family policies afterward.

political rallying cry for conservatives in Russia[441] claiming that the country must be saved from the "decadent West" that allegedly imposes a perverted form of sexual morality under the guise of liberalism and human rights.[442]

The 1993 Russian Constitution guarantees human rights such as the freedoms of conscience, expression, and assembly. These rights and freedoms are basically the same as those that are set forth in the ECHR and in the constitutions of other European countries. However, the interpretation and implementation of these rights and freedoms in Russia differs, significantly, from how they are interpreted and implemented in Western Europe. Russian political leaders have constantly stressed that Russia is not prepared to recognize any active rights or freedoms for LGBT individuals, and this is one of those rare issues where both the ruling party and opposition liberal parties take the same stance.

While sexual minorities formally have passive rights (in the sense of the right to be tolerated),[443] exercising these rights is considered amoral against the backdrop of communitarian religious morality. From the vantage point of "tradition" (be it Russian Orthodox, Muslim, or Soviet) or of "authentic family values", such rights or freedoms are inadmissible and even intolerable. President Putin summed up this balance in 2019 as follows: "We have no problem with LGBT persons. God forbid, let them live as they wish […] But this must not be allowed to overshadow the culture, traditions and traditional family values of millions of people making up the core population."[444]

However, Russia has to honor its international obligations and, therefore, has to tolerate minorities. This partly explains why the legal regulation of the LGBT community's rights in Russia is passive, meaning that no active rights are explicitly recognized for sexual minorities in case law (*e.g.*, the right to gay-pride parades as an element of the freedom of expression for

441 The common conservative logic in Russian political discussions equates liberalism with all-permissiveness (a pejorative term for tolerance), which, in this logic, supposes freedom from moral and religious constraints and serves as justification of homosexuality and other "perversions". An example of this logic can be found in a 2017 speech by Chief Justice Valerii Zorkin, "Spravedlivyi miroporiadok: sovremennye podkhody" [A Just World Order: Contemporary Approaches] (30 November 2017), Juridical Forum of the BRICS countries (Moscow), available at <http://www.ksrf.ru/ru/News/Speech/Pages/ViewItem.aspx?ParamId=83>.

442 Olga Malinova, "Russia and 'the West' in the Twentieth Century: A Binary Model of Russian Culture and Transformations of the Discourse on Collective Identity", in Reinhard Krumm *et al.* (eds.), *Constructing Identities in Europe: German and Russian Perspectives* (Nomos, Baden-Baden, 2012), 63-82.

443 In addition to the constitutional principle of non-discrimination, homosexuality was decriminalized in 1993 (pursuant to Law No.4901-1 [29 April 1993]), which means that homosexuality no longer is subject to any criminal liability. Before 1993, individuals engaging in homosexual acts faced up to seven years in prison under Art.121, RSFSR Criminal Code.

444 "Vladimir Putin Says Liberalism Has Become Obsolete", *Financial Times* (28 June 2019), available at <https://www.ft.com/content/670039ec-98f3-11e9-9573-ee5cbb98ed36>.

the LGBT community), even if no formal discrimination is imposed on them in statutory or in constitutional law. This means that LGBT culture is only tolerated but not protected, and no allowance is legally granted to it.

This stratagem can be seen as a way to equilibrate Western moral and legal standards—to which Russia has subscribed through numerous international declarations and conventions—with the prevailing sense of what is just and normal in Russian society (from the standpoint of the majority). Russian attitudes toward minorities differ, significantly, from what is considered just and normal in Western democracies. In particular, Russians in general are less tolerant toward the LGBT community than residents of Western countries[445] which also, unsurprisingly, impacts judicial practice.

This dialectic of passive/active regulation explains why Russian federal statutory law does not *de iure* prohibit "homosexual propaganda" or homosexuality (lesbianism and other non-traditional sexual orientations) directly although this prohibition works *de facto*—given the broad interpretation of the terms "non-traditional sexual relations" and "family values" in case law. In this normative ambiguity, other mechanisms of social control (primarily religion and traditional morality) are at work, shaping the attitudes both of ordinary people and of legal actors toward sexual minorities. With regard to the teachings of the main religious denominations in Russia (Orthodoxy, Islam, Judaism, and Buddhism)—and to the morality that is historically based on their dogmas—it is not surprising that this attitude is negative. References to "traditional", "national", and "authentic" values can easily become decisive factors in the adjudication process while statutory provisions are silent and can be interpreted as tacitly prohibiting those behavioral patterns that are not directly allowed.[446]

In the absence of explicit legislative rules, the judiciary has gradually coined an implicit rule that is contrary to the general principle of antidiscrimination: public performances, demonstrations, and mass actions that touch on the issues of gender and sexuality are tolerated insofar as they

445 According to a survey conducted by the Pew Research Center in June 2013: "The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries", *pewglobal.org* (4 June 2013), available at <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/>. Similar findings can be found in 2014 research conducted by two Russian sociologists. However, some authors find that Russians are progressively becoming more and more tolerant toward LGBT: Margarita Fabrikant and Vladimir Magun, "Semeinye tsennosti rossiian i evropeitsev" [Family Values of Russians and Europeans] *Demoskop* (6-19 October 2014), available at <http://demoscope.ru/weekly/2014/0613/demoscope613.pdf>. However, this increase in tolerance has so far not changed the balance of attitudes in Russian public opinion, and more recent polls have shown that 83% of Russians consider gay sex reprehensible. See "83 Percent of Russians Think Gay People Are Reprehensible", *pinknews.co.uk* (11 January 2018), available at <https://www.pinknews.co.uk/2018/01/11/83-percent-of-russians-think-gay-people-are-reprehensible/>.

446 Sergey Taskov, "Razresheno vse, chto ne zapreshcheno zakonom: pravovye i nravstvennye aspekty" [All which Is Not Prohibited by the Law Is Permitted: Legal and Moral Aspects], *Rossiiskaia iustitsiia* (2014) No.11, 50-51.

do not contravene established value standards.[447] This brings a drop of equivocality into the Russian legal system because this case law is at odds with the Constitution in at least two ways. *First*, according to prevalent legal doctrine and to constitutional law (Art.120, RF Constitution), the task of judges is to apply rules, but never to create them. This means that courts have no rule-making power: in attempting to establish such power, the judiciary would be contravening the constitutional principle of the separation of powers (Arts.10 and 11, RF Constitution). *Second*, constitutional law formally takes a favorable attitude toward various minorities, as it contains the same anti-discriminatory principles (Art.19, RF Constitution) that are common to Western constitutions.[448]

What is at play here is not so much positive law (in the sense of constitutional and statutory law) but, rather, the informal constraints and regulations stemming from the societal environment and based on social conventions. These conventions in Russia—as in other countries where religion has a significant impact on the social sphere—are essentially conservative, banning from the public sphere any attempts to justify behavior considered to deviate from established sexual and other models. Considering the judicial function from a sociological standpoint, one can assert that, in their routine work, judges tend to uphold and reinforce these underlying conventions—lest they risk facing social pressure.[449]

3 The Statutory-Law Framework

Properly stated, there are no laws or directives about the status of LGBT people in Russia, and legal regulation in this field has a passive character. Statutory law is simply silent on the rights of the LGBT community which does not mean that there is no legal regulation at all. On the one hand, there are some statutory rules that do not directly restrict sexual minorities but that, in reality, negatively shape the limits of LGBT rights. On the other

447 This is one of the major ideas of Russia's anti-extremism legislation and of how it is enforced in the courts, which is summed up in Decree No.11 of the Russian Supreme Court Plenum "O sudebnoi praktike po ugolovnym delam ekstremistskoi napravlennosti" [On Judicial Practice in Criminal Cases having an Extremist Character] (28 June 2011).

448 These arguments have been reiterated by LGBT activists in Russia but are ignored by the Russian courts. See Alexander Kondakov, "Resisting the Silence: The Use of Tolerance and Equality Arguments by Gay and Lesbian Activist Groups in Russia", 28(3) *Canadian Journal of Law and Society* (2013), 403-424.

449 Kathryn Hendley, Peter Murrell, and Randi Ryterman, "Law Works in Russia: The Role of Legal Institutions in the Transactions of Russian Enterprises", in Peter Murrell (ed.), *Assessing the Value of Law in Transition Economies* (University of Michigan Press, Ann Arbor, MI, 2001), 56-93; and Arina Dzmitryieva, "How the Law Really Works: The New Sociology of Law in Russia", 13(2) *Economic Sociology* (2012), 13-20. Surely, the law works through unofficial channels not only in Russia but in "classical democracies" too. See Richard Posner, *How Judges Think* (Harvard University Press, Cambridge, MA, 2008).

hand, the factual limits of the LGBT rights in Russia are formed by social attitudes toward their sexual behavior,[450] and this fact is gradually transforming into normativity (what the German legal scholar Georg Jellinek called "the normative force of the facticity") providing a kind of "soft law" that is not codified but that influences both political and judicial decision-making.[451] In Russian legalese, this system of regulation is referred to as "family values" or "traditional values", and in law-enforcement practice it might be placed even above constitutional law, which may prescribe rules contrary to the "tradition" or "customs" of family life.[452] In this aspect, the "living law" sometimes prevails over the "law in books"; with the approval of the political authorities and the popular majority but with the disapproval of international organizations or supranational courts.

Russian law contains two statutory rules containing a very powerful constraint on the rights of sexual minorities to declare their sexual orientation, to provide argumentation for this orientation, and to foster public discussions on this topic. The first rule usually serves as the normative justification for prohibiting gay-pride parades and other public LGBT actions; the second is applied when LGBT activists are punished when attempting to organize such unauthorized actions. These provisions (in the 2013 wording and further amendments) are as follows:

(1) Article 5 of Federal Law No.436 of 29 December 2010 on the Protection of Children from Information That Harms Their Health and Development. Para.2(4) of this article prohibits the dissemination of information that "negates family values, promotes non-traditional sexual relations or provokes disrespect toward parents and/or other members of the family". This interdiction is backed up by the penalty set forth in Article 6(17) of the RF Code of Administrative Offenses (CAO) providing for fines of up to RUB 50,000 for the dissemination of information that can harm children.

(2) Article 6.21 of RF CAO prohibiting "the promotion of non-traditional sexual relations among minors if said promotion results in the dissemination of information that is aimed at promoting non-traditional sexual patterns among minors, at interesting [minors] in non-traditional sexual

450 For an excellent analysis of the public opinion on homosexuality in Russia, see Alexander Kondakov, "Gomoseksual'nost' i obschestvennoe mnenie v Rossii: ot negativnykh otsenok do bezrazlichiia" [Homoxesuality and Public Opinion in Russia: From Negative Evaluations to Insensitivity], *Demoskop Weekly* (2013), 565-566, available at <http://demoscope.ru/weekly/2013/0565/analit05.php>.

451 Alexander Kondakov, "Injured Narratives and Homosexual Subjectivities in Russia: The Production of Rights Vocabulary in Post-Soviet Context", in Marianna Muravyeva and Natalia Novikova (eds.), *Women's History in Russia: (Re)Establishing the Field* (Cambridge Scholars Publishing, Cambridge, 2014), 101-117.

452 On the official strategy to use homophobia as a proxy for traditional values and to apply moral regulation instead of legal regulation, see Cai Wilkinson, "Putting Traditional Values into Practice: Russia's Anti-Gay Laws", *Russian Analytical Digest* (2013) No.138, available at <http://www.css.ethz.ch/publications/pdfs/RAD-138-5-7.pdf>.

relations, at perverting the social equivalence between traditional and non-traditional sexual relations, or at providing information about non-traditional sexual relations that provokes interest in such relations".

The prevalent interpretation of the first legislative provision is restrictive and tends to routinely support refusals to allow gay-pride parades or similar actions: there is always the probability that, at any public place where LGBT activists can gather, there will be at least one child passing by. In fact, this results in an automatic ban on public LGBT demonstrations in populated areas.

Along with these statutory texts, there are several federal and regional programs that touch on family values. These programs do not have any direct binding effect on ordinary social relations but can be seen as justification for judicial decisions seeking to protect these values from infringement by those minorities whose activities are deemed to be contrary to such values. Further, they serve as guidelines for the judiciary as to what the priorities of state policy are. These programs, thus, can indirectly influence judicial reasoning in this category of cases even if the courts do not directly cite them when adjudicating cases and justifying their decisions. A 2012 presidential Edict[453] states that social welfare is foremost endangered by such phenomena as alcoholism, drugs, and also by what is characterized as "the degradation of family and social values" (Chapter 1) calling for a program to propagate these family values (Chapter 5). Another Edict of the same year establishes national-policy priorities where "the revival of family values" is mentioned in point 21 as one of the main goals of the Edict.[454] The government's development program mentions that best efforts should be made in the media to promulgate family values and to promote them especially among young people.[455] One can easily imagine that any judge, attempting to deviate from these state policies, could be suspected of disloyalty to the ruling regime which would be fraught with negative professional consequences.

453 Ukaz Prezidenta Rossiiskoi Federatsii [Edict of the RF President] (1 June 2012) No.761, "O Natsional'noi strategii deistvii v interesakh detei na 2012-2017" [About the National Strategy of Actions in the Interests of Children in 2012-2017], *SZRF* (2012) No.23 item 2994. Since it has not been repealed or replaced by other strategies, this Edict remains formally in force.

454 Ukaz Prezidenta Rossiiskoi Federatsii [Edict of the RF President] (12 December 2012) No.1666, "O Strategii gosudarstvennoi natsional'noi politiki Rossiiskoi Federatsii na period do 2025 goda" [On the Strategy of State National Policy of the Russian Federation for the period up to 2025], *SZRF* (2012) No.52 item 7477.

455 Rasporiazhenie Pravitel'stva Rossiiskoi Federatsii [Order of the RF Government] (17 November 2008) No.1662-p, "O Kontseptsii dolgosrochnogo sotsial'no-ekonomicheskogo razvitiia Rossiiskoi Federatsii na period do 2020 goda" [On the Conception of the Long-Term Development of the Russian Federation Until 2020], *SZRF* (2008) No.47 item 5489.

4 The Constitutional-Law Framework

The Constitution contains a number of liberal principles, including on ideological diversity (Art.13: "In the Russian Federation ideological diversity shall be recognized; no ideology may be established as a state or obligatory [ideology]") and on secularity (Art.14: "The Russian Federation is a secular state; no religion may be established as a state or obligatory [religion]"). These articles are included in Chapter 1, "Fundamentals of the Constitutional System", implying that law creation and law enforcement in Russia are subject to these principles. Their pivotal significance is stressed in Article 16(2): "No other provision of the present Constitution may contradict the fundamental principles of the constitutional system of the Russian Federation".

These principles are echoed by a set of liberal rights and freedoms established in the following provision of the Constitution:

> "The rights and freedoms of man and citizen shall be directly operative. They determine the essence, meaning and implementation of laws, the activities of the legislative and executive authorities, local self-government and shall be ensured by the administration of justice." (Art.18)

Among these rights and freedoms are "freedom of conscience, freedom of religion, including the right to profess individually or together with others any religion or to profess no religion at all, to freely choose, possess and disseminate religious and other views and act according to them" (Art.28); "the freedom of ideas and speech" (Art.29(1)); the interdiction to force anyone to express [their] views and convictions or to reject them (para.2); "the right to freely look for, receive, transmit, produce and distribute information" (para.3); "the right to assemble peacefully, without weapons, hold rallies, meetings and demonstrations, marches and pickets" (Art.31); and "the freedom of literary, artistic, scientific, technical and other types of creative activity, and teaching" (Art.44).

Article 55 of the Constitution establishes a mechanism to balance fundamental rights and freedoms with other constitutional principles and values. Para.2 of this article warns that "in the Russian Federation no laws shall be adopted cancelling or derogating human rights and freedoms". On the other hand, the next paragraph states that "the rights and freedoms of man and citizen may be limited by federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defense of the country and security of the State" (para.3).

The cited paragraph of Article 55 enumerates only a "necessity for protection" but, in fact, all laws in a democratic state (pursuant to Art.1, RF Constitution, Russia is proclaimed as a democratic state) are intended to provide such protection. A strictly positivist reading of these provisions

cannot offer a clear answer to this question. In practice, such a "necessity" means "where the Constitutional Court finds it necessary". However, this is not a solution to the problem since there should be criteria for the Constitutional Court itself to decide about the necessity in question. The Constitution is silent on this point.

Being careful about the limits of interpretation, the authors of the Constitution stressed the universality of human rights: "the listing in the Constitution of the Russian Federation of the fundamental rights and freedoms shall not be interpreted as a rejection or derogation of other universally recognized human rights and freedoms" (Art.55(1)). Article 15(4) states that:

> "The universally recognized norms of international law and international treaties of the Russian Federation are component parts of its legal system. If an international treaty of the Russian Federation establishes other rules besides those envisaged by law, the rules of the international agreement shall be applied."[456]

Thus, constitutional law is supposed to provide guarantees against any particularism or exceptionalism in the interpretation and application of these rights and freedoms. The "violation of the principle of equality of citizens before the law" by public officials can be punished by up to five years in prison. Such a contravention constitutes the *corpus delicti* described in Article 136, Russian Criminal Code.

However, the applicability of these principles and rules is largely limited by two major constraints: the authoritarian political system along with its traditionalist ideology, and the formalist legal training of judges and law officers who have been (and still are being) taught to see the law as nothing but a set of commands from the sovereign and to consider the subjects of law (human beings) as merely the addressees of these commands with no rights independent of, or prevailing over, these commands.[457] Religion,

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456 This language of the Constitution notwithstanding, under prevailing Russian legal doctrine, an ECtHR decision is not deemed to contain norms or principles of international law. See Postanovlenie Plenuma Verkhovnogo Suda RF [Decree of the RF Supreme Court Plenum] (26 July 2013) No.21 "O primenenii sudami obshchei iurisdiktsii Konventsii o zashchite prav cheloveka" [On the Application of the ECHR by General Jurisdiction Courts].
In a judgment handed down two years later (14 July 2015) No.21-P, *op.cit.* note 16, the RF Constitutional Court ruled that decisions of the ECtHR are not self-executing and are not endowed with supreme force above the 1993 RF Constitution. There, the Court stressed, in particular, that the ECtHR can deviate from its proper function of protection of human rights, and national constitutional courts should limit the negative impact of such ECtHR judgments on their domestic laws. At the end of 2016, as a logical development of this trend, a new constitutional law (28 December 2016) No.11-FKZ was adopted conferring the power on the RF Constitutional Court not to execute decisions of the ECtHR when they are deemed contrary to the Constitution.

457 Antonov, "Theoretical Issues of Sovereignty in Russia", *op.cit.* note 369. This orientation coincides with the autocratic policies of the political regime and its understanding of the rule of law. See Jeffrey Kahn, "Vladimir Putin and the Rule of Law in Russia", 36(3) *Georgia Journal of International and Comparative Law* (2007-2008), 511-558.

morality, and the law work together in Russia in a rather specific manner—with no prevalence on the part of the law (which is expected from a state based on the rule of law) and with rights being subject to concerns of sovereignty.[458]

Russia is a secular, democratic state that is based on the rule of law and that promotes value pluralism. But, in fact, moral and religious principles often prevail over legal principles not only in politics but, also, in court proceedings. Judges, scholars, and politicians in Russia sometimes admit that "liberal" constitutional human rights are binding only insofar as they do not contravene "public" morality, social dynamics[459] or, in some opinions, also religious values.[460] Such opinions are legitimized by Article 55(3) of the Constitution, which makes it possible to limit human rights for the sake of national security and, also, several other collective interests. This conservative logic is rather primitive: the law can exist only insofar as there is a state, the state is a political form of national integration, and national integration is possible only if there are common basic values that bring the nation together. Consequently, legal rules and principles (human rights included) are not as important as collective values and, thus, should cede in the case of a conflict.[461]

5 Case Law of the RF Constitutional Court

Russian courts have profited a great deal from this conceptualization of the legal effect of the constitutional principle of non-discrimination, balancing it against other constitutional principles and refusing to confer legal protection on sexual minorities. The RF Constitutional Court has had numerous opportunities to confirm its negative attitude toward LGBT culture and its readiness to support informal restrictions on this culture.

458 Mikhail Antonov, "Conservative Philosophy and Doctrine of Sovereignty: A Necessary Connection?", *Archiv für Rechts- und Sozialphilosophie* (2017) No.153, 45-59.

459 Nikolai Bondar', "Sotsioistoricheskii dinamizm Konstitutsiii bez perepisyvaniia konstitutionnogo teksta" [The Social and Historical Dynamism of Constitution without Rewriting the Constitutional Text], *Zhurnal konstitutsionnogo pravosudiia* (2014) No.2, 22-34.

460 Boris Kurkin, "Ideologema prav cheloveka i ee interpretatsiia v sovremennoi otechestevennoi pravovoi teorii" [The Ideologeme of Human Rights and Its Interpretation in Contemporary Russian Legal Theory], *Pravo: Zhurnal VSE* (2008) No.2; and Mikhail Krasnov, "Khristianskoe mirovozzrenie i prava cheloveka" [A Christian World Outlook and Human Rights], *Rex russica* (2013) No.5, 465-477.

461 Compare with the communitarian conceptions that are promoted by some prominent specialists in constitutional law. See Vladimir Kruss, "Doktrinal'nye innovatsii v kontekste konstitutsionalizatsii rossiiskoi pravovoi sistemy" [Doctrinal Innovations in the Context of Constitutionalization of the Russian Legal System], *Konstitutsionnoe i munitsipal'noe pravo* (2013) No.4, 2-11; Boris Ebzeev, "Konstitutsiia, gosudarstvo i lichnost' v Rossii: filosofiia rossiiskogo konstitutsionalizma" [Constitution, State and Personality in Russia: the Philosophy of Russian Constitutionalism], *Konstitutsional'noe i munitsipal'noe pravo* (2013) No.11, 14-23.

Back in 2006, the RF Constitutional Court ruled out the possibility of gay marriages in Russia, reasoning that it was up to the Russian Parliament to decide whether or not it was appropriate to introduce gay marriages.[462] Remarkably, this 2006 ruling was rather short and devoid of the traditionalist narrative that would become typical of the Court's reasoning in the years to come. In denying a claim concerning the unconstitutionality of the RF Family Code that permitted only heterosexual marriage, the Court abstained from any criticism of liberal principles and the ECtHR case law evoked in the claim, concluding formalistically that, under international treaties, Russia had never assumed the obligation to introduce gay marriages. No mention of traditional culture or religious beliefs was made in the ruling.

In 2010, in response to a claim by a well-known gay activist, Nikolai Alekseyev, the Constitutional Court considered administrative penalties for promoting homosexuality among minors. These penalties had been introduced, in 2006, by the local legislature in the city of Ryazan and Ryazan *Oblast'*.[463] When the relevant regional laws were challenged in 2010,[464] the Court reasoned that the remedies provided under Article 29 of the Constitution should cede to communitarian morality:

> "Family, maternity and childhood in their traditional understanding inherited from [our] ancestors shall guarantee the uninterrupted change of generations; therefore, they are a condition for preservation and development of the multinational people of Russia and must have special protection from the state."

This meant that the non-discrimination remedies provided under Article 29 of the Constitution were not valid when their use could harm the health, morals, and spiritual development of minors. In the Court's opinion, this "harm" was implicitly present in any statement about the normalcy of

462 Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii [Ruling of the RF Constitutional Court] (16 November 2006) No.496-O "Ob otkaze v priniatii k rassmotreniiu zhaloby grazhdanina E. Murzina na narushenie ego konstitutsionnykh prav punktom 1 stat'i 12 Semeinogo kodeksa Rossiiskoi Federatsii" [On the Refusal to Accept for Consideration the Complaint of E. Murzina on a Violation of his Constitutional Rights by Point 1 of Article 12 of the RF Family Code].

463 As Russia is a federal state, its constituent members (regions, republics, etc.) are empowered to enact local regulations including administrative penalties for infractions of local regulations.

464 Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii [Ruling of the RF Constitutional Court] (19 January 2010) No.151-O-O "Ob otkaze v priniatii k rassmotreniiu zhaloby grazhdan N.A. Alekseeva, N.V. Bayeva i I.B. Fedorovoi o narushenii ikh konstitutsionnykh prav stat'ei 4 Zakona Riazanskoi oblasti 'O zashchite nravstvennosti detei' i stat'ei 3.10 Zakona Riazanskoi oblasti 'Ob administrativnykh pravonarusheniiakh'" [On the Refusal to Accept for Consideration the Complaint of N.A. Alekseev, N.V. Bayev and I.B. Fedorova on a Violation of their Constitutional Rights by article 4 of the Law of Riazan Oblast' "On the Protection of the Morality of Children" and on Article 3.10 of the Law of Riazan Oblast' "On Administrative Offenses"].

LGBT culture that could eventually reach children. Based on these grounds, the RF Constitutional Court found that the protection of family under Article 38 of the Constitution could be endangered by information about "parity between traditional and non-traditional families".

Unlike the 2006 ruling, this 2010 ruling contained indirect references to "normal" and "abnormal" sexual relations depending on their congruency with the prevailing culture and tradition. Even if religious feelings were not explicitly referred to in this ruling, they were present in the background. As has been shown above, on the one hand, Russian culture and tradition have always been significantly shaped by Orthodox Christianity which is hostile to LGBT culture (the same goes for Communist morality in the Soviet era). On the other hand, the new ideology of the ruling elites in Russia is explicitly based on adherence to Orthodoxy whereby President Vladimir Putin, and other members of the political establishment, overtly display their religiosity in spite of the secularity principle enshrined in Article 14 of the Constitution. The impact of the prevailing religious ideology can easily be seen in the words of the 2010 ruling about "normality" and "abnormality".

Affirming this approach in a 2013 ruling, the Constitutional Court stressed that Russia never had accepted any binding obligation under its constitutional law or under its international treaties to treat LGBT culture as equal to Russian traditional culture. Moreover, as far as concerns children and their rights, the Constitution and the international treaties to which Russia is a party should be interpreted in a way coextensive with the constitutional objective of protecting minors from the possible harmful impact of propaganda on their mentality and psyche.[465]

Until 2014, however, the Constitutional Court had not entered into substantial discussions about the limits of LGBT rights. In a 2014 judgment,[466] the Court tried to strike a balance between its jurisprudence and the case law of the ECtHR and considered the constitutionality of Article 6(21), RF CAO, which is applied to punish those who organize LGBT actions without authorization.[467] While finding this rule to be in compliance with the Constitution, the Constitutional Court called for the creation of a space for "unbiased public discussions about the status of sexual minorities and for the articulation of their position by representatives of these minorities" and

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465 Ruling of the RF Constitutional Court (24 October 2013) No.1718-O, *op.cit.* note 353.

466 The formal difference between an *opredelenie* and a *postanovlenie* is that the former is the form applied by the Constitutional Court for rejecting an inadmissible complaint while a ruling is a decision based on the merits of an accepted complaint. That is why the reasoning in judgments is usually more detailed and substantiated.

467 Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii [Ruling of the RF Constitutional Court] (23 September 2014) No.24-P "O proverke konstitutsionnosti chasti 1 stat'i 6.21 Kodeksa Rossiiskoi Federatsii ob administrativnykh pravonarusheniiakh v sviazi s zhaloboi grazhdan N.A. Alekseeva, Ia.N. Evtushenko i D.A. Isakova" [On Verification of the Constitutionality of para.1 of Art.6.21 of the RF Code of Administrative Offences in Connection with Applications of Citizens N.A. Alekseyev, Ia.N. Evtushenko and D.A. Isakov].

warned lower courts against a "formalist approach" (para.4). The Court found that gay-pride parades are not interdicted *per se* and must be allowed unless they take on an "aggressive and pervasive character" and, thereby, could endanger the rights and lawful interests of other people.[468] The Court agreed that state authorities have the right to monitor how "the contentious and delicate problem of non-traditional sexual orientation" is discussed in society in order to protect law and order, but this monitoring must be proportionate and must not be excessive.

These liberal considerations were, however, mitigated by the conservative statement that seemingly became the *ratio decidendi* of the case:

> "Russia may decide how to regulate spheres pertaining to sexual relations and interpersonal relations connected with sexuality, basing this regulation on traditional ideas about these values in the context of the particularities of the national and confessional composition of Russian society."

Here, along with its ubiquitous traditionalist rhetoric, the Court makes explicit reference to the "confessional composition" of the Russian people as one of the reasons for imposing restrictions on the LGBT community. Given the animosity toward this community from more than 95 percent of Russian believers (85 percent of whom are Orthodox Christians and 10 percent are Muslims, Jews, and Catholics[469]), the Court came to the not unexpected conclusion that the state should protect minors from the "imposition of social models that differ from the models commonly accepted in Russian society and that are sometimes perceived as unacceptable".[470]

This judgment was subject to a number of critical attacks of a sundry of Russian legal scholars and, also, was criticized by the ECtHR in its 2017 *Bayev and Others* judgment.[471] Proponents of the approach proposed by the RF Constitutional Court retort that rights and freedoms—even if they are proclaimed to be fundamental—cannot be limitless; that one constitutional right can restrain another right, a constitutional freedom can be in conflict with another constitutional value or with a principle; and that, in reality, these limits are established for each freedom in a particular concrete case in the view of the circumstances of the case, *i.e.*, the values and interests that

468 Judgement of the RF Constitutional Court (23 September 2014) No.24-P, *op.cit.* note 467.

469 See "Religious Belief and National Belonging in Central and Eastern Europe", *op.cit.* note 435.

470 See Ol'ga Kriazhkova, "Novyi raund bor'by za prava seksual'nykh men'shinstv: kommentarii k Postanovleniiu Konstitutsionnogo Suda Rossii ot 23 sentiabria 2014 g. No.24-P" [A New Round of the Struggle for the Rights of Sexual Minorities: Comments on the Ruling of the Russian Constitutional Court from 23 September 2014 No.24-P], *Sravnitel'noe konstitutsionnoe obozrenie* (2014) No.6, 123-131.

471 See the ECtHR judgment in *Bayev and Others v. Russia* (20 June 2017) Application Nos.67667/09, 44092/12 and 56717/12, available at <http://hudoc.echr.coe.int/eng?i=001-174422>.

are at stake in the case.[472] This is the work of judges in any developed civil-law society, and Russia is not an exception to this rule, some ideological differences notwithstanding.[473] It remains to be discussed, however, whether such considerations might justify placing religious and moral norms over constitutional rights.

This short case-law analysis demonstrates that, in recent years, the RF Constitutional Court has been evolving toward including the prevailing religious creeds and beliefs into the normative framework of Russian law. From the 2006 ruling where the issue of gay marriages was tackled in a strictly formalist manner, the Court (under the pressure of its direct or indirect discrepancies with the ECtHR and of the general tendencies in Russian policy) applied the traditionalist narrative and, in the end, shaped its approach to LGBT rights with a clear reference to religious dogmas. In the Court's opinion, they are an integral part of Russian law and even may overrule the statutory and constitutional guarantees of non-discrimination. To shed more light on the ideology behind the case law of the RF Constitutional Court, we should cite the opinions of its Chief Justice, Valerii Zorkin. In a 2014 speech presented at the Third Congress of the World Conference on Constitutional Justice, Zorkin insisted that:

> "The law, being the most complete reflection of the rational foundations of social rules, has to *promote the preservation and development of all mankind* and, at a minimum, not to undermine the foundations of its preservation and development. Meanwhile, real life shows that a *liberal-individualistic interpretation of human rights often contradicts this imperative*. One can see this in different spheres of human life: from the egocentric behavior of economic monopolies grabbing the planet's main life-supporting resources to the *aggressive struggle of sexual minorities for equality of opportunities for their self-realization, including such controversial issues as the upbringing of adopted children*. These facts, which seem to be

472 See, for example, the dissenting opinion of Russian Judge Dmitry Dedov at the ECtHR in the case of *Bayev and Others*, *op.cit.* note 471. There, he asserted that "states shall have [...] a wider margin of appreciation in respect of public morals, decency and religion" and that Russia may introduce positive discrimination against sexual minorities "to protect the traditional values of Russian society".
There are many Russian scholars who, similarly to Dedov, think that Russian traditional values are incompatible with LGBT culture. See Anatolii Diachenko and Evgenii Tsimbal, "Sotsial'naia obuslovlennost' zapreta propagandy gomoseksualizma" [The Social Determination of Prohibiting Propaganda of Homosexuality], *Lex russica* (2013) No.11, 1216-1223. These authors insist that the Russian mentality is different compared with that of people living in Western democracies. To support this position, they refer to numerous sociological polls.

473 We can refer here to the fortunate formulation by several respected authors about the Russia's current legal system: "the civil law tradition with some special Russian characteristics". Peter B. Maggs, Olga Schwartz, and William Burnham, *Law and Legal System of the Russian Federation* (Juris Publishing, Huntington and New York, NY, 2015, 6th ed.), 1-8, esp. at 7.

> very different from one another, have a common route: the *individualistic ideology that currently determines the dominant approach toward understanding the core meaning and content of human rights*. From the perspective of this approach, a person regards the world not as an environment that has inner connections and ties with this person, which is a precondition for the continuation and uplifting of mankind, but rather as the sum of external means that he or she can use for personal well-being and success."[474]

These conclusions speak for themselves: even if the Chief Justice did not mention religious creeds, he evidently had in mind the communitarian Russian culture based on Orthodox religious dogma. In the end, liberal rights are admissible insofar as they are compatible with this communitarian culture, and it is up to the sovereign state authorities to determine the limits of concession to these rights. The justification behind this reasoning is rather trivial: there can be no nation without common values and no country without laws that protect these values, and no law and order without the sovereign state that keeps the country together and enacts good laws. By this logic, in case of a conflict, national courts should abstain from applying human rights for the sake of the survival of the entire society.

For Zorkin, the Constitution is not only a text but "a living instrument" that evolves in accordance with communitarian religious morality, as he asserts in a 2017 speech: "From antiquity to modern times, good lawmakers have tried to create laws with the support of mass ideas about [what is] just. And the roots of these ideas have always been sanctified by a religious tradition of the corresponding culture and era", as far as "law, morality and religion constitute an internally interconnected socio-normative complex". That is why "protection of human rights should not undermine [the] moral foundations of society and destroy its religious identity". The criterion for evaluating the admissibility of human rights is the prevailing communitarian culture: "Norms of morality (*i.e.*, social morality), norms of individual morality and the rule of law which, in their totality, are determined either by the religious tradition or secular ideology, are rooted in culture and consonant with the soul of every reasonable person".[475] Evidently, LGBT rights fail to fit this criterion, and thus religious dogma and culture evidently have become an argumentative tool for justifying Russia's particularism about the protection of minority rights.

474 Zorkin's English-language report, presented at the Meeting of the Bureau of the World Conference on Constitutional Justice (29 September 2014), available at <http://www.venice.coe.int/WCCJ/Seoul/docs/WCCJ_report_Session_1-Zorkin_ENG.pdf>. Emphasis added.

475 Zorkin, "The Essence of Law", *op.cit.* note 81.

6 Case Law of the Courts of General Jurisdiction

The lower courts[476] generally abide by the approaches elaborated by the RF Constitutional Court and cite them when reasoning their decisions on limiting LGBT rights. For the most part, the cases heard in courts of general jurisdiction about LGBT rights concern gay-pride parades and other rallies where these communities publicly assert and defend their sexual orientation.

Before the 2013 legislative amendments, there were no federal laws that imposed penalties for such demonstrations. The main problem for LGBT people was to get authorization for demonstrations, as local authorities generally refused to provide such authorization. Upon the requests of LGBT activists, regional courts regularly hear complaints about groundless refusals that uniformly dismiss LGBT applications. The main rationale for dismissing these complaints is the fact that the local authorities have the competence to decide about mass gatherings based on issues related to security and public order. However, after the ECtHR condemned Russia for this formalist approach in the 2010 *Alekseyev* case (complaints No.4916/07, 25924/08 and 14599/09), such arguments were no longer valid. To retain control over the issue of gay-pride parades, local legislatures started passing laws about the prohibition of so-called LGBT propaganda among minors.

Before 2013, when this prohibition was also established in federal law, the RF Supreme Court had heard several cases where the validity of local laws was challenged. The subject matter of these cases was almost identical, and so it is enough for our purposes to provide a brief description of just one of these cases.[477] In 2012, the RF Supreme Court formulated defenses for these local laws, mainly reproducing the findings of the RF Constitutional Court in the case of Alekseyev, Bayev, and Fedorova (19 January 2010, No.151-O-O, as cited above). This 2012 case concerned antigay laws enacted in 2009 in the Arkhangelsk *Oblast'*. Citing the Constitutional Court's 2010

476 The Russian court system has two higher courts: the Constitutional Court and the Supreme Court, the latter being at the top of the system of courts of general jurisdiction. Along with these courts, there are constitutional courts (*ustavnye sudy*) of the subjects (constituent members) of the Russian Federation (regions, republics, etc.). But these courts do not have the competence to hear cases pertaining to the regulation and protection of human rights since this is within the exclusive competence of the Federation and its courts (Art.71, RF Constitution). Even if the Supreme Court is not formally subordinated to the Constitutional Court, given the hierarchy of laws (the Constitution as the supreme law of the country), the Supreme Court mostly follows the case law of the Constitutional Court, which is why one can consider, with some reservations, that the Supreme Court and its subordinated courts are "lower' than the Constitutional Court.

477 The most illustrative cases of Rulings of the RF Supreme Court were those concerning: Ruling (15 August 2012) No. 1-APG12-11 (a law of the Arkhangelsk Region No.113-9-OZ); Ruling of the RF Supreme Court (7 November 2012) No.87-APG12-2 (a law of the Kostroma Region No.193-5-ZKO); and Ruling of the RF Supreme Court (27 February 2013) No. 46-APG13-2 (a law of the Samara Region No.115-GD).

ruling, the Supreme Court argued that the non-discrimination remedy under Article 29 of the Constitution was not available to those whose behavior might endanger the constitutional values of family, maternity, and childhood that are protected under Article 7 of the Constitution.

It seems that the *ratio decidendi* in this case was that "Russian federal legislation does not consider homosexual relations to be family values pursuant to national traditions and with respect to norms of international law".[478] Tipping the scale in favor of a broader interpretation of Article 7 of the Constitution, the Supreme Court implicitly argued that civil and human rights (including the non-discrimination principle) should not be applied if they collide with family values. It goes without saying that in referring to "national traditions" and "family values", the Court had religious dogmas in mind—although, in fact, neither the Supreme Court nor the Constitutional Court has ever addressed any historical facts or entered into a substantial discussion about what "genuine Russian traditions" are from a historical point of view. The main point in the Court's argumentation was a kind of binary code—"acceptable/unacceptable"—where LGBT culture was unquestionably coded as unacceptable.

After RF Constitutional Court Judgment No.24-P of 23 September 2014, which legitimized identical federal antigay regulations, local legislatures repealed their local laws to avoid the *non bis per idem* problem. The crucial issue for the courts of general jurisdiction was to be seen in cases about the legality of local authorities' decisions to prohibit LGBT demonstrations. We will provide a brief analysis of two cases from 2016 to show that these courts, generally, follow the reasoning of the RF Constitutional Court.

In one of these cases, the St Petersburg City Court rejected the complaint, reasoning that the plaintiffs (LGBT activists) had failed to prove that they were going to assert their homosexuality in "an acceptable and neutral form".[479] However, the Court did not set out what this "form" had to be, making a meaningless reference to a "lack of neutrality" and shifting to the plaintiffs the burden to prove that LGBT culture can be publicly asserted in a form acceptable to society. Given the commonly shared animosity of traditionalist culture toward homosexuality, it remains unclear how this

478 Postanovlenie Verkhovnogo Suda RF [Ruling of the RF Supreme Court] (15 August 2012) No.1-APG12-11, "Ob ostavlenii bez izmeneniia resheniia Arkhangel'skogo oblastnogo suda ot 22.05.2012, kotorym otkazano v udovletvorenii zaiavleniia o priznanii nedeistvuiushchimi otdel'nykh polozhenii oblastnogo Zakona Arkhangel'skoi oblasti ot 15 dekabria 2009 g. No.113-9-OZ 'Ob otdel'nykh merakh po zashchite nravstvennosti i zdorov'ia detei v Arkhangel'skoi oblasti' i oblastnogo Zakona Arkhangel'skoi oblasti 'Ob administrativnykh pravonarusheniiakh'" [On a Restatement of the Decision of the Arkhangelsk Regional Court of 22 May 2012 Which Rejected an Application to Invalidate Certain Provisions of the Arkhangelsk Regional Law of 15 December 2009 No. 113-9-OZ "On Particular Measures to Protect the Morals and Health of Children in Arkhangelsk Region" and of the Arkhangelsk Regional Law "On Administrative Offences"].

479 Appellate Ruling of the St Petersburg City Court 22 June 2016 (No.33a-10916/2016) in case No.2a-2006/2016.

might be possible for the LGBT plaintiffs. This shifting of the burden of proof is not compatible with the principles set forth in a 2014 judgment of the RF Constitutional Court about the inadmissibility of a formal approach to banning gay-pride parades, let alone the ECtHR approach in the 2010 *Alekseyev* case.

In a similar case,[480] the Court was of the opinion that the plaintiffs failed to demonstrate that information about homosexuality had any cultural, artistic, or historical value and that this information was worth being disseminated publicly. Making an implicit reference to the narrative of Chief Justice Zorkin (as analyzed in Chapter 3 above), the Court found that information about LGBT culture was "aggressive because it prioritizes the individual autonomy of the administrative plaintiffs". In the Court's opinion, this information transmits "the subjective and inadequate idea about the socially recognized models of family relations commonly accepted in Russian society and contradicts moral values". Here, the Court suggested that there was "objective information" that is based on the values and ideas shared by the majority, whereas the opinions of minorities are "subjective" and, therefore, distort the "objective picture".

This supposed objectivity of prevailing opinions was justified with a reference to:

> "[…] the traditional ideas about humanism formulated in the context of the particularities of the national and confessional composition of Russian society, its sociocultural and historical background, and especially with a view to representations about marriage, family, maternity, paternity, and childhood that are commonly recognized in Russian society and shared by all traditional confessions".[481]

Having established this "objective truth" with direct references to prevailing religious doctrines, the Court concluded that the dissemination of information about sexual relations must not challenge the morality or religious beliefs of the majority—forming an integral part of the Russian legal order—and rejected the claim.

These rulings are demonstrative of the general attitude of the Russian courts to LGBT culture, which, in the end, has no legal protection because it is not part of Russia's traditional values. In turn, these traditional values are frequently defined by Russian courts with reference to prevailing religious ideas and to communitarian morality. On the whole, Russian case law is

480 Appellate Ruling of the St Petersburg City Court 30 May 2016 (No.33a-10894/2016) in case No.2a-1897/2016. This reasoning was so persuasive for Russian judges that it was copied and pasted into a number of other decisions in other Russian regions *e.g.*, Appellate Ruling of the Moscow City Court (4 October 2016) in case No.33a-35552/2016 and Appellate Ruling of the Moscow City Court (20 October 2016) in case No.33a-35769/2016.

481 *Ibid.*

rather homogeneous in this category of cases, and the ordinary (general jurisdiction) courts do not shy away from reproducing not only the rulings and judgments of the Constitutional Court but, also, copying phrases from speeches made by its Chief Justice.

7 Russia and Europe: A Discordant Dialogue

Criticism from human rights organizations and from the ECtHR and other European agencies of Russia for violations of human rights can be viewed, formally, as well founded in a number of situations—particularly, given that both the ECHR and Russia's Constitution grant almost exactly the same scope of rights and freedoms. Russian courts claim to protect some rights while limiting others, seemingly doing so in the same manner as the ECtHR but with a focus on different values.[482] Herein, the difference can be seen between the case law of the ECtHR and that of Russian courts. This difference becomes obvious in the polemic between the RF Constitutional Court and the ECtHR about justification of discrimination.[483] The theme of values inevitably comes to the fore when discussing differences of interpretation, providing one of the most viable sources for reassessing the "civilizational" disputes between European and Russian human rights institutions.

Conceptually, limiting human rights implies balancing individual values (autonomy, self-determination, personal choice, etc.) in favor of collective ones (security, justice, order, etc.). Currently, and in the foreseeable future, this balancing is one of the most important stumbling blocks in relations between Russian and European institutions, as individuality and individual choice are more highly valued in Western cultures than in Russia. Evidently, this difference in value cannot be overcome or at least smoothed over without engaging in a value dialogue, for which neither of the parties is fully prepared.

Some Russian legal scholars, including constitutional judges, have been searching for a solution in the Preamble to the Constitution which solemnly proclaims "respect for [our] ancestors". For example, Professor Valerii Lazarev insists that the Preamble justifies the traditionalist interpretation of human rights in the sense that human rights are respected within the "moral framework" of Russian statehood.[484] An acting RF Constitutional Court Justice, Nikolai Bondar', finds that the Preamble establishes certain

482 On the ECtHR's approach, see Paul Johnson, "Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the European Court of Human Rights", 11(3) *Human Rights Law Review* (2011), 578-593.

483 Andrey Makarychev, "Communication and Dislocations: Normative Disagreements between Russia and the EU", in Reinhard Krumm *et al.* (eds.), *Constructing Identities in Europe* (Nomos, Baden-Baden, 2012), 45-62.

484 Valerii Lazarev, "Konstitutsionnye ogranicheniia konstitutsionnykh tsennostei" [Constitutional Restrictions on Constitutional Values], in V. Golubtsov and O. Kuznetsova (eds.), *20 let rossiiskoi Konstitutsii* (Statut, Moscow, 2014).

implicit moral values of supreme importance that are "necessary regulators of practical life" and, therefore, justify bans on the "promotion of homosexuality." Such values, Bondar' assures us, protect Russian society from "attempts to impose and take to the constitutional level so-called values of sexual freedoms and of the equal rights of gays".[485] Another Constitutional Court Justice, Konstantin Aranovskii, pursues the same line, although more discreetly:

> "No legal protection can be granted to sexual perversions or same-sex marriages in a situation where the moral order of society considers homosexuality to be an oddity or unpleasantly exotic and if that society has not yet fully protected truly fundamental rights."[486]

In the same vein, RF Constitutional Court Chief Justice Zorkin reiterates that positive law is intertwined with the web of social regulation and calls for:

> "A good deal of sound conservatism in understanding the internal connection between law, morality and religious values […] when assessing the requirements for tolerance toward any sexual and gender permissiveness whatsoever."[487]

Other Constitutional Court justices have made similar assertions in their publications,[488] and it is no wonder that such opinions are systematically included in the texts of judicial acts.

Seemingly, the discrepancies between the Russian and European authorities are not so much about rules but, rather, about the values underpinning those rules and the practice of their implementation. The fact that the Russian courts systematically support bans on gay-pride parades can serve here as an illustrative example (several cases filed by Nikolai Alekseev can serve as an example (*Alekseyev v. Russia*, application Nos.4916/07, 25924/08, and 14599/09).[489] On the one hand, the ECtHR reiterates that

485 Bondar', "Bukva i dukh rossiiskoi Konstitutsii", *op.cit.* note 459, 9.

486 Konstantin Aranovskii, "Usloviia soglasovaniia praktiki mezhdunarodnogo i konstitutsionnogo pravosudiia" [Conditions for Reconciling the Practice of International and Constitutional Justice], *Zhurnal konstitutsionnogo pravosudiia* (2013) No.3, 1-10, at 6.

487 Zorkin, "Tsivilizatsiia prava: sovremennyi kontekst", *op.cit*. note 159, at 10.

488 At a 2016 round table y organized by the Institute of Philosophy of the Russian Academy of Sciences, Constitutional Court Justices Gadis Gadzhiev and Nikolai Bondar' stressed the creative role of the Court in shaping a specific conservative Russian attitude toward religious and sexual deviance. See "Pravo i natsional'nye traditsii": Materialy kruglogo stola s uchastiem: A.A. Guseinov, V.S. Stepin, A.V. Smirnov, G.A. Gadzhiev, N.S. Bondar', E.Iu. Solov'ev, V.M. Mezhuev, P.D. Barenboim, V.V. Lapaeva, S.L. Chizhkov" [Law and National Traditions: Materials of a Round Table with the Participation of: A.A. Guseinov, V.S. Stepin, A.V. Smirnov, G.A. Gadzhiev, N.S. Bondar', E.Iu. Solov'ev, V.M. Mezhuev, P.D. Barenboim, V.V. Lapaeva, S.L. Chizhkov], *Voprosy Filosofii* (2016) No.12, available at <http://vphil.ru/index.php?option=com_content&task=view&id=1541&Itemid=52>.

489 *Op.cit*. note 352.

such bans are discriminatory; on the other hand, the RF Constitutional Court stresses that Russian laws do not prohibit gay-pride parades as such and, therefore, that the systematic banning of these parades by the local authorities is due to some extra-statutory principles pursued by ordinary officials within their legitimate administrative discretion. It would be incorrect to explain this use of discretion as an abuse of power since officials (or judges) generally gain nothing (or only very little) from pursuing discriminatory policies toward the LGBT population. Entwined with the broader machinery of social regulation—in relation to which they are both active agents and passive recipients at the same time—judges perform not only their proper legal function (that of the application of laws) but, also, the societal function of maintaining the existing order. This order for many of them is synonymous with the communitarian religious culture.

This role of Russian judges is ambiguous and controversial. Their factual policies violate not only Russian constitutional law but, also, international humanitarian law manifestly based on the principle of non-discrimination.[490] Yet, their policies are congruent with the convictions of the overwhelming majority of the population and of the ruling elites, and one would hardly expect judges to go against this. Unlike the Anglo-Saxon judiciary, judges in civil-law countries take a less activist stance, due to various institutional constraints, and very seldom act as promoters of moral or legal changes. They do have tools, however, to avoid application of legislative innovations and they readily use them via conservative reinterpretations of constitutional principles. What is actually happening with the liberal principles of the Constitution is that they are interpreted in the style of the Soviet attitude toward human rights. Why it does not work the other way around (a liberal reading of conservatively formulated rules) is a question that requires a separate study, combining the political, cultural, and institutional aspects of the issue.

Evidently, the ECtHR is also engaged in a more complicated game than the modest interpretation and application of the ECHR, the text of which is silent on most of the topics discussed before this court. Whether a crucifix can be displayed in a public school or whether medical personnel can wear crucifixes around their necks: these and many other issues require going far beyond the text of the Convention and imply discerning and balancing basic values. If we accept moral pluralism in the sense that there is no universal moral system (be it Western, Christian, "civilized", or some other) but, rather, many moral systems in every society—each of which has its *raison d'être*—then courts engaged in these "penumbra" cases (to use the term of Herbert Hart[491]) are always responsible for their value choice and have

490 Eric Allen Engle, "Gay Rights in Russia? Russia's Ban on Gay Pride Parades and the General Principle of Proportionality in International Law", 6(2) *Journal of Eurasian Law* (2013), 165-186.

491 Herbert L. A. Hart, "Positivism and the Separation of Law and Morals", 71(4) *Harvard Law Review* (1958), 593-629, at 607.

to justify this with reference not to one single system (*e.g.*, that of liberal values implicitly present in the "necessity for a democratic society") but to various systems.[492] In other words, it means that the agency (be it a court or a parliament), assuming responsibility for making a value choice that is valid for different countries, should become a platform for intercultural dialogue and not so much a pulpit for moralizing by activist judges.

In fact, the role the ECtHR is playing in this regard seems to be different from the role of the Russian judiciary; their respective attitudes toward value innovations in society also differ significantly. This problematizes the role of the ECtHR for the Russian legal system and, more generally, for all national legal systems with which this court cooperates. This also creates an arena for discrepancies with national courts because of the different normative frameworks which frame the working of European and national institutions. Along with the potential conflict between international law and domestic laws, conflicts among regulatory backgrounds also occur. The national cultural environment protected and promoted by EU member states is not always in perfect harmony with the "common European (legal) culture" which the ECtHR and other European institutions are trying to forge. With all necessary reservations being made, one can state that the level of tension between the supranational jurisprudence of the ECtHR and the national legal orders of EU countries is directly proportional to the difference between the "common European culture" *in statu nascendi* and national legal cultures. The situation of Russia, Turkey, and other "peripheral" (in the sense of the cultures prevailing in these countries) civilizations can serve as an illustration. It is not unexpected that the greater the distance between such countries and the allegedly "pan-European" cultural core, the more they resist cultural uniformization by claiming that the ECtHR is not competent to articulate the prevalence of any values.

The stance consequently repeated both by the Russian authorities and by the Russian Orthodox Church is that, in the final analysis, nothing justifies the validity of the moral precepts sermonized by the ECtHR or their pretense to universality (at least, within the European area).[493] On the contrary, they maintain that a wider margin of appreciation is reasonably needed provided that there are significant differences among countries and cultures that, therefore, need to maintain their sovereignty. From this perspective, the question is not about the complete uniformity of the interpretation and implementation of human rights but, rather, about the practical

492 Sergei Belov, "Predely universal'nosti konstitutsionalizma: vliianie natsional'nykh tsennostei na praktiku priniatiia reshenii konstitutsionnymi sudami" [The Limits of the Universality of Constitutionalism: The Impact of National Values on the Practice of Decision-Making in Constitutional Courts], *Sravnitel'noe konstitutsionnoe obozreniie* (2014) No.1, 37-56.

493 Lauri Mälksoo, "The Human Rights Concept of the Russian Orthodox Church and Its Patriarch Kirill I: A Critical Appraisal", in Wolfgang Benedek *et al.* (eds.), *European Yearbook on Human Rights* (Neuer Wissenschaftlicher Verlag, Vienna, 2013), 403-416; and Kristina Stoeckl, "The Russian Orthodox Church as Moral Norm Entrepreneur", 44(2) *Religion, State and Society* (2016), 132-151.

reasonableness of the restraints which national legal orders may impose on the exercise of human rights in their countries.[494] This reasonableness can have two dimensions. One of them is universal: setting out to discover some rules valid for any nation or state. The other is relative: searching for contingent rules depending on the circumstances in each country. The debates about LGBT rights between the ECtHR and the Russian authorities can be described in the logic of these two dimensions of reasonableness.[495]

Conclusion

This Chapter has analyzed the cultural constraints which are factually imposed on actors in the Russian legal system by the prevailing social philosophy, characterized by a significant degree of religious conservatism. This conservatism emphasizes collective interests and, predictably, is opposed to sexual minorities and to those who want to defend (or justify) them. Such a cleavage between the formally valid provisions of Russian law on non-discrimination, on the one hand, and the factual cultural constraints that nudge judges to refuse in the protection of sexual minorities, on the other hand, is demonstrative of the general dichotomy between formalist and decisionist elements of Russian law as they were elucidated in the Chapter 1 of the present volume. The specific development of Russian intellectual culture in this regard has been elucidated in Chapter 3 and was, therefore, beyond the scope of this Chapter. In the light of the analysis conducted in the Chapters 1-4, it can be asserted that this development—historically rooted in religious traditions—still shapes the general conservative attitudes of Russians. These attitudes cannot be ignored by judges and other actors in the Russian legal system who, to some extent, are subject to the general perception of what is just, acceptable, and reasonable in society. The example of sexual minorities examined in the present Chapter can illustrate the machinery of interaction between "law in books" and "law in action" in Russian law.

Such a dichotomy between the liberal wording of the laws (up to and including the RF Constitution) and its conservative interpretation has provoked debates not only between Russian and European authorities but, also, among Russian legal scholars. Fundamentally, these debates fall within the province of value discourse based on a pre-established cognitive and axiological choice. This province and its bearing for the mind-sets of Russian judges were examined in Chapter 2 on the example of Chief Justice Zorkin and his conservative philosophy. Rational arguments are employed

494 Chaim Perelman, *The Idea of Justice and the Problem of Argumentation* (Humanities Press, New York, NY, 1963); and Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, Cambridge, MA, 1996, William Rehg intro. & transl.).

495 Mikhail Antonov, "Conservatism in Russia and Sovereignty in Human Rights", 39(1) *Review of Central and East European Law* (2014), 1-40.

too, but they come not at the point of choice but, rather, at the point of the justification of this choice.

This practical reasonableness—underpinning the judicial function in different countries—can become a *tertium comparationis* yielding a criterion for a charitable comparison of various regulative systems in Europe even if finding and formulating such reasonableness would be a much more difficult enterprise than a simple commentary on statutory law or a political assessment of legal systems. Such a thick description can be obtained from a historical perspective, providing the comparative background for drawing parallels in the development of human rights and religious freedoms in Russia and in the West. This perspective involves different religious and philosophical conceptions developed over the course of Russian history, as examined in Chapter 3 above.

One more aspect, concerning the role of religion in transitory societies, can be added here to that examination. In most Western countries, the secularization of the state was a painful and lengthy process connected with the struggle for individual liberties leading to the conviction that tolerance is a prerequisite for the protection of rights. The Russian experience has been somewhat different. The Soviet state was secular from the very beginning, and nothing fundamentally changed with *perestroika* in terms of legal regulation. This historical experience does not allow the unambiguous linking of positive or negative values: secularity is conceptually associated with Bolshevik repressions of the clergy and believers. For this reason, the principle of secularity in public discussions in Russia is often critically reassessed with reference to the anti-religious and atheist campaigns conducted by the Bolsheviks under the flag of secularity. The encroachment on religious freedoms seems to Western observers to be an indisputable and impermissible violation of civil rights; however, this is not the case for many Russians. The case law that indirectly promotes prevailing religious creeds has popular support. The authorities pragmatically endorse this case law and the value choice behind it to buttress their legitimacy. Judges, in their turn, pragmatically choose to follow the general political line and interpret the law conservatively. Judicial argumentation, examined in the present Chapter, provides some clues as to the philosophy that underpins Russian exceptionalism in matters concerning the rights of minorities. A closer look at this philosophy reveals its anti-universalist stances: the proponents of this conservative approach stress that Russia has religious, cultural, and other civilizational particularities which make the legal regulation of human rights in the country irreducible to the universalist humanitarian standards of the West.[496]

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496 On the influence of political, historical, and social forces on the autonomy of the judiciary in Russia in cases involving minorities, see James Richardson, Galina Krylova, and Marat Shterin, "Legal Regulation of Religion in Russia: New Developments", in James Richardson (ed.), *Regulating Religion: Case Studies from Around the Globe* (Kluwer Academic Publishers, New York, NY, 2004), 246ff.

The indeterminacy of the decision-making process cannot be fully eliminated even if the power to decide lies not in the hands of judges but, rather, of political actors. In the latter case, however, many more public debates would be required to justify the margins of appreciation in generic cases. Taking these debates from the secrecy of judges' chambers to the public sphere would lessen the feeling of disproportionality on the part of peripheral countries because of the constant bickering over whether this or that consideration should apply to this or that country. The lack of cogency of judicial discretion in determining values and standards would (and, in reality, already does) also affect their effectiveness, given that "*le gouvernement des juges*" is seen by many political actors as incongruent with the conservatively viewed ideals of democracy. Whether these ideals are "correct" or not is a question to be decided through public debates with the participation of all citizens or, at least, their representatives. From this viewpoint, the struggle for an enhanced equal protection of rights in Russia implies addressing the intricate combination of the underpinning conventions and shared values shaping Russians' attitudes to the limits of individual choice in terms of social morality. The case law on the protection of religious beliefs, examined in the following Chapter, provides a number of examples of such underpinning conventions.

5 Religious Beliefs and the Limits of Their Accommodation in Russia: Some Landmark Cases from the Russian Supreme Court[497]

Foreword

As shown in the preceding Chapter, the Russian Constitution has established liberal principles for the exercise of freedoms by minorities, but Russian statutory law does not provide explicit rules on how to implement these principles or define the limits thereof. This puts Russian courts in an ambiguous situation in which they have to defend minorities pursuant to constitutional law but, in practice, are precluded in effect from granting accommodations to these minorities. If they were to do so, the courts could be viewed as snatching the legislative function from parliament or encroaching on the sovereign prerogative of the political leadership.

Meanwhile, Russia's legislative authorities and the political leadership are reluctant to legitimize such accommodations for minorities. For the courts, it means that they are empowered to considering the issue of equal protection rather on the level of a general principle, concretizing it in terms of case law and providing such protection only insofar as it is either expressly mandated by the statutory law or indirectly requested by the political leadership in official narratives or political programs. This introduces an important cleavage point between the formalist and the decisionist dimensions of Russian law: judges formally remain bound by the equal-protection and non-discrimination principles of the constitutional law but, at that same time, factually may make exceptions from these principles either by granting additional protection to the favored-religious denominations or striping the so-called "non-traditional" religious denominations of the protection which, otherwise, is formally granted to these denominations by constitutional law.

In this situation, Russian courts of general jurisdiction decide, in specific cases, on the factual limits of protection and thereby indirectly accept the idea of accommodation, which is not elaborated in statutory law. The courts are generally indisposed to recognize that their decisions develop statutory law and, therefore, tend to hide their approaches and criteria behind formalistic language. This Chapter examines some criteria and approaches which the Russian Supreme Court has formulated in some landmark cases concerning religious freedoms. The present Chapter underscores

497 The first version of this Chapter was published in 11(1) *Religion and Society in Central and Eastern Europe* (2018), 3-19. The present Chapter is an updated version of that work.

the relevance of such an analysis for comparative research projects aimed at understanding (dis)similarities of legal accommodations on religious grounds in different countries and their reasoning.

Based on the general theoretical background of Russian law as described in Chapters 1-3 and grounded in the analysis set forth in Chapter 4, the present Chapter studies a number of cases considered by the RF Supreme Court in which the same legal norms are accorded different interpretations depending on whether participants belong to a religious minority or the majority.

Introduction

Courts of law and law-enforcement agencies in various countries use different criteria when determining the extent to which a right or freedom can be restricted or extended. These criteria are of immense importance in the field of religious freedoms where, under some circumstances, a person may be released from a legal obligation because of her religious beliefs. In many countries, courts can also restrict a person's religious rights in order to avoid a possible negative impact on others or on society as a whole where a person asserts her religious rights allegedly to the detriment of the public interest. Such cases are heard regularly by supreme and constitutional courts in many Western countries and provoke vivid polemics in societies about what can justify such restrictions and whether they are justifiable at all.

National and supranational courts are not always consistent in imposing limitations on religious liberties and in allowing religious accommodations. Along with formal statutory provisions and abstract principles, courts normally take into consideration expediency and the acceptability of certain religious practices for entire societies, their reception in public opinion, and other criteria which, often, are quite subjective and circumstantial.[498] Religious freedoms cannot be put into a set of rigid normative statements in advance and, in this sense, fully formalized in statutory law. By this logic, religious freedoms precede—and, to some extent, may supersede—the official law in this field regardless of whether or not they are posited in the law. Historically, religious freedoms—in the Western legal tradition—asserted their primacy over the posited state norms; in the end, gaining the upper hand and, thereby, giving way to the idea of human rights. In other words, these rights are *prima facie* rights against the state and its laws that can sometimes become excessively restrictive. Therefore, the very nature

498 As one author suggests, this is exactly the case of the ECtHR, which adopts two different strategies for locally grown and imported religious rituals and practices. See Nehal Bhuta, "Two Concepts of Religious Freedom in the European Court of Human Rights", 113(1) *South Atlantic Quarterly* (2014), 9-35.

of these rights resists any formalization. Yet, at the same time, these rights need to have reasonable limits in order to make their exercise sensible in pluralist societies.

That is why an analysis of formal legal enactments hardly can fully describe the factual limits and constraints on religious freedoms existing in a society. These rights—albeit normatively limitless (or limited by too general formulations)—are always constrained by public opinion which might also affect case law and administrative practices. At the same time, a purely political analysis of purported influences and power structures does not provide sufficient clues to a proper understanding of the machinery of law which, in every society, builds up its own semi-autonomous mechanisms of regulation (autonomy of procedures, language, legal community, legal technique, etc.) although the degree of this autonomy, naturally, can vary in different countries. This suggests looking at the language in which courts describe their attitudes toward certain fields of regulation. In the present case, toward religious freedoms and consider what is behind this language. Such is the central task of this Chapter which considers the approaches of the RF Supreme Court concerning religious freedoms: the real limits of their protection and restriction as they are formulated in several mainstream cases.

A caveat should be added about our attitude to what is described herein. This Chapter is focused on analyzing Russian law (constitutional, statutory, and case law) and the social context of its application. Readers will not find herein our value judgments on the cases decided by Russian courts or a political critique of these cases. This is a deliberate choice to keep ourselves as far as possible on the *is* side of the philosophical *is-ought* divide, and to keep this Chapter at a manageable arm's length. Our intention here is not to praise nor to condemn any norms or practices involved in their application but, rather, to examine how the RF Supreme Court reasons in its decisions on religious freedoms, and how this reasoning can be representative of collective mindsets and attitudes. This analysis can help identify what William Ewald called "law in the minds";[499] doing so here with the RF Supreme Court in matters of religious freedoms. Potentially, it may be useful for subsequent political analyses, for a comparative-law examination of (dis)similarities in regulation of religious freedoms in Russia and other countries, and perhaps for normative judgments by policymakers or by those who aspire to become such.

499 Ewald, "Comparative Jurisprudence I", *op.cit.* note 54, 1889-2149; and *id.*, "Comparative Jurisprudence (II)", 489-510.

1 Constitutional Ambiguity

The Russian Constitution has established quite liberal, Western-style religious freedoms: "freedom of conscience, freedom of religion, including the right to profess individually or together with others any religion or to profess no religion at all, to freely choose, possess and disseminate religious and other views and act according to them" (Art.28). The Constitution also confirms that Russia is "a secular state where no religion may be established as a state or obligatory [religion]" (Art.14). The basic law governing religious freedoms, the 1997 Federal Law on Freedom of Conscience and on Religious Denominations,[500] was expected to develop mechanisms for implementing these liberal freedoms but it remains mostly declarative. In particular, the 1997 law does not specify the conditions under which a person may declare their conscientious objections and be released from certain legal obligations because of their faith, or what the criteria are for courts to decide thereupon. Article 2 of the 1997 Law provides that "nothing in this law can be interpreted in a manner that infringes or encroaches on the human rights guaranteed by the Constitution or by international treaties". Following this principle to the letter, the law did not add anything about conditions for, or limits of, the exercise of these constitutional and international-law principles—apparently considering these principles to be self-evident.

There could have been at least two rationales for such a declarative approach in the 1997 law. On the one hand, in the absence of statutory limits to these freedoms, a strictly formalist interpretation could easily result in the conclusion that religious freedoms have no limits except those mentioned in Article 55(3) of the Russian Constitution.[501] On the other hand, the Constitution establishes that it has direct effect (Art.15(1)) and that international law is an integral part of Russian law with primacy over domestic statutory law (Art.15(4)). In both these views, constitutional and international principles can be applied even if there are no statutory norms about implementation of these principles. These rationales were likely among the ideas that inspired

500 Federal'nyi zakon [Federal Law] (26 September 1997) No.125-FZ "O svobode sovesti i o religioznykh ob"edineniiakh" [On the Freedom of Conscience and Religious Associations], *Rossiiskaia gazeta* (29 September 1997) No.4465. For a commentary on the law, see Lauren B. Homer and W. Cole Durham, Jr., "Russia's 1997 Law on Freedom of Conscience and Religious Associations: An Analytical Appraisal", 12(1) *Emory International Law Review* (1998), 101-246.

501 Art.55 of the Russian Constitution warns that "in the Russian Federation no laws shall be adopted cancelling or derogating human rights and freedoms" (para.2). On the other hand, the next paragraph states that "the rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defense of the country and security of the state" (para.3).

the authors of the 1997 law. Under the conditions that exist in Russia, however, this approach—taken to the letter—has turned out to be destructive for religious freedoms.

As a matter of fact, the constitutional provision in Article 55(3) contains an empty formula which can be filled in with any restrictions whatsoever including those stemming from narratives about "traditional values"—currently popular and widely evoked by Russia's political leadership and the judiciary.[502] The problem of involving traditional values in discussions about human rights is not specifically Russian,[503] but, as shown in the previous Chapters, Russia takes exorbitant measures to protect its "constitutional identity" by banning "non-traditional" religious beliefs.[504] In the same vein, Russia continues to insulate itself from international law, utilizing the sovereignty argument examined in Chapter 3. The 2015 Ruling of the RF Constitutional Court and the ensuing statutory amendments have confirmed that, despite the plain meaning of Article 15(4) of the RF Constitution, international law has no primacy over domestic law when the Constitutional Court decides that the implementation of certain interpretations of international law poses a threat to Russia's sovereignty.[505]

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502 In recent years, especially after the beginning of the Ukraine crisis, the Russian authorities have frequently referred to traditional values to justify their exceptionalist attitudes toward the West. The term "traditional values" constantly appears in official narratives in Russia. Thus, it is no wonder that the ordinary courts grant protection to these values even if they are not formally included in the statutory law regulating matters of religious accommodations. In a certain sense, Russia pretends to be a leader in terms of defending traditional values in Europe. See, for example, Melissa Hooper, "Russia's Traditional Values' Leadership", Foreign Policy Centre (1 June 2016), available at <http://www.humanrightsfirst.org/sites/default/files/Melisssa%20Report.pdf>. Such traditionalist discourses also prevail at the RF Constitutional Court.

503 See, for example, Jacob W.F. Sundberg, "Human Rights and Traditional Values", in Peter Wahlgren (ed.), *Human Rights: Their Limitations and Proliferation* (Stockholm Institute for Scandinavian Law, Stockholm, 2010), 125-154.

504 See Alicija Curanović and Lucian N. Leustean, "The Guardians of Traditional Values: Russia and the Russian Orthodox Church in the Quest for Status", *Transatlantic Academy Paper Series* (2015) No.1, available at <http://www.transatlanticacademy.org/sites/default/files/publications/Curanovic_GuardiansTraditionalValues_Feb15_web.pdf>.

505 Thus, in a mid-2015 ruling (14 July 2015) No.21-P, *op.cit.* note 16, the Constitutional Court ruled that decisions of the ECtHR are not self-executing, as we have noted above at the text at note 471. There the Court stressed, in particular, that national constitutional courts must limit the negative impact of ECtHR judgments on domestic laws and ensure that the principle of subsidiarity is duly observed by the ECtHR. As a logical development of this trend, in December 2016 a new constitutional law was adopted (28 December 2016) No.11-Federal'nyi konstitutsionnyi zakon [Federal Constitutional Law] "O vnesenii izmenenii v FKZ "O Konstitutsionnom Sude Rossii" [On Introducing Amendments to the Federal Constitutional Law "On the Constitutional Court of Russia"], conferring the power on the Constitutional Court to refuse to enforce those decisions of the ECtHR deemed to be contrary to the Russian Constitution.

The Russian legal system turned out to be resilient to the idea of the direct effect of the Constitution. This idea first was rejected by the RF Constitutional Court and then by other courts despite the clear wording of the Constitution itself. The long-lasting struggle between the RF Constitutional Court and the RF Supreme Court about the direct applicability of the Constitution is illustrative in this sense. Prior to 16 April 2013, the RF Supreme Court had instructed its lower-level (general jurisdiction) courts to apply the Constitution directly when the courts found that a federal law (or a presidential edict) contradicted the Constitution and to refrain from applying such legislation or edicts.[506] In a 1998 Ruling, the RF Constitutional Court had condemned this practice, reasoning that no court can abstain from applying legislation unless such legislation has been deemed unconstitutional by the RF Constitutional Court.[507] In other words, the RF Constitutional Court's point was that ordinary judges may not consider whether a particular legislative provision is constitutional or not, and to refuse to apply such a provision in a specific court case on the grounds of the presumed unconstitutionality of this provision. This point was not supported by the RF Supreme Court which preferred the literal reading of Article 15 of the RF Constitution that endorses its direct effect. This discrepancy between these two jurisdictions lasted fifteen years until the RF Supreme Court abandoned its position and removed the controversial points from its 1995 ruling.[508]

This position of the RF Constitutional Court implies that neither international nor constitutional law can serve as suprastatutory criteria to ordinary (not constitutional) judges for deciding about restricting religious freedoms under Article 55 of the Constitution or for granting accommodations on religious grounds. As could have been expected, in this situation, courts have turned to traditionalist narratives to link national security and public morality with prevailing religious, moral, and other popular attitudes which, mostly, is based on conservative precepts of Orthodox Christianity and Islam and which are hostile to religious sects and new ("non-traditional") religious denominations.[509]

506 Para.2(b), (v), and (g), [Ruling of the Plenum of the RF Supreme Court] (31 October 1995) No.8, *op.cit.* note 342.

507 Ruling of the RF Constitutional Court (16 June 1998) No.19-P, *op.cit.* note 342.

508 Ruling of the Plenum of the RF Supreme Court, *op.cit.* note 342. More details on this discrepancy will be provided in Section 3 below.

509 For example, 80% of Russians support a ban on Jehovah's Witnesses in Russia although most respondents of a 2017 Levada poll have no idea about the religious teachings of Jehovah's Witnesses, available at <https://www.levada.ru/2017/07/13/svideteliegovy/>. Almost the same percentage of Russians (79%) supports a proposal to take children away from members of sects who teach their children about non-traditional religious beliefs, available at <https://wciom.ru/index.php?id=236&uid=116573>.

A controversial 2017 case—involving the banning of Jehovah's Witnesses as an extremist organization by the RF Supreme Court[510]—can be demonstrative of the dependence of the courts on this traditionalist narrative.[511] The basic argument for banning the Jehovah's Witnesses was their "extremism", understood as their claim of being the holders of a supreme religious truth. Such claims are theoretically applicable to almost any religious denomination, and this case suggests that the RF Supreme Court may face an uneasy dilemma in the future: either to reconsider its approach in the *Jehovah's Witnesses* case or enforce it in relation to other religious organizations that, for one reason or another, are not considered to be one of the traditional religions mentioned in the Preamble to the 1997 law. Some Buddhist, Christian, Hindu, and Muslim books also already have suffered from evidently disproportionate and inadequate judicial interference, but political or diplomatic pressure from within (or outside) Russia helped to set aside such decisions and calm the situation. The *Jehovah's Witnesses* case may be a harbinger of another, more restrictive approach.

In this Chapter, we do not endeavor to undertake a historical or cultural investigation into the particularities of the Russian (Orthodox) attitude to rights, and we will limit our analysis to the jurisprudence of the RF Supreme Court preceding its findings in the *Jehovah's Witnesses* case. This jurisprudence is very similar to the ideology of the Russian Orthodox Church as expressed in such documents as its 2000 *Social Doctrine*[512] or 2008 *Basic Teaching on Human Dignity, Freedom and Rights*.[513] This should come as no surprise since the Russian Orthodox Church exerts an important moral

510 The ruling banning Jehovah's Witnesses in Russia was rendered by the RF Supreme Court on 20 April 2017 in case No.AKPI 17-238. The full text in Russian is available at <http://www.jw-org.info/2017/05/tekst-reshenija-verhovnogo-suda-o-likvidacii-Svidetelej-Iegovy.html>. It was upheld by the Appellate Collegium of the RF Supreme Court on 17 July 2017, available at <http://vsrf.ru/stor_pdf.php?id=1564706>. On 16 August 2017, the RF Ministry of Justice entered Jehovah's Witnesses on its list of extremist organizations.

511 Surely, it is not an easy task to formulate what this public morality really is, and we do not intend to attempt to do so here. Nonetheless, one can find remarkable coherence in statements by state authorities and other sociopolitical institutions such as the Russian Orthodox Church or political parties on what this morality is and what it should be. For example, the "opposition" parties in the Russian parliament (the Communists, the Liberal Democrats led by Vladimir Zhirinovsky and Just Russia headed by Sergey Mironov) are even more hostile to religious and other minorities than the governmental party, United Russia.

512 "Osnovy sotsial'noi kontseptsii Russkoi Pravoslavnoi Tserkvi" [The Foundations of the Social Conceptions of the Russian Orthodox Church] (19 July 2000), available at <https://mospat.ru/ru/documents/social-concepts/>.

513 "Osnovy ucheniia Russkoi Pravoslavnoi Tserkvi o dostoinstve, svobode i pravakh cheloveka" [The Basic Teachings on Human Dignity, Freedom and Rights of the Russian Orthodox Church] (26 June 2008), available at <https://mospat.ru/ru/documents/dignity-freedom-rights/>.

influence on society and on the political authorities,[514] and, profiting from this influence, it can fight those denominations whose teachings are hostile to its dogma and its institutional interests. Some researchers even claim that the mechanisms used to balance religious rights with other rights and privileges in Russia has some specific traits which contribute to state policies for the formation of new national identities.[515] Using the leeway provided by the gap between formalism and decisionism in Russian law, as examined in Chapter 1 above, Russian courts can indirectly utilize the creeds of the ROC in their decision-making to meet both political expectations and to satisfy public opinion.

2 Methodology

Building on the methodological considerations exposed in Chapter 1, we will depart from the hypothesis that there is a correlation between the legal formalism prevailing in Russian law and the restrained decisionism elaborated by the RF Supreme Court in the field of religious freedoms. This connection will be demonstrated below, in Section 3 based on the example of some mainstream cases heard in the RF Supreme Court.

This old-fashioned legal positivism—based on the presumption that laws contain responses to all possible legally relevant issues, so that the task of judges is to reveal these responses through careful interpretation of the laws and the legislator's will which is enshrined in these laws—might explain why Russian law does not explicitly recognize the doctrine of "religious accommodation". Formally, all rights and obligations are posited only in laws, so that judges may remain "mouths that pronounce the words of the laws" (according to Charles Montesquieu[516]) and have no discretion whatsoever. If a judge were to attempt to introduce an exemption to a legal

514 Kristina Stoeckl, "The Russian Orthodox Church as Moral Norm Entrepreneur", 44(2) *Religion, State and Society* (2016), 132-151.

515 Alexander Agadjanian, "Tradition, Morality and Community: Elaborating Orthodox Identity in Putin's Russia", 45(1) *Religion, State and Society* (2017), 39-60. See also, for example, Nikolas Gvozdev, "Religious Freedoms: Russian Constitutional Principles – Historical and Contemporary", *Brigham Young University Law Review* (2001), 511-536; Lev Simkin, "Church and State in Russia", in Silvio Ferrari and W. Cole Durham Jr. (eds.), *Law and Religion in Post-Communist Europe* (Peeters, Louvain, 2003), 261-280; John Garrard and Carol Garrard, *Russian Orthodoxy Resurgent: Faith and Power in the New Russia* (Princeton University Press, Princeton, NJ, 2008); Christopher Marsh, *Religion and State in Russia and China: Suppression, Survival, and Revival* (The Continuum International, New York, NY, 2011); Geraldine Fagan, *Believing in Russia: Religious Policy After Communism* (Routledge, New York, NY, 2012); and Roman Lunkin, "The Status of and Challenges to Religious Freedoms in Russia", in Allen D. Hertzke (ed.), *Future of Religious Freedoms: Global Challenges* (Oxford University Press, Oxford, 2013), 157-180.

516 Charles Louis de Montesquieu, *The Spirit of the Laws* (Cambridge University Press, Cambridge, 1989, Thomas Nugent transl.), Book 1, Ch. 3.

rule (*e.g.*, bakers must sell their cakes to everyone except when selling cakes to certain people whose behavior contradicts their beliefs), in Russian legal theory this could be taken as an expression of judicial activism and be condemned as a judge's expropriation of the legislative function. It is curious that the term "judicial discretion" in Russian legalese still has a pejorative meaning and is equated with arbitrariness.[517] Moreover, this formalism negates the idea of accommodation by referring to the secular character of the state and the constitutional principle of equality before the law (Art.19, RF Constitution) which is interpreted in such a way that it rules out any preferences based on an individual's religious status.

In spite of not being recognized in the prevailing doctrine, the idea of accommodation makes its way through Russian case law and jurisprudence: the courts show a clear proclivity to grant such accommodations to traditional religious denominations and, especially, to the Russian Orthodox Church and to state-recognized Muslim spiritual congregations (*dukhovnye upravleniia musul'man*). Analyzing key precepts of the prevailing formalist theory can bring to light the conceptual reasons behind the discrepancy between the constitutional principles on religious freedoms and the practice of their implementation or, more correctly, their non-implementation. In Russian law, the rule-based reasoning prevails, while principles generally work only if supported by relevant statutory provisions paving the way to the implementation of these principles in law-enforcement practice.[518]

The prevalent legal theory in Russia follows the first form of positivism that arose in the 19th century in the spirit of John Austin and Jeremy Bentham who saw the law solely as a set of commands from the sovereign.[519] Within this positivist paradigm, only subsumption (legal syllogism) can be accepted as the legitimate means of establishing and applying the law in concrete cases. In light of this theory, such procedures as balancing or proportionality tests are viewed rather as theoretical attempts to justify judicial discretion or arbitrariness or even latently to introduce "alien Western values" under the guise of liberal moral discourse.[520] As shown in Chapter 1, formalism is combined with decisionism, which does not require addressing legal principles and suggests revealing the true political will which is behind legal texts.

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517 Alexei Trochev, "Legitimacy, Accountability and Discretion of the Russian Courts", in Martin Brusis *et al.* (eds.), *Politics and Legitimacy in Post-Soviet Eurasia* (Palgrave Macmillan, Hampshire, 2016), 121-147.

518 From this point of view, Russia is similar to other post-Soviet countries. See, for example, Kühn, *op.cit.* note 122.

519 See Butler (ed.), *op.cit.* note 9.

520 See, for example, Mikhail Antonov, "Philosophy Behind Human Rights: Valerii Zorkin vs. the West?", in Mälksoo and Benedek, *op.cit.* note 70, 150-187.

Given the hierarchy of legal rules set out in Article 15 of the RF Constitution—the Constitution itself, international law, constitutional and ordinary statutes, bylaws—judges have no authority to introduce or apply principles except those expressly stipulated in laws, treaties, and other posited sources of the law, and, furthermore, they are prohibited from refusing to apply any laws because of their presumed opposition to such principles. This approach is dubbed "legality" (formerly, "socialist legality") and, in procedural codes, requires that judges be bound only by the law (*e.g.*, Art.195, RF Civil Procedure Code; Art.7, RF Criminal Procedure Code). This attitude was expressed, in particular, in the above-cited disagreement between the RF Constitutional Court and the RF Supreme Court about the direct effect of the Constitution, and it seems to be a result of the formalist interpretation of *Rechtsstaat* (law-bound state, *pravovoe gosudarstvo* in Art.1, RF Constitution) where the law is independent of other social regulatory mechanisms and where it prevails over them.[521]

Nonetheless, the reality in Russia and elsewhere is that legal norms cannot provide solutions for all possible cases. Therefore, judges inevitably have to go beyond posited norms to render reasonable decisions in the multitude of cases where the law might remain silent or ambiguous. Sometimes, judges also have to discard some posited norms if their application, under the given circumstances, would result in unjust or unreasonable decisions. This is especially true about such difficult cases as those connected with religious freedoms.

For its part, the RF Constitutional Court has continuously demonstrated its preference to formally abide by the principle of secularity and to abstain from coining any clear-cut principles or approaches in matters of religious freedoms. Until now, the most important case involving the intervention of the RF Constitutional Court in religious matters concerned a question that was rather formal: a 1999 ruling on the re-registration of religious denominations.[522] This ruling did not contain any substantial argumentation about legal principles or policies in the religious domain applying, instead,

521 Frances Nethercott, *Russian Legal Culture Before and After Communism: Criminal Justice, Politics and the Public Sphere* (Routledge, London, 2007).

522 In this case, the RF Constitutional Court (23 November 1999, No.16-P) rejected the claim about the unconstitutionality of the requirement that religious organizations must be periodically re-registered but ruled that those organizations that were incorporated in Russia prior to the adoption of the 1997 Law on Freedom of Conscience have no obligation to re-register. In another "positive" ruling (17 February 2015, No.2-P), the RF Constitutional Court legitimized the power of the Prosecutor-General's Office to monitor the observance of legislation by religious denominations and to obtain any information from these denominations that—directly or indirectly—may prove that they are violating the laws.

general principles of law. The abstention of the RF Constitutional Court[523] from interfering in religious matters led, as expected, to a lack of legal certainty (predictability) in these matters.

In this penumbra and lacunae situation, the ordinary courts (courts of general jurisdiction), headed by the RF Supreme Court, have developed jurisprudence that somehow fills this gap.[524] Below, we will analyze several rulings from the case law of the RF Supreme Court that might illustrate the main arguments which have been repeatedly applied in the Court's reasoning about religious freedoms. Our analysis of the practice of the RF Supreme Court will be limited to the aims of this Chapter: we will consider only cases published in the official journal of the Court, the *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* (The Bulletin of the Supreme Court of Russia; hereinafter, "*The Bulletin*").[525] If case reports are published in the Bulletin, they have a much larger audience compared to unpublished decisions,[526] and consequently exert more influence on the practice of lower courts and on the entire legal system. Moreover, the RF Supreme Court uses *The Bulletin* to promulgate decrees of its Plenum and rulings of its Presidium that have

523 Nonetheless, there are some cases in which the RF Constitutional Court adjudicated matters concerning religious freedoms. If not to cite negative statements (*opredeleniia*) on the inadmissibility, the most important rulings (*postanovleniia*) are (besides the 1999 ruling cited above and rulings that were delivered prior to the enactment of the 1997 Federal Law on Freedom of Conscience): (1) a ban on the creation of religious political parties was held to be constitutional (Ruling of 15 December 2004, No.18-P); (2) the dismissal of a claim about the inapplicability of the rules on the liquidation of legal entities for liquidation of religious organizations (Ruling of 6 December 2011, No.26-P); and (3) denial of a claim about the unconstitutionality of the requirement that religious denominations must ask in advance for permission to conduct mass religious meetings (Ruling of 5 December 2012, No.30-P). See Mikhail Antonov, "Balancing Religious Freedoms: Some Examples from the Practice of the RF Constitutional Court", in Piotr Szymaniec (ed.), *The Principle of Proportionality and the Protection of Fundamental Rights in the European States* (Wydawnictwo Państwowej Wyższej Szkoły Zawodowej im. Angelusa Silesiusa, Wroclaw, 2017), 259-268.

524 When courts do provide *de facto* accommodations, their choice hinges rather on varying political expediency and on the general logic of constraints shaping the interrelation between the courts and other branches of state power. There are other mechanisms and organizations mitigating the relations between the state and religious denominations in Russia, the most important organ being the Presidential Council for Interrelations with Religious Denominations. The logic of their activities is rather political and goes beyond the scope of this Chapter.

525 *The Bulletin* is published monthly, available <http://www.supcourt.ru/documents/newsletters/>.

526 These unpublished decisions, nonetheless, are available on the official site of the RF Supreme Court: <http://www.supcourt.ru/indexA.php>. Decisions and acts adopted by courts of law in Russia are available on the government's *Pravosudie* website: <http://www.sudrf.ru>. It should be kept in mind, however, that the research engines on these sites are not easy to use and, by far, not all court acts are registered in these systems. It is also possible to use private-sector legal databases such as KonsultantPlus (<www.consultant.ru>) or Garant (<www.garant.ru>). These represent the Russian equivalents to databases such as Lexis-Nexis or Westlaw allowing the user to gain more convenient access to court practice. Full access to these private databases requires a paid subscription.

a normative character and are binding for lower courts and also, indirectly, for the entire Russian legal order. This normative character implies that if a decision of a lower court diverges from the position formulated in the decrees or rulings of the RF Supreme Court, it can be overturned on these grounds (point 3 of Art. 391(3) and point 5 of Art.392(4), RF Civil Procedure Code; point 3 of Art.341 and point 5 Art.350(1), RF Administrative Procedure Code). For our purposes, we have chosen to focus on some landmark cases and on normative decrees in order to give readers an idea about the case law of the RF Supreme Court prior to the 2017 *Jehovah's Witnesses* case cited above.[527]

This analysis clearly does not exhaust all the "law in action" on this matter in Russia, and here we will not devote any attention to the mass of court decisions that were pronounced by ordinary courts of law since their analysis would require much more extensive research.[528] We will also skip cases that were considered and decided by the RF Supreme Court but were included in the case reports published in *The Bulletin*.[529] It should also be mentioned that "electronic justice" in Russia is not as reliable a tool as one might wish it to be, especially in the courts of general jurisdiction. Even if the courts carry out a large amount of their workload nowadays in electronic form and numerous decisions are available through electronic resources, there still remains a trove of cases that are not entered into any databases because of concerns about national security, confidentiality, or simply due to irresponsibility on the part of court clerks and because of a lack of proper supervision over them. To our knowledge, no scholarly research has been conducted in Russia to establish the degree of reliability of legal databases in this regard.

In the following pages, we will provide a brief overview of the Court's argumentation retrieved from the case reports of the RF Supreme Court, mentioning the *ratio decidendi* of the relevant cases and describing the Court's reasoning in the general recommendations it provides to lower courts. As we have noted above, the highest instance of this Court (its Plenum) is entitled to issue binding decrees about how to interpret and apply the applicable laws. The commentaries made by the Plenum (decrees) are not necessarily connected with the particularities of concrete cases and

527 *Op.cit.* note 510.

528 To give readers an idea about the number of cases in this field, we accessed the *Rospravosudie* database (<https://rospravosudie.com>) using three combinations of keywords within a time frame from 1 June 2017 to 1 June 2018. The combination of keywords "freedom of belief' (*svoboda veroispovedaniia*) within this period of time yielded 594 results; the combination "freedom of consciousness (*svoboda sovesti*) yielded 1,394, and that of "religious freedoms" (*religioznye svobody*) yielded 14,932. The cases (court decisions, statements, and other acts) retrieved in the first two searches were mostly reproduced in the third search as well since it is the most comprehensive of the three.

529 A search for the keywords "religious freedoms" in the private database KonsultantPlus provided 379 results for cases considered by the RF Supreme Court in the timespan between 2002 and 2018.

are of a general nature. In Russian legalese, both general commentaries about court practice provided by the Court's Plenum and decisions made by the RF Supreme Court (by its Cassation Collegium or its Supervisory Collegium-Presidium) in individual cases are called *postanovleniia*. In order to avoid confusion, we will use two different terms in English: "decree" and "ruling" for these types of Court acts (general and individual ones). The RF Supreme Court sometimes considers cases as the first instance, and then its acts are made in the form of decisions (*resheniia*).

Not all of the retrieved cases are important for understanding the Court's approach in the mentioned category of cases. In some cases, "religious freedoms" are only occasionally mentioned in case reports and do not provide any specific recommendations or comments on this matter. We will omit these irrelevant results and focus on those that can contribute to elucidating the Court's principles and policies in "religious" cases. The comments given by the RF Supreme Court on judgments of the ECtHR in matters of religious freedoms are not provided here. Otherwise, we would have to substantially widen the subject matter of our research and to provide a comparative analysis of these comments and of the arguments of the ECtHR.[530] We will also skip rulings and decrees where only procedural aspects (which court fee is to be paid or which district court a claim should be addressed to, and so on), or aspects that are not relevant for this Chapter (extradition cases, real-estate disputes, custody discrepancies between parents, etc.) are examined. We only will discuss cases that concern principal issues involving the protection of religious beliefs.

The retrieved results will be organized chronologically. We warn readers that, as rule, certain details (like the names of the claimants or defendants, dates, addresses, names of judges, etc.) are not provided. The data-protection policy of the RF Supreme Court is such that anonymity is meant to protect the parties to court disputes and judges against illegal influence. This practice is different from the practice of the state commercial (*arbitrazh*) courts which publish their decisions online without hiding any of these details.

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530 Pursuant to Art.15(4), Russian Constitution, norms and universally recognized principles of international law constitute an integral part of Russian law and have primacy over domestic legislation in case of a collision of norms. As shown in the preceding Chapters of this volume, Russian scholars and judges have a different opinion as to the normative value of the jurisprudence of supranational courts (such as the ECtHR). But there is a consensus that such jurisprudence should be at least respected. As a result, the RF Supreme Court sometimes also publishes, in its Bulletin, judgments of the ECtHR and of other jurisdictional bodies (such as the United Nations Human Rights Commission) and courts cite (although rarely) this jurisprudence. See Anton Burkov, "Impact of the Convention for the Protection of Human Rights and Fundamental Freedoms on the Russian Legal System", *The EU-Russia Center Review* (May 2010) No.14, 30-35, available at <http://www.eu-russiacentre.org/wp-content/uploads/2008/10/EURC_Review_XIV_english.pdf>.

3 The Russian Supreme Court on Religious Freedoms: A Selective Analysis

We begin our analysis with an interesting dilemma, already mentioned above, which arose before Russian courts in the mid-1990s and concerned the question of young men avoiding obligatory military service by claiming that it contradicted their religious beliefs. Making such claims meant potentially facing criminal prosecution for draft evasion, and the RF Supreme Court needed to decide either to uphold this prosecution in accordance with statutory law or to absolve young men of criminal charges on the basis of their constitutional right to alternative civilian service. This dilemma even led to a confrontation between the two major Russian courts—the RF Supreme Court and the RF Constitutional Court—about whether conscientious objection could serve as the legal basis for releasing individuals from compulsory military service.

This situation was made even more complicated by the fact that before 2002 (when the law on alternative civilian service was adopted), there were no laws or regulations explaining what this alternative service could be, how (and under which conditions) it was to be carried out despite the fact that Article 59 of the RF Constitution already, in 1993, had introduced the right to alternative non-military (civilian) service for those not wishing to enroll in military service based on their conscientious objections. In order to justify not applying the applicable laws about criminal and administrative liability for those who avoided military service, the courts either had to introduce rules on alternative service themselves and, thus, take the place of legislators or to clear young believers of criminal charges on the basis of the direct effect of Article 59 of the Constitution. The RF Supreme Court chose the latter option and asserted that the courts should apply the Constitution even in the absence of laws and regulations (the issue of direct applicability of the Constitution has been reiterated by the RF Supreme Court on many occasions both before and after) and, therefore, that the courts should reject the presumably unconstitutional charges and acquit the conscientious objectors.

This approach has been embodied in a series of rulings by the RF Supreme Court. For example, in the *Overview of Court Practice* for the first (*The Bulletin* 1996: 10)[531] and second quarters of 1996 (*The Bulletin* 1997: 3), the Court indicated that in the absence of laws on alternative non-military service, the courts should apply Article 59 of the Constitution and, consequently, should not apply the Criminal Code or the 1993 Federal Law on Military Service imposing criminal liability on conscientious objectors. This position was confirmed in Decree of the RF Supreme Court No.8 (31 October 1995) on Certain Questions of the Application of the RF Constitu-

531 The first number is this (and later citations) refers to the year of publication; the second number after the colon to the issue in that year of *The Bulletin*.

tion in the Administration of Justice by the Courts (*The Bulletin* 1996: 1), where the RF Supreme Court instructed the lower-level courts to apply the RF Constitution when these courts determine that a federal law contradicts the Constitution and to refrain from applying such legislation (points b, v, and g of para.2, Decree No.8).

As already mentioned, the RF Constitutional Court disagreed with this position and, in 1998, implicitly condemned it as an encroachment on its exclusive competencies. It held that no court in Russia can abstain from applying federal legislation on the grounds of purported unconstitutionality unless such legislation has been deemed unconstitutional by the RF Constitutional Court itself. This implied that the RF Supreme Court and its subordinate courts cannot deviate from the application of federal laws even if these courts find that these laws contradict the Constitution. In such a case, the RF Constitutional Court preferred the courts to suspend proceedings and submit a query to the RF Constitutional Court. This approach underscores that constitutional principles in Russia do not function properly without mechanisms for their implementation established by statutory law.

The aforementioned Supreme Court Decree No.8 also touched on a number of other principal issues and, in particular, on balancing the freedom of religious activities with other human rights and freedoms. The courts were instructed to pay attention to a possible collision between values protected by the Constitution and to assume responsibility for choosing between them. However, this responsibility of the courts was about resolving possible value conflicts in light of the decrees and rulings of the RF Supreme Court.

As a starting point for analysis, the RF Supreme Court took the expression of religious beliefs: Article 28 guarantees the right to propagate and disseminate religious beliefs, but Article 13 of the Constitution prohibits the establishment of organizations fomenting religious strife. This latter prohibition, in the Court's opinion, is absolute and cannot be overridden on the basis of any religious freedom (point 11 of the decree). Therefore, the RF Supreme Court itself determined in advance which value has priority: this is characteristic of formalist jurisprudence which leaves ordinary judges with no room for activism and rules out the possibility of balancing various principles. In the second issue of *The Bulletin* in 1996, the Chief Justice of the RF Supreme Court, Vladimir Lebedev, published his commentary on this decree in which he also stressed that the constitutional right to create religious organizations is not absolute and is limited by the provisions of Article 13 of the Constitution. This reasoning signified that violations of religious freedoms could be remedied in a court of law if it is proven that the exercise of said freedoms does not contravene statutory laws against fomenting religious strife. In other words, religious freedoms can be discarded if said freedoms are considered dangerous in accordance with Russia's anti-extremism laws. Here, one can see the origins of the argumentation embodied in the 2017 *Jehovah's Witnesses* decisions.

This issue was also at stake when the RF Supreme Court considered a headscarf case (*The Bulletin* 2004: 2) in which several Muslim women challenged a police instruction that prohibited individuals from using passport photos while wearing a headscarf. Here, the Court's position was that traditional religions may claim exemptions. The first instance of the RF Supreme Court had denied the petition (using reasoning similar to that of the ECtHR in the 1993 case of *Karaduman v. Turkey*), following a formalist approach. However, the Cassation Collegium of the RF Supreme Court quashed the verdict and allowed the petition, ruling that the restriction was invalid (Ruling of 15 May 2003, No.KAC-03-166) because the main function of passport photographs is to depict a citizen in the way s/he usually appears in public. Therefore, if certain Muslim women usually wear a headscarf in their daily life in accordance with established traditions, there are good reasons for them to use a photo depicting them in their typical head covering. The Ruling stressed that Russian laws do not prevent women from wearing a headscarf in public places. Therefore, these limitations were unjustified and were held to violate the religious freedoms of Muslim women.

In a series of *hijab* cases considered by the RF Supreme Court between 2012 and 2016, the Court reasoned that wearing a *hijab* in schools is allowed not as a religious accommodation but, rather, as a tribute to national traditions. As the *hijab* is an Arab custom rather than a local one, there is no justification for allowing it in public schools of the Muslim regions of Russia tradition (Bashkir, Chechen, Dagestan, Tatar, etc. schools). The *ratio decidendi* in these cases was expressed by President Vladimir Putin, who interfered in the matter, saying publicly in 2004 that there is no good reason to allow the wearing of the *hijab* in schools since there has never been such a tradition in Russia's Muslim regions. This reasoning implied that religious accommodation could be legitimately conceded to "traditional" religions only provided that such religious practices are compatible with national traditions. This reasoning was repeatedly used afterwards when Russian courts struck down several regulations upon requests from Orthodox or Muslim communities paying a tribute to national traditions in public religious ceremonies, but at the same time turned down similar petitions from religious minorities.

This policy can be illustrated by another case considered in 2004 in which the Court used a broad interpretation of the 1997 Law on Issues of the Corporate Status of Local Religious Organizations (*The Bulletin* 2004: 10). Muslims living in a town in the Kamchatka *Oblast'* had established a local religious organization in which Muslims living in other neighboring towns were also members. The RF Ministry of Justice claimed that this organization was illegal since the members did not live in one locality as required by the 1997 law. The Ministry's petition to close down the organization was rejected by the RF Supreme Court (Ruling of 6 February 2004, No.60-G04-3), which argued that the term "local organization", according to the logic (but not pursuant to the literal text) of that law, implied the territory of a subject of the Russian Federation. Since all the members of the

Kamchatka Muslim Religious Community lived in the Kamchatka *Oblast'*, which is a subject of the Russian Federation, there was nothing to prevent them from establishing such a community. At the same time, Jehovah's Witnesses, Scientologists, and other religious minorities were desperately fighting to convince the Russian state to accept them as legitimate religious denominations based on similar arguments.

In its Ruling No.49-G04-48 (21 May 2004), the RF Supreme Court commented on religious educational activities and formalities to be observed when engaging in such activities (*The Bulletin* 2004: 11). In the case of the Church of Scientology's Dianetica branch office in Bashkortostan, the Court ruled that representing a religious dogma in the form of a scientific concept and regularly teaching that concept is a particular kind of education. Thus, teaching the concept of L. Ron Hubbard, the founder of the Church of Scientology, is not solely a missionary activity but, also, a process of transferring scientific and religious knowledge or an educational process that, according to Russian legislation, requires a license. In the opinion of the Court, a religious denomination providing religious education is fully eligible to receive a license since Russian laws do not introduce any exemptions for religious education in this regard. In addition to exercising psychological pressure, including hypnosis on adherents,[532] the Court held that the fact of illegal (*i.e.*, without a license) educational activity may serve as grounds for liquidation of this religious denomination.

In a judgment rendered a few years later, the RF Supreme Court (Ruling of 16 October 2007, No.31-G07-8) confirmed this finding and held that the mere fact of engaging in educational activities without a license constitutes sufficient grounds to close down a religious organization (the Biblical Center of the Evangelic Church in Chuvashia).[533] These findings are confirmed by the observation that other religious schools (Catholic, Lutheran, Orthodox, and other Christian denominations) normally obtain licenses for offering religious education at their theological seminaries. But Ruling No.31-G07-8 ignored the difference between professional education (such as theological studies at a religious university) and day-to-day meetings with discussions which are commonplace in many Russian public schools where traditional religions are studied. In the case of Dmitrii Bondar', who challenged the legitimacy of teaching ROC dogma at schools and its indirect inclusion in school curricula, the Court took an unfavorable position. Reasoning quite formalistically, the RF Supreme Court disagreed with the claimant's suggestion that the constitutional principle of secularity is a legal obstacle preventing the RF Ministry of Education from including religious

532 Similar arguments were made earlier by the RF Supreme Court in Ruling No.58-G2-38 (26 November 2002) against Dianetica in Khabarovsk.

533 This case was later reconsidered by the ECtHR, which found violations of the right to religious freedom in the licensing requirement applied to Sunday schools ECtHR Judgment. First Section, *Biblical Center of the Chuvash Republic v. Russia* (14 July 2014) Application No.33203/08.

dogma of the prevailing religious denomination (the ROC) as a part of school instruction (and allowing priests to visit school classes) and rejected Bondar's petition.[534]

As an example of this selective approach, the Cassation Collegium of the RF Supreme Court (*The Bulletin* 2005: 5) stressed that the constitutional right to freedom of religion also implies that prisoners should have an opportunity for exercising their religion in prisons and, for this purpose, for taking literature, icons, and other religious items to their cells. This right has been restricted by para.23 of a RF Ministry of Justice Regulation (2001) No.224. This restriction was challenged by a prisoner who claimed that his religious freedoms were being arbitrarily restricted since he was unable to pray without icons (which had been prohibited by the prison authorities pursuant to para.23 of Regulation No.224). The RF Supreme Court's First Instance Collegium invalidated this provision of the Regulation. Reconsidering this case on a cassation petition from the RF Prosecutor-General's Office, the RF Supreme Court's Cassation Collegium agreed (Ruling of 2 September 2004, No.KAS04-351) with the first instance's holding, stressing that human rights and liberties can be restricted only in order to assure national security, public morality, or the health or rights of other citizens (Art.55, RF Constitution) and finding that it was not the case concerning the right of prisoners to exercise their religion in line with established traditions. In the RF Supreme Court's opinion, this balance will not be affected if prisoners follow their religious practices in their cells so that the Prosecutor-General's arguments—that prisons have prayer rooms and libraries for such practices—are unjustified. This case fits the reasoning of the RF Supreme Court in the previous cases where it confirmed that religious accommodation can be granted to "traditional" religions (to Orthodox icons in this case).

However, Russian courts do not always protect the interests of the Russian Orthodox Church. As an example, one can cite the controversial point of restitution where the interests of the state and of the Church seem to be in a permanent conflict. In a 2004 ruling (5 October 2004, No.GKPI04-1253), the RF Supreme Court turned down the application of the St. Elea-the-Prophet Orthodox temple in Moscow (*The Bulletin* 2005: 6), which claimed that of the RF Government's 2001 Regulation No.490 (point 8)—about the process for transferring former ecclesiastical buildings back into the ownership of the religious denominations possessing these buildings prior to the 1917 Revolution—was invalid. The basis of this claim was that the federal laws on this issue imperatively prescribed restitution of all ecclesiastical buildings to the ownership of churches. Nonetheless, the challenged regulation allowed the termination of restitution only under certain conditions. Therefore, in the claimant's opinion, the government exceeded the bounds conferred upon it by the law. The Court disagreed and rejected the petition, reasoning that the obligation of restitution was not absolute and the rights

534 Ruling of the RF Supreme Court in case No.AKPI13-810 (13 October 2013), available at <http://supcourt.ru/stor_pdf.php?id=565700>.

of religious denominations should be balanced with the ownership rights of the current occupants of buildings. In this case, the Court had to balance religious freedoms not only with historical traditions but, also, with the state interest. Equating the latter with the public interest, the RF Supreme Court prioritized it over other values. Later on, this argument will reappear in cases involving the Jehovah's Witnesses when Russian courts began confiscating this denomination's real estate subsequent to its liquidation.[535]

For several years, one controversial point related to tax legislation for Russian ultra-Orthodox adepts was the use of a taxpayer identification number (TIN). These adepts had fought for the right not to have a TIN, arguing that it is inadmissible to categorize human beings by numeric identifiers and, thus, to replace the names given to them at baptism. The Russian courts have regularly dismissed these claims. The RF Supreme Court in its Ruling (30 May 2000) No.GKPI00-402 held that this sort of tax identification is compatible with the believers' principal religious beliefs and, therefore, did not violate any freedoms. This finding was confirmed by the RF Constitutional Court in its Ruling No.287-O (10 July 2003).

New arguments—heard in 2004 by two courts in Tambov *Oblast'*—appealed to the freedom of conscience, to human liberty, and to reasonability in general. The petitioner insisted that the tax inspectorate should, first, inform a taxpayer about the TIN chosen for them and assign it only after the taxpayer confirms that this number does not contradict their beliefs. The courts of the first and the second instances allowed the petition, reasoning that in this situation there were no concerns about national security or public morality and therefore religious freedom could not be limited under Article 55 of the Constitution. The RF Supreme Court (*The Bulletin* 2007: 2) quashed these decisions and held (Ruling of 1 March 2006, No.13-V05-13) that the state authorities are not under any obligation to consider religious beliefs of taxpayers. It is enough that attributing a TIN is not contrary to the beliefs of the main (traditional) religious denominations in Russia, which was confirmed by the position expressed by the Holy Synod of the Russian Orthodox Church: in a statement of 7 March 2000, it came out in favor of the use of TINs.[536] In this case, the Court ruled that

535 In St Petersburg, for example, real estate belonging to the Jehovah's Witnesses was confiscated in 2018 following a decision of the Sestroretsk District Court. See Mikhail Telekhov, "Imushchestvo Svidetelei Iegovy na 881,5 mln rublei iz"iato v pol'zu gosudarstva" [The Property of the Jehovah's Witnesses Valued at 881,5 Million Rubles Is Confiscated in Favor of the State], *rapsinews.ru* (5 March 2018), available at <http://www.rapsinews.ru/judicial_news/20180503/282635534.html>. A similar decision was taken by a Petrozavodsk court in Karelia in 2018 and in a number of other regions: "Sud lishil Svidetelei Iegocy prava na zdanie v Petrozavodske" [The Court Dispossessed a Jehovah's Witnesses' Building in Petrozavodsk], *interfax.ru* (4 April 2018), available at <http://www.interfax.ru/russia/606962>.

536 In a decision from the end of the 2000s, the ECtHR rejected as inadmissible the subsequent petition of one of the claimants in this case: *Skugar v. Russia* (3 December 2009) Application No.40010/04.

the petitioners had failed to support their claim of using a tax identification number as being contrary to their own religious beliefs: they had not proven that an identification number was not congruous with national traditions or the religious creeds of "traditional" denominations.

Shaping its symbolic policy, the RF Supreme Court ruled that certain signs or images could not be displayed or worshipped; that the use of such signs or images could constitute grounds for banning a religious denomination (Ruling of 6 February 2007, No.18-G07-1). In this case, the Ingilistic Aryan Church of Old Believers had challenged the interdiction of the RF Prosecutor-General's Office preventing them from exercising their religion. The petitioner reasoned that the image of a swastika used in their rituals was an old Aryan Sun symbol serving as a cult object long before the National-Socialists in Germany had started using the symbol in their ideology. Dismissing the petition, the RF Supreme Court held that the image of a swastika has a clear cultural connotation in contemporary societies; that its use normally provokes a clear link with the ideology of Nazism; that the existence of any religious denomination worshipping the swastika is incompatible with the basic codes of public morality in Russia (*The Bulletin* 2007: 12). The sole fact of worshiping this symbol is enough to prohibit the activity of such denominations regardless of the historical context in which the "new Aryans" interpret the swastika or how they correlate this symbol with their beliefs. In vain, the applicant had argued that the ROC also utilizes a number of symbols similar to swastika, *e.g.*, on ceremonial dresses of Orthodox priests: the Aryan Church had no traditional background similar to that of the ROC to justify its right to the same use of this symbol.

Here, the RF Supreme Court also confirmed that it had evaluated the religious beliefs and symbols against the backdrop of prevailing tradition.

Conclusion

This analysis suggests that there are earlier cases connected with religious freedoms that paved the way to the 2017 *Jehovah's Witnesses* decision. Legal argumentation in Russia can be characterized as mostly rule-based—mostly relying on legal formalism and its technique. If there is a statute clearly regulating a matter, the courts—in cases about the rights of religious minorities—would be reluctant to re-evaluate or reinterpret the rules of the statute from the point of view of reasonability, proportionality, or other non-formal criteria. If there is no statutory law on religious matters, the courts likely will refuse to protect religious matters unless the case touches upon interests of the prevailing denominations. This fact is obvious in many of the judgments brought by the ECtHR against Russia in cases of religious freedoms where the Russian courts remained obsessively faithful to the letter of the 1997 Law "On Freedom of Conscience and Religious Associa-

tions" without taking account of the absurdity of applying the rules in some specific situations.[537]

In certain difficult cases, however, the RF Supreme Court decided to go beyond the literal meaning of rules and regulations; reasoning in terms of values and policies. The literal wording of Russia's 2002 anti-extremism law leaves the Court no choice but to ban almost all religious denominations because they insist on their spiritual superiority over other religions and, in this sense, fall under the category of "extremist', understood as claiming "national or religious superiority" over other religious groups. This literal approach was followed in the *Jehovah's Witnesses* case.

Nonetheless, the analysis in this Chapter shows that the RF Supreme Court has in its arsenal more flexible methods of reasoning allowing it to avoid applying this legislation to "traditional denominations"; even granting them exemptions from general legal obligations. Utilizing the technique of doublespeak, Russian courts shy away from making their argumentation transparent and from explicitly recognizing any substantial difference in protecting "traditional" and "non-traditional" religions. On the contrary, the courts insist that protection is equal; that they are abiding by constitutional principles which are interpreted restrictively, except for the situations where the courts would decide to introduce exceptions from this restrictive interpretation in favor of the ROC. Such an interpretative approach reveals once again the tension between formalism and decisionism that is specific to Russian law. As follows from the analyzed case law, this doublespeak predictably leads to contradictions in argumentation on the part of the RF Supreme Court and its subordinate courts.

This analysis can be demonstrative of what may be one of the major paradoxes of Russian law: the Russian state formally endorses liberal norms and principles which do not fit the current political situation, interpreting them selectively, in clear contradiction to their original and literal meanings. This doublespeak in official narratives touches upon the rule of law, democracy, non-discrimination, human rights, supremacy of international law, and other pillars of the Russian constitutional order; solemnly proclaimed but, by and large, not respected. As was shown in the example of Russia's anti-extremism laws or laws protecting the feelings of religious believers in the present Chapter or the equal protection principle for sexual minorities in the previous Chapter, the authorities introduce laws that make it possible to overrule the constitutional principles on freedom without repealing them. Russian courts, while formally supporting liberal constitutional principles, reinterpret them in a conservative sense generally reflecting the conservative mood prevailing among the population; implying the use of specific argumentation in referring to national values, traditions, popular mindsets, etc. The extent to which this court practice is a result of political interference and influence is not discussed in this Chapter and in this volume generally.

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537 See, for example, the 2012 ECtHR Judgment *Jehovah's Witnesses of Moscow v. Russia*, *op.cit.* note 18.

We can, however, reasonably suggest that even if such influence continues to persist in Russian law, it is not the only factor shaping court practice. There are also a number of informal mechanisms of "social control" in every society imposing common values upon the judiciary shared by the majority. It means that judges will sometimes make exceptions in rulings against religious minorities or in favor of the ROC, based on their own estimation of the communitarian values which serve as the intellectual background of Russian law or balancing these values with the political or public interest that might be involved in such cases. In turn, these values have an impact on the formation of the attitudes, prejudices, and biases of judges and, thus, can be expected to influence their decisions. Our general comments on the political, historical, and legal frameworks for the protection of human rights have been provided in the earlier Chapters of this volume. Therefore, here we will not revert to the broader cultural and social contexts surrounding the legal regulation of religious freedoms.

Summing up twenty-five years of development of the jurisprudence of the ECtHR in religious cases, one cannot fail to observe that the first case came to this Court from Greece,[538] and many other intricate and controversial issues on religious freedoms have been raised since then by Greece, Moldova, Romania, Russia, and other Orthodox countries (those in which the Orthodox denomination is prevalent and/or has a privileged status). It has been justly noted that religious identities may, to a certain extent, prefigure believers" attitudes toward legal regulations, and this is, for example, the case of Orthodox Christianity.[539] At the same time, proponents of Orthodox religious denominations tend to adopt some standard viewpoints and stances toward law and rights making the legal interpretation and application of laws in Orthodox countries somewhat more particular as compared with legal regulations in other societies.[540] When seeing to unveil the real policies behind the formalist language of court decisions, the example of Russia can provide an important basis for further research into the particularities of understanding the divide between the sacred and profane, the religious and non-religious in Orthodox societies. This final Chapter is intended to demonstrate, once again, that there are certain ideological or, more broadly, philosophical constraints which impede Russia from adhering to the liberal standards for the protection of religious freedoms. These constraints are based on conservative and communitarian mind-sets which predictably shape the legal reasoning of judges and nudge them to re-interpret liberal legal provisions so that these provisions will be in better harmony with these mind-sets.

538 ECtHR Judgment *Kokkinakis v. Greece* (25 May 1993) Application No.14307/88.

539 See an important collection of analyses, from different points of view, in Maria Hämmerli and Jean-Francois Mayer (eds.), *Orthodox Identities in Western Europe: Migration, Settlement, and Innovation* (Ashgate, Burlington, VT, 2014).

540 Kristina Stoeckl, *The Russian Orthodox Church and Human Rights* (Routledge, London and New York, NY, 2014).

6 Concluding Chapter

In the present study, we analyzed the formalist and decisionist elements, present in Russian legal thinking, and examined the impact of conservatism on the interplay of these elements. The focus of this study was on the conceptualization of rights in Russia: in legal theory (Chapter 1), in legal community (Chapter 2), in social philosophy (Chapter 3) and in case law (Chapters 4 and 5). This is one of the aspects in which the foundational narratives of Russian law underscore its civilization distinctiveness and legal exceptionalism. In case law, the argument of distinctiveness is frequently referred to as the rationale for crafting exceptions to the constitutional equal-protection principle as it is applied to religious, sexual and other minorities. In their turn, such discussions about distinctiveness reveal certain features of Russian legal culture and, specifically, the intellectual culture that is continually transmitted in Russian (previously: Soviet) legal education, scholarship and practice: there are legal rules that shall be obeyed by all the addressees, but some of these addressees might be given exceptional treatment to secure the best interests of the state. We examined the historical dimension, philosophical background and normative implications of this culture, paying particular attention to the prevailing understanding of rights, the validity of law and its application, and how this understanding influences legal practice. Our findings are summarized in the following pages.

The main research question, with which we undertook this work, revolved around the specific style of legal thinking in Russia and its impact on the practice of interpreting and applying the law. We identified the gap which exists between the wording of Russian laws, their interpretation and application which establishes that Russian judges in penumbra and lacunae cases sometimes decide them contrary to the letter of the law. To justify their decisions in such cases, Russian court judgments sometimes refer—directly or implicitly—to fundamentals of the social order such as cultural and civilizational distinctiveness, social cohesion around certain values or the collective interest understood as guiding principles of social development. Such approaches can be found in other legal orders. Therefore, it is not the tension between the prerogative and the normative or, in other words, between the decisionist and the formal elements in law which makes Russian law peculiar. This peculiarity concerns rather the specific interpretation and application of fundamental legal concepts and of the intellectual frameworks that lie behind these concepts.

In its turn, a conservative reading and interpretation of these fundamentals is a source for further identification of legal principles. In other words,

if the law is silent or ambiguous, or if the law seems to be bad (obsolete, intrusive, etc.), judges act (or are supposed to act) in the logic of the legal system so that their decisions maintain and reinforce the social order. For many other legal orders, this also is the general rule which can be dubbed as "justice", "sustainability", or "certainty" or by other terms which display the dialectic of rule-and-exception that is at work in a particular legal order.

In contemporary Russian law, it is often asserted that a correct balancing of rule and exception is attainable if judges follow tradition, protect the collective interest and defend the cultural specificity of their country. Such is the main message of the conservative philosophy that can be revealed behind the texts of court decisions in lacunae/penumbra cases and in the narratives of senior judges as well as of other legal or political actors. The situation is complicated by the fact that Russian constitutional law and a number of statutory laws, adopted in the 1990s, are liberal in both letter and in spirit. We argued that this tension between liberal laws and their conservative reading and application in contemporary Russian law can be seen as one of its distinguishing features.

At face value, Russian legal theory largely continues to adhere to the methodological premises of legal positivism dating from the turn of the 19th-20th centuries. For a number of practical and ideological reasons, Soviet law—from the late 1930s on—continued to utilize pre-revolutionary positivist theories of law, distilling them with ideological assertions but without changing them profoundly. Soviet (Russian) textbooks usually reproduced the formalist approach to law, and this suggested to a number of researchers that the Soviet (Russian) law-enforcement and legal scholarship by-and-large are positivistic. This suggestion seems to be oversimplified. On the one hand, formalism required fidelity to the letter of the law. On the other, Marxist ideology considered the law practically to be a means of the class struggle and exploitation—viewing it epistemologically as an epiphenomenon of production relations. In its core, this Marxist approach rendered senseless any respect for the letter of the law and added much ambiguity to the positivist side of the Soviet theory of state and law, introducing into legal theory the prerogative element under the cover of "class will".

Our analysis led us to the conclusion that formalism cannot serve as the only theoretical hallmark of Russian (and previously, Soviet) law; that there was, and still is, a collateral tendency which one can dub "Russian legal realism".[541] This tendency entails three main hypotheses. *First*, in high-

541 Despite the conceptual reservations made in Introduction above, we have retained this term in the title of the present volume as it grasps two essential elements characterizing American and Scandinavian versions of legal realism: its decisionist ("law is what judges say law is", insofar as legal texts do not factually determine court decisions), ideological aspects (law is the means for implementing state policies and for educating citizens about these policies) and the function of "social engineering" implicitly attributed to judges—to use the law and the legal order to push social life forward, to attain certain ideals, and to change it accordingly. Similar "realist" elements—albeit with different implications and ideological messages—also can be identified in Soviet law as well as in contemporary Russian law.

profile cases judges are not bound by words of the law (legal texts, "law in books") and can decide—independently or counseled by state officials, party members or higher judges—about exceptions to the law in order to attain certain ideological objectives. *Second*, court decisions and proceedings must educate lay people and transmit to them knowledge about such objectives, showing how rights and obligations should be exercised for the common good. *Third*, judges and their decisions must contribute to building and maintaining a better social order. In the 21st century Russian context, "better" usually is interpreted to mean "backward": *i.e.*, to some facts of Russia's glorious past. But such value preferences also can be projected forwards: *e.g.*, to the "bright future" as was the case with Soviet legal ideology.

Naturally, analogous facts can be identified in other legal systems where conservative narratives recurrently infer the need to make a country "great again" or similar slogans, which have some evident implication for law and which influence its application. In order to avoid misunderstandings, we underscore here once again the following: our analysis is not to be taken in the sense of asserting that a conservative combination of decisionist and formalist elements is peculiar only to Russian law or that the impact of conservative philosophies on law is only a Russian specificity. On the contrary, our initial thesis—on which this research builds—is that comparable combinations and impacts also can be seen in other legal orders. Yet, the present volume does not contain any comparative analyses of the Russian situation with other legal orders and legal cultures. Such an ambitious project would go far beyond the limits of this work and require a more detailed examination than that which we have included here.

The subject matter of our research has been an examination of institutional, cultural, political and other factors of the Russian situation and of the particularities which shape the style of legal thinking in Russia. We hope that this analysis can help to remove artificial academic barriers, be they the logic of "the West and the Rest" or the unending quest to uncover legacies of "socialist law" in various transitional systems—the barriers that may, conceptually, impede comparative lawyers from drawing insightful parallels and comparing different legal cultures in new perspectives. Using similitudes and differences in this respect, one can employ different combinations of decisionism and formalism and the variable role of conservative and liberal philosophies in law as a *tertium comparationis* for viewing Russian law along with other legal systems.

Furthermore, another of our assertions was that value choice (conservative, liberal, socialist or something else) is a secondary variable in the respective style of legal thinking. Very roughly sketched, the conceptual scheme prevailing in Russian law can be described as "norms plus facts yield the decision" (the formalist element) "unless sovereign will mandates otherwise" (the decisionist element). At the same time, this "sovereign will" does not always mean "the will of political leaders". One hardly could imagine a person or persons (be they the President, senior members of the

Presidential Administration or other authorities) who could be in a position to specifically express their will about the tens millions of cases annually decided by Russian courts. In most of the cases in which an impact of such "sovereign will" can be reconstructed, it will be judges who anticipate the dispositions and moods of their superiors and of the political authorities standing above these superiors, and who engage in guesswork about what this "sovereign will" might be in some of the cases they hear ("high-profile cases") or whether there is any room for thinking about "sovereign will" in other cases ("ordinary cases"). There is an array of examples where judges, in their anticipations, go far ahead. In such cases, their decisions (*e.g.*, prohibiting some religious texts, as illustrated in Chapter 5) in fact can strike against the will of the political leadership. Consequently, defining this "sovereign will" is vital for interpreting and applying law, and it highlights the importance of the debates about sovereignty in Russian law.

There can be two main theoretical solutions of the sovereignty issue along with sundry possible combinations. On the one hand, sovereign will can be formulated by legislative, administrative or other actors of the state (*the first part of the formula*) and, therefore, can be attributed to parliament or another competent authority to which formally belongs the lawmaking function or a respective part thereof (*the second part of the formula*). This second part can become redundant, as sovereign will is tantamount to that which is established by the lawmakers. On the other hand, as the power to decide about exceptions from rules, sovereignty can factually be shared among various actors (judges, party bosses, the executive or presidential power, secret agencies, the clergy, sundry lobbying forces, etc.). This factual power remains formally unwritten in the law. Consequently, there are no clear demarcating frontiers between factual powers and competences of different actors to "act on behalf of the sovereign"; no established rules for drawing these frontiers *ad hoc*. In such a case, "sovereign will" indicates the frames of reference for identifying and interpreting the real unwritten rules factually determining actions and decisions of judges and other legal actors.

This latter case characterizes the conceptual state of affairs in contemporary Russian law where the sovereign power of exception *de facto* is shared by different actors and is a contentious issue for a number of reasons. Any explicit assertion of this power is beyond and contrary to constitutional statutory and law. Pursuant to the generally accepted principle of legality, exceptions almost always are formally excluded; yet, practically are often inevitable. The lack of explicit rules for exception-making has been compensated in court practice by implicit rules that are based on a conservative

philosophy,[542] including references to the prevailing ideology (in the Soviet era) or to the collective interest, cultural and civilizational distinctiveness, fidelity to tradition and national identity, the inviolability of state sovereignty, as well as to a number of other variables, in post-Soviet law. Already in Soviet law, supreme courts at the levels of the Union and of the republics were granted the power to provide "guiding directions" (*rukovodiashchie raz"iasneniia*) so that some coherence was brought into this "gray zone".

Under Russian law, the only legitimate organ formally empowered to make exceptions from legislative rules (also through "ascertaining their constitutional meaning")—or to annul their legal effect—is the RF Constitutional Court. However, this Court only deals with an infinitesimal number of cases as compared with the judicial load of other courts across the Russian Federation. The RF Constitutional Court took the lead in formulating these implicit rules that, as a result, are regularly being brought to the surface—despite that fact that are no explicit rules for constitutional interpretation which could contribute to the transparency of exception-making in Russian law. In any case, even after concretization on the case-by-case basis of so-called "constitutional values" (*konstitutsionnye tsennosti*)—serving as the justification for exceptions in the argumentation of the RF Constitutional Court—implicit rules do not become entirely explicit as this argumentation, to a large extent, is doublespeak.

This is quite explicable in terms of normative unity: creating a parallel system of such rules would plainly contradict the Constitution and would introduce a dualist divide into the legal system (similar to the divide which was seen in English law, in the past, between common law and the law of equity). At the same time, the strategy of doublespeak—adopted by the RF Constitutional Court and other actors who practically formulate such rules, naming them in metaphysical terms (such as constitutional values, the fundamentals of law-and-order, etc.) and introducing them as interpretations of posited law—could not fail to produce a divisive effect in Russian law in which formal, general rules co-exist with informal (or semi-formal) rules of exception.

The decisionist tendency was not clearly visible in pre-revolutionary Russian law (before 1917) and mostly developed in the first years of Soviet rule. It was the time when legal formalism was condemned by the Bolsheviks as a part of bourgeois legal ideology and when Soviet lawyers were

542 We prefer this term of "philosophy" (in the sense of a system of ideas) to that of "ideology", as it would be too a strong proposition to say that, in Russian reality, judges may introduce ideologies, given the explicit prohibition of state ideology under Art.13 of the RF Constitution. At the same time, it is plausible that judges—especially when balancing different principles at high courts—have in a mind a certain *Weltanschauung* and embody it in their decisions; sometimes, also in their writings and discussions. Another reason is that one can find quite different (and, sometimes, contradictory) ideas and assertions in grand narratives of Russian leaders. Therefore, these narratives are not so much similar to conventional definitions of ideology as they are a more or less coherent compendium of ideas that can be dubbed "philosophy" (or "theory").

called upon to find law, immediately, in the social reality. Mikhail Reisner, Piotr Stuchka, Evgeny Pashukanis and many other Soviet legal theoreticians of that time insisted that the formal law always lagged behind social development, especially in periods of revolution. Fidelity to the letter of the law is only a trick for diverting the working class from political struggle and revolution, and there is no practical or ideological value to keep it up to date. Social reality itself—correctly identified and interpreted in the light of Marxist-Leninist teaching—would point to the exceptions that judges and other law-enforcement officials could make from the general rules when the literal application of general rules resulted in purported damage to the collective interest (class interest, national interest, etc.) as this interest was defined by the political power. To a certain extent, the formal (posited) law could be entirely replaced by the living law identified by bearers of the revolutionary legal consciousness (*revoliutsionnoe pravosoznanie*), as the 1917 Soviet Decree No.1 "On Courts" attempted to do. Yet, according to Marx's writings, law was doomed to wither away soon after the proletarian revolution. This "soon" became the object of theoretical discussions among Soviet lawyers after the 1917 Revolution; in the course of these discussions, it turned into "anytime soon", "after the full and decisive victory of the revolution", "after the full suppression of hostile classes", and other conceptually flexible formulations.

In the 1930s, "anytime soon" was projected into the undiscernible future, while this anti-formalist (decisionist) tendency of Marxism began to be balanced with legal formalism. When Vyshinsky coined the Soviet theory of state and law in the late 1930s, he combined these two tendencies, inevitably bringing into this theory a significant measure of inconsistency.[543] After the end of Soviet rule in the early 1990s, the ideological element was removed from Russian law. But the cited combination of formalism and decisionism—and its applications in legal reasoning—largely remained the same and still constitutes the intellectual framework in which many Russian lawyers understand their law and its machinery. After some years of Yeltsin's attempts to reshape Russian law according to Western patterns, the liberal spirit of constitutional and statutory law gradually has been replaced with a conservative philosophy which bears a striking resemblance to the communitarian ideologies of Soviet law and of the preceding legal system of Imperial Russia: the individuality and her rights are largely molded by community relationships and, therefore, are not a value *per se*. It implies that individual rights cannot be used against the majority or against the state which acts as the personification of the social community.

The prevalence of the collective interest over individual rights in Russian law has a long history and, occasionally, is perceived as a sort of "Russian legal tradition" supposedly distinguishing Russia from the West. Such romanticism in the legal sphere reminds one of Russian conservative authors

543 Kelsen, *op.cit.* note 66.

such as Karamzin, Ilyin or Berdyaev (and the philosophical origins of their inspiration in the German philosophy of Hegel, Schelling or von Savigny). The main tenets of (post-)Soviet legal theory with its anti-individualist background can also be seen as coextensive with this communitarian trend.[544]

This tension between formalism and decisionism nowadays has become one of the main discussion-points about "legal politics" (*pravovaia politika*) in Russian legal scholarship. Quite often, justices of the Russian higher courts and other leading Russian legal actors make references to Russian "traditions" so as to assert their power to decide upon exceptions when dealing with the protection of minority rights. In Russia and elsewhere, references to "tradition" usually involve the philosophical paradigm prioritizing organic historical development over revolutionary changes, majority opinion over dissenting minority views, established patterns and mind-sets over innovations in religion, morals, gender and other main symbolic spheres of the social; according preference to stability of the social structure over attempts to make this structure more just, equitable or simply better. In short, this paradigm refers to a conservatism which, by definition, is hostile to new patterns of behavior—especially in such susceptible spheres as family or religion.

At face value, the conservative logic—as applied to the issue of rights—is simple: Russia does not endorse the Western accentuation of individual rights to the possible detriment of collective rights and interests, as in the "Russian legal tradition" individual rights never have been accepted as constitutive elements of the legal order. Prioritizing individual interest can split the organic collective whole and lead to the destruction of the whole of society which cannot survive if it loses its integrity and cohesion; or, at least, it can impede organic social development. This argument is not new: it can be traced from Plato and Thomas Aquinas to Soviet international lawyers or to Valerii Zorkin who have made similar arguments about the correlation between the collective and the individual.

However, oversimplifications about this conservatism can be misleading as it has several implications for legal thinking. As we mentioned above, this legal thinking comprises two main contradictory elements: formalism

544 A renown Russian expert with the long experience in various Western projects concerning the modernization of ex-USSR legal systems, points out at what he calls the "theoretical deformation of the legal framework": Leonid Golovko, "The Space for Legal Reform in Central Asia: Between Political Limits and Theoretical Deformations", *OSCE Yearbook 2010* (Baden-Baden: Nomos, 2011), 105-115, implying that obsolete legal knowledge is being reproduced at law schools in the ex-USSR. Professor Golovko has good reason to assert that "without proper theoretical preparation, a one-time normative measure that aims to remove a complex deformation will not be understood or will be distorted at either the law-enforcement or the judicial level. The theoretical basis is also vital to ensure the coherence of subsequent legislative steps" (*ibid.*, 111). Citing some exemplary "deformations", he refers to the aberrant distinctions between public and private law, between criminal and administrative law, between police and judicial functions, and insists that "the reform most urgently needed is the removal of this historical deformation at the theoretical level. Otherwise, all efforts to "normalize" legal systems, in order to overcome their protracted "transition state", are misplaced and futile" (*ibid.*, 115).

endorsing the sovereign's commands in law; and decisionism justifying the prevalence of collective morality over legal texts. In Russian law, this tension is intensified by the discrepancy between the universalist language of the Constitution (commitment to universal human-rights standards which are prioritized as the supreme standards of legality under Article 18 of the RF Constitution) and official narratives about how Russia is not ready to scarify its civilizational distinctiveness for the sake of such universal standards.

In the historical perspective of its naissance in the 1920s, this decisionism was epistemologically based on Lenin's idea that law (as all other elements of "superstructure") mirrors the existing social relations in the prism of the ideology of the ruling class. This idea was developed by Piotr Stuchka and became one of the cornerstones of the Soviet theory of state and law in the 1930s. In the Soviet era, this relationship of basis (economy) and superstructure (law) implied that the cognition of law necessitates addressing the real economic structure of production relations (especially in Evgeny Pashunanis' commodity exchange theory) or the ideology of the working class which reflects laws and objectives of historical development of mankind.

This ideology expectedly drew from the Marxist-Leninist philosophy which was supposed to form correct mind-sets and, thereby, to uncover social processes and regularities in an appropriate perspective. According to this philosophy, production relations create a social structure (an interaction of classes and their struggle), and this structure creates the system of political power while the latter, organized as the state, creates its law. Such a conceptualization, only sketched here in general lines, logically led to the conclusion that the correct interpretation and application of law must be based on the correct ideology introduced and ascertained by the political power. In this sense, law reflects production relations, the system of class domination and the class struggle that are the immanent results of these relations.

In cases where judges were not sure of fully understanding the ideological implications of high-profile cases, the internal logic of the Soviet legal system nudged them to consult with party officers who were supposed to be familiar with the esoteric philosophical knowledge of dialectical materialism (*diamat*) and its correct practical applications. The practice of interference of the CPSU into judicial processes, on one hand, and the strategy of Soviet judges asking advice from *partkoms*, on the other hand, are well documented in Soviet history. In Western scholarship, these Soviet practices were labelled as "telephone law" or "politicized justice".[545] Surely, analogous schemes also can exist in other societies where ideological knowledge plays a similar role.

545 *E.g.*, Maria Popova, *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine* (Cambridge University Press, Cambridge, 2012); Alena Ledeneva, *Can Russia Modernise? Sistema, Power Networks and Informal Governance* (Cambridge University Press, Cambridge, 2013); and Maria Popova, "Putin-Style 'Rule of Law' & the Prospects for Change", 146(2*) Daedalus* (2017), 64-75. For a more general perspective, see Tom Ginsburg and Tamir Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, New York, NY, 2008).

Contemporary Russian law has rejected Marxist-Leninist ideology: the *diamat* no longer is the prevailing social philosophy, but this style of legal thinking did not suffer any cardinal shifts. Law is still mainly taught at law schools as an "objective phenomenon" (*ob"ektivnoe iavlenie*) rooted in the social structure, collective mentality and historical tradition, and dialectically mirroring them. Implicitly, it means that a cleavage between the real/objective law[546] which exists directly in social structure and collective mentality, on the one hand, and the formal law which is contained in legal texts and more or less mirrors the real/objective law on the other. Nowadays, this legal ontology supports the nationalist romanticism: the legal system of a country is not a result coincidence but, rather, a product of organic growth; if anything is transplanted from the outside, it must be brought into conformity with the native legal culture. Otherwise, the legal system will become dysfunctional because of the incongruity between formal law and real law.

Such methodological tenets are advantageous for great historical narratives and discourses about the civilizational role of Russia that, unsurprisingly, also become the foundational narratives for the legal system. Practically applied to law, this philosophy means that judges do not have unfettered discretion when they deal with high-profile cases. In order to make good decisions, they have to check how their decisions contribute to reaching the ultimate objectives of Russian organic development and whether these decisions fit the "collective consciousness" reflecting this development and revealing its objectives. As in the Soviet system, these objectives will be defined by those who have the factual political power (in a limited number of high-profile cases) or by judges themselves (in other cases).

It is evident that such a Herculean mission (in terms of Ronald Dworkin and his construction of the ideal judge Hercules) is hardly bearable for ordinary justice. Thence, it is practical that the power of formulation of exoteric knowledge about organic social development and the power of naming of its objectives belong to an "intellectual aristocracy"; to policy-makers from the executive or from the higher ranks of the judiciary. This decisionist (or realist) perspective of Russian law synchronizes with its formalist tenets: judges are bound by the formal commitment of legality to apply the laws to their letter.

This combination of two incompatible elements (legal formalism and decisionism) predictably leads to theoretical contradictions and to practical tensions between supporters of different political views who may find justification for their positions in either of these two elements. It happens

546 Not to be confused with the distinction between "objective law" and "subjective law" which, although is based on the same philosophical premises, refers to another conceptual distinction. Here, the definition of the "true" law as "real law" refers to another dimension of realism: that of a philosophic apriorism as it was formulated in the medieval polemic between realists and nominalists.

also in other legal orders: for example, the opposition of originalism and interpretivism in US constitutional law. In a number of important issues, tensions between decisionism and formalism suggest to Russian legal scholars and practitioners that they should take issue with the ensuing theoretical and practical problems. Some of these problems have been examined in the chapters of the present study. Without pretending to deal with them in all their possible implications and aspects, we concentrated on the problem of rights, examining the impact of the tensions between formalism and decisionism on the conceptualization of rights and the delimitation of the scope of their protection in Russian law.

As the first step, we sought to clarify methodological grounds and implications of the combination of decisionism and formalism in Russian legal thinking in Chapter 1 ("Formalism and Decisionism in Soviet and Russian Jurisprudence"). One of the important implications is that Russian legal scholarship still endorses "mechanical jurisprudence" requiring passivity from judges to act as the "mouth that pronounces the words of the law'. In this paradigm, judges only have to apply—but not change—the words of laws. Tense discussions are taking place in Russian legal scholarship about the limits of judicial discretion; about a judge's fidelity to the words of the law and the right to reinterpret these words. Facing theoretical impasses of formalism, quite a few judges and prominent legal scholars have decided to move from this formalism toward a realist methodology, trying to get free from the statutory constraints in interpretation and insisting that judges and other law officers have the final say about the true meaning of laws.

Examination of this theoretical background of Russian law reveals a number of clues for understanding some current debates in Russian legal theory oscillating between two principal theses (excluding smaller methodological and conceptual issues): either the judge[547] is bound by the law and shall in no case transgress the will of the legislator, or the judge is free to decide cases against the law, relying on considerations that she might extract from traditional values, conservative (or different) ideologies, or from other sources. In other words, the dilemma—apparent in many academic writings—is that the judge shall either abide by the legal rules also in the cases brought to courts by individuals against the state and its interests, or that she may depart from them in order to secure the best interests of the collective—even when these interests are contrary to individual rights and freedoms posited in the constitutional and statutory law and formally protected by it.

On the one hand, the official attitude to such decisionist narratives remains rather negative as they can potentially undermine the entire political

547 The term "judge" in this context does not mean that our conclusions are applicable only the judiciary. For the purposes of the present study, this term was utilized broadly as a shortcut to all law-enforcement officials and court clerks as they all are trained within the same system of legal education that translate similar values, conceptual ideas and theories.

system which, formally, relies on legislative rules. On the other hand, the strict observance of laws and a literal interpretation of legal rules can be cumbersome—from time-to-time—for attaining political goals in high-profile cases. At this point, the official attitude can change, nudging judges to look behind statutory texts in order to decide a case in accordance with the ultimate political objectives underpinning these texts (or, rather, construed as underpinning these texts). However, it would be dangerous to leave judicial discretion unbridled in these cases: for the sake of predictability and manageability of the legal system, this discretion needs to be framed within a certain *Weltanschauung* setting out priorities for the interpretation and application of law.

One of the technical difficulties for fixing such a *Weltanschauung* in statutory law lies in the general interdiction of Article 13 of the Russian Constitution against establishing a state or obligatory ideology. The only institution that may legitimately outline such a *Weltanschauung* in the legal sphere—through coining "constitutional values" or through other intellectual highways and byways—is the RF Constitutional Court. The identification of constitutional and other legal values, theoretically, also can be carried out by other Russian courts; but, as we showed in Chapter 1, the Constitutional Court jealously bans such attempts, asserting its exclusive competence in this symbolic sphere.

Our analysis showed how—in formulating a particular conservative *Weltanschauung*—the RF Constitutional Court has reinterpreted the conception of human rights so that, in fact, it excludes its application in sensitive high-profile cases. According to this reinterpretation, in a conflict between individual rights and the collective interests, the former shall be defeated as is well illustrated in the series of cases concerning YUKOS and, personally, Mikhail Khodorkovsky. To defend this reinterpretation, the Constitutional Court chose to deny the universality of human rights, arguing that national states have the unrestrained power to make exceptions with a view to national interest, cultural specificity and other similar reasons.

Following this strategy, the RF Constitutional Court pragmatically extended its scope of competences, *de facto* assuming an ideological function—at the same time, encapsulating itself from normative criticism from within or from without. In terms of competence, no other opinion can prevail over the Court's opinion. This is the main premise in the long contentious debates with the ECtHR, culminating in the RF Constitutional Court's famous 2015 Judgment 21-P concerning the prevalence of constitutional interpretations rendered by the Constitutional Court over international law and the ECtHR case law. To a certain extent, this conflict can be seen as a struggle for the decisionist power to make exceptions from legal rules—the power that the RF Constitutional Court unambiguously considers as its exclusive prerogative.

Comparing various versions of decisionism in Russia and in other countries, we suggested that decisionism in the Russian context is based on different methodological assumptions than the judicial or the administra-

tive powers of exception are to be found in realist jurisprudence in US or Scandinavian law (or in other legal systems). The apparent similarity of their theoretical conclusions—the ideological nature of law-enforcement and the *de facto* uncheckable discretion of judges—cannot hide the difference of the intellectual contexts in which the respective realist approaches are coined. Thus, the intellectual environment of pragmatism—common to American legal thinking—normally requires judges to provide a rational justification for their decisions thereby constraining their discretion by the limits of practical rationality accepted in the legal community and in society in general (public opinion). Similar intellectual constraints exist in the Nordic legal culture where the theoretical use of realist jurisprudence is also wide-spread.

Such pragmatism is not observed in Russian culture in general or in Russian legal culture in particular. This culture is mostly antirational and communitarian; historically rooted in *grands récits* about the superiority of "heart" (belief, intuition) over "reason", about collective identity with assertions of its preeminence over individual choice. The state and its commands are supposed to have absolute priority over individual rights and interests since the state represents and defends the collective interest, while individual reason is supposed to be too weak to grasp the entire web of social life and to critically assess it. "Disenchantment"[548] with state power can, in this sense, lead to its delegitimization in the Russian context—a concern that is consistently expressed by protagonists of the conservative legal philosophy in Russia. Thereby, the factual social structure (legal system inclusive) evades criticism and discards calls for change. At the same time, this logic provides for argumentation tools in situations of exception.

In the interplay of rule and exception that is common to all legal orders, exceptions from rules in Russian law usually are justified with reference to the social, cultural or sometimes the religious specificity of Russia, and finally to the sovereign power of the state. In this logic, the state is authorized to define this specificity and, also, Russian "limits of concession" to international standards. Argumentation from the standpoint of individual rational interests turns out to be of secondary relevance at best or irrelevant—even if formally they are cited in some court decisions. Viewed from this angle, the discussion about "margins of appreciation" predictably leads to the issue of sovereignty, this term in Russian legal parlance being applied to a wide range of phenomena and utilized with various adjectives (*e.g.*, cultural sovereignty, language sovereignty or even "alimentary sovereignty", etc.).

We concluded Chapter 1 with the proposition that decisionist elements in Russian law are based on similar methodological premises as in Western legal culture but that their intellectual contexts differ. This difference was

548 In terms of Max Weber's *Entzauberung* which refers to the modern style of thinking that demystifies the world and renders it transparent, removing theological and supernatural accounts and putting faith in the ability of science to explain the world in rational terms.

illustrated in Chapter 2 by the reasoning of Chief Justice of the RF Constitutional Court Valerii Zorkin. Zorkin explicitly builds his theory on a conservative social philosophy. This philosophy leads to a rejection of the alleged individualism of Western legal culture (or what Zorkin condemns as such "individualism") in which the idea of human rights is rooted. This traditionalist conception of human rights is not meticulously elaborated in Zorkin's writings, but its reconstruction provides an interesting perspective from which to evaluate the dualism of Russian legal thinking and the role of conservatism in shaping of the theoretical foundations of Russian law.

We argued that, in his conservative philosophy, Zorkin combines two perspectives of law. On the one hand, he endorses statist positivism which presupposes that the sovereign power of state is the source of rights and the supreme criterion of the validity of all legal rules and principles. Unsurprisingly, this positivism leads Zorkin to a dualist account of the relation between international and domestic law (existing as two independent systems) and, consequently, to the denial of the universal and absolute character of human rights. On the other hand, Zorkin is well aware that consistent positivism precludes judges from checking the validity of legal norms and principles from the standpoint of supra-statutory criteria of justice and the like; the power that belongs to his Court and that he is reluctant to give away.

Considering the Russian Constitution as a "living instrument", he argues that the living substance in each constitution unveils its continued and variable relevance for maintaining the social order. Therefore, "living constitutions" (understood as tools of social control) are based on values and mind-sets which, generally, are accepted in corresponding societies. This suggests to Zorkin that constitutions be considered as statements of national distinctiveness; that preference be given to the social whole over the individual. In this conservative logic, distinctiveness is produced by the organic development of each country and touches not only on cultural but, also, on political and legal aspects, excluding subordination of domestic law to universal standards.

Zorkin's starting point is the well-known conservative logic, pursuant to which the loss of distinctiveness in any of the existentially important spheres—including that of legal regulation—may cause death for a nation. From this perspective, Zorkin unleashes his merciless criticism of globalization and its effects in the legal sphere. Among such effects he counts the idea of the universality of human rights which undermines the principles of law-and-order and legality, threating to bring national legal orders into chaos. Rights cannot be interpreted and protected in the same way in different countries precisely because of the national distinctiveness of each country. There are no universal legal principles that would be equally valid in every country. That is why legal universalism not only is theoretically unwarranted but, also, poses an existential menace to national law. Constitutional judges must be the final instance in defining which norms are valid in the Russian legal order and which are not. In this sense, they act as guardians of the "living constitution".

In his numerous publications, the Chief Justice rejects the idea that human rights can be universal, considering conceptions of universality to be products of postmodernist, globalist and multiculturalist discourses that are unacceptable to Russian society and the Russian state.[549] He justifies this criticism by contending that the inviolability of sovereignty—invariably interpreted, in terms of Westphalian sovereignty, as absolute and perpetual power—must remain unchecked if it is really sovereign power.[550] In order to create legal (*i.e.*, binding) norms and principles, the political power must be sovereign; in other words, sovereign is the one who is unchecked by any norms or principles over which this power has control (in terms of exception-making). If state power ceases to be sovereign, it cannot maintain law-and-order (*pravoporiadok*) and no longer is state power properly speaking. Political entities that are not sovereigns (such as international organizations and supranational courts, NGOs, etc.) can neither create binding norms and principles nor challenge the power of the state to create legal norms. The validity of such norms and principles only is derived from the state's acceptance thereof. From this standpoint, any ideology which attempts to dissolve this system, and prioritize supranational legal regulation, will be considered to be destructive for law-and-order. This set of arguments became Zorkin's main analytical tool against the universalizing human-rights discourse and international criticism.[551] But the issue of human rights turned out to be more complicated from a practical perspective.

Following the statist positivism, Zorkin feels himself on the safe road and concludes that legal norms and principles only are created by the state; or, at least, need to be recognized by the state. There can be no superior authority (*i.e.*, the international community) above the state that might overrule legal commands issued by the state or invalidate them. The Westphalian sovereignty which lies in the foundation of Russian constitutional order is not compatible with universal human rights, as it cannot tolerate superior instances imposing legal rules and principles on states. On the other hand, human rights are established in the 1993 Russian Constitution with the status of supreme values standing above positive legal rules (Art.18, RF Constitution), and—as Russia acknowledged that the ECHR and other treaties ratified by Russia are integral parts of its law (according to para.4 of Art.15, RF Constitution)—human rights are directly applicable in Russian courts of law. However, taken as *ius cogens*, human rights conceptually undermine the perspective of legal positivism.

Here, Zorkin faced a dilemma. Human rights are not universally binding in the sense that there is no instance to check state authorities and prevent them from encroaching on human rights. The RF Constitutional Court has the right to repeal federal laws in case they contradict the Constitution and, in particular, if they violate human rights—including those which are

549 Nussberger, *op.cit.* note 95.
550 Antonov, "Theoretical Issues of Sovereignty in Russia", *op.cit.* note 369.
551 Zorkin, *op.cit.* note 24.

not mentioned in the Constitution (Art.55, para.1) or those established only in international law (Art.17, para.1). Therefore, human rights are crucial for the institutional survival of the RF Constitutional Court, in its present form, and are one of the main tools for maintaining and expanding the symbolic power of this Court, its legitimacy. At the same time, human rights are potentially dangerous for the existence of this Court and for the entire Russian state because of possible subjugation to supranational organizations and to the international community which can use human-rights narratives for criticizing the state authorities and, thereby, undermining their legitimacy. In this latter aspect, Zorkin is anxious that human rights not become a Trojan horse for international law insofar as their direct application can mean that national law is subordinated to international law; that the validity of national law is dependent on its congruency with international principles and standards.

At first sight, it seems that Zorkin found an easy way to solve this conundrum. Only after implementation into national law can human rights acquire legal validity and become a part of the national legal order. Before such positivation, human rights are simply a part of some extralegal ideology and are not directly binding on the state. To a certain extent, this interpretation coincides with the Soviet perception of human rights as a part of the "bourgeois ideology"[552] as argued by Professor Tumanov and numerous other Soviet legal scholars. For Zorkin, before being defined by the competent national court or introduced into national law by its legislation (including the Constitution), human rights serve only as a morality of the law (in the sense of "positive morality" as John Austin called norms of international law) but not as law properly said; to wit, not something that is posited and, therefore, binding. Still, in order to be utilized as arguments for repealing federal laws through constitutional justice, human rights need to be defined. This power of definition must, in Zorkin's opinion, belong to national courts.

However, granting to ordinary (non-constitutional) national courts the power to define human rights and decide on their applicability against the posited law can be dangerous. This can lead to a difference of opinion between courts (which, in fact, happened in the mid-1990s between the RF Constitutional Court and the Russian Supreme Court about the direct application of the Constitution by ordinary judges) and, therefore, to the factual disintegration of "sovereign will". This is the scenario Zorkin seeks to escape by conferring upon his Court the exclusive power to define human rights and decide about their prevalence over federal laws.

Employing Schmittean language, one can sum up Zorkin's position: the Constitutional Court is the only "Guardian of the Constitution" who can decide on exceptions from legislative rules and from international law.

552 Vladimir A. Tumanov, *Contemporary Bourgeois Legal Thought: A Marxist Evaluation of the Basic Concepts* (Progress Publishers, Moscow, 1974).

In other words, this Court works as a normative gatekeeper which does not let in pernicious normative elements from the outside (or from inside via regional authorities or political opposition) and puts an end to internal normative discrepancies. The justification is rather trivial: there can be no nation without common values and no country without laws protecting these values, no law-and-order without sovereign state power keeping the country together and enacting binding laws. In this logic, in case of a conflict with constitutional law (which expresses the "living constitution"), human rights will be put on the back burner by constitutional judges for the sake of survival of the entire society, no matter what the wording of the Constitution may be about their prevalence.[553]

The theoretical framework of this conception makes clear that all the solemn declarations about fidelity to human rights and about their direct effect notwithstanding, in fact human rights work in Russian law rather as the "morality of law' providing only orienteers for developing national law; not as direct legal instruments for defending freedoms and for compelling the state to observe them.[554] Several important cleavages between the ECtHR and the Constitutional Court have developed in recent years underscoring this problem. Such cases as *Markin*,[555] *Anchougov*[556] or *Yukos*[557] have shown that international human-rights treaties and ECtHR jurisprudence do not, in fact, have direct effect in Russian legal system: their application only can be allowed within limits formulated by the RF Constitutional Court (sovereignty, traditional values, etc.). Zorkin's discussions pertaining to these cases are illustrative of the consequences of this conception for legal practice. In this connection, one of Zorkin's main theoretical challenges has been to insulate his Court and his country from international criticism for disobeying not only international law but, also, the spirit and the letter of the Russian Constitution itself.

For this effect, Zorkin emphasized the "civilizational argument" referring to a specific legal culture and to traditions in Russia that, presumably, differ from the Western ones. If international-law norms and their interpretations contravene so-called traditional (or constitutional) values, judges may give preference to national law in which these values are embodied or, even better, turn to the foundational narratives relying on the idea of

553 See, *e.g.*, Zorkin, "The Essence of Law", *op.cit.* note 81.

554 Most of the citations to ECHR and to the jurisprudence of the ECtHR were clearly decorative, with no real value for reasoning of Russian courts. See Burkov, *op.cit.* note 321.

555 *Op.cit.* note 176; ECtHR Judgment *Markin v. Russia* (Grand Chamber) (22 March 2012) Application No.30078/06; and RF Constitutional Court Ruling (6 December 2013) No.27-P, *op.cit.* note 176.

556 ECtHR Judgment *Anchugov and Gladkov v. Russia*, *op.cit.* note 177; and RF Constitutional Court Ruling No.12-P, *op.cit.* note 177.

557 ECtHR Judgment *Yukos v. Russia* (31 July 2014) Application No.14902/04; and RF Constitutional Court Ruling (19 January 2017) No.1-P.

organic development.[558] It was exactly this legal romanticism and conservatism that Zorkin employed in his diatribes against the ECtHR in order to explain the reasons and criteria of the conservative interpretations which his Court gives to Russian federal laws and to Russia's international treaties. With this, he defended the exclusive right of his Court to decide about exceptions and, in doing so, eliminated the direct effect of the Constitution and of international law.

The next Chapter in this work ("Conservatism in Russia and Sovereignty in Human Rights") examined the foundational narratives about state sovereignty and their conceptual relation to conservatism and the interpretation of human rights in Russian law. In this Chapter, we argued that the move of Russia from the enthusiastic acceptance of human rights in the early 1990s to more reserved attitudes toward these rights in the 2000s can be explained through the prism of the normative incongruence of human rights with the basic conceptual premises of Russian law. Once incorporated into Russian law, human rights took the form of high ideals remote from the practice of Russian law. When it turned out that human rights are not only about lofty words but, also, impose positive obligations on state authorities and sometimes require that the respective societies reconsider their mind-sets and values in such sensitive issues as LGBT rights or freedom of expression, the normative incongruence between human rights and the conservative narratives became ostensible.

As we demonstrated in Chapter 1, from the formalist standpoint, human rights cannot become binding unless they are transformed into commands of the sovereign and, especially, they may lose their validity if at any moment they contradict the sovereign's will. In the decisionist perspective, international treaties, constitutions, laws and any other legal texts do not determine court decisions and, rather, only provide frames of reference for justifying decisions taken by judges discretionally and/or under influences of various sorts. Neither of these perspectives compels the state and its agencies (the judiciary inclusive) to unswervingly observe and protect human rights.

To understand this incongruence, our analysis turned to the context of Russia's legal development during last three decades. The breakdown of Soviet rule was accepted by many in Russia with enthusiasm. In the beginning of the 1990s, the main legal provisions of the Russian legal order were enacted formally creating a new normative framework.[559] Among these laws is the 1993 Constitution, seen by its authors as a continuation of Russian liberal constitutional acts of the early 20th century (the 1906 Basic State

558 See the manifesto of this Kremlin's ideology "National Identity and the Future of Russia," *Valdai Discussion Club Report* (February 2014), available at <http://vid-1.rian.ru/ig/valdai/Identity_eng.pdf>.

559 See Ferdinand J.M. Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law* (Martinus Nijhoff Publishers, Dordrecht, The Netherlands, 1993).

Laws).[560] There were no conceptual problems in relating the new legislation with human-rights discourses as long as the judiciary could stick to the literal interpretation of these laws and, at the same time, remain true to their spirit; to the liberal values enshrined in these laws. However, after Putin's coming to power in 2000, the political trends and objectives began changing quite significantly, marking a propensity to authoritarianism and isolationist attitudes.[561]

For some important practical reasons, no attempts have been made by the Russian political authorities to change the liberal wording of the 1993 Constitution, even if there are many voices insisting that the liberal constitutional provisions must be abrogated or amended. It easily explains itself: touching upon the fundamentals of the constitutional order and bringing any substantial amendments into the RF Constitution through convocation of a Constitutional Assembly could be fraught with unpredictable outcomes (it would have been the first convocation of such an Assembly under the 1993 Constitution). So, the political strategy employed during in the last years has been to change the interpretation without changing the words of the Constitution;[562] similar to the living constitutionalism in the US and other countries.

This brought a performative contradiction into the Russian legal system. From the formalist standpoint, the enacted rules (the posited law) shall prevail and judges have to apply the law and only the law (the principle of legality). Meanwhile, political objectives in effect prevail over formal rules and create factual constraints for judicial decision-making (the principle of expediency).[563] This tends to limit the rights of minorities (religious, political, sexual, etc.) with references to the political expediency of protecting sovereignty, maintaining traditional values, or evoking other similar reasons. As a result, such objectives—and the conservatism underpinning them—collide with the liberal values enshrined in the formal norms of the

560 Andrey Medushevskii, *Russian Constitutionalism. Historical and Contemporary Development* (Routledge, London, 2006).

561 The ideological rationale was that democracy, human rights and other Western liberal values can be utilized to undermine the Russian sovereignty and lead the Russian people astray. See, *e.g.*, Viacheslav Morozov, "Western Hegemony, Global Democracy and the Russian Challenge", in Christopher S. Browning and Marko Lehti (eds.), *The Struggle for the West: A Divided and Contested Legacy* (Routledge, London, New York, NY, 2010), 185-200.

562 With all necessary reservations, this situation can be compared with that of Germany in 1930s when the German lawyers re-interpreted the Weimar laws in the way to fit them to the new ideology (so called "*Rechtserneurung*"). See Karl Larenz, *Deutsche Rechtserneuerung und Rechtsphilosophie* (J.C.B. Mohr, Berlin, 1934).

563 This modality implies rather the pragmatic choice. In Russia, as in some other civil-law countries, the judiciary is dependent both on the executive power (the Ministry of Justice that provides material resources to courts) and on the presidential power that decides on appointments and on promotion of judges, so that pragmatically judges have all reason to avoid conflicts with these powers and, therefore, not to contravene the political objectives of these powers.

Constitution. This situation puts the RF Constitutional Court in an ambiguous situation where it has to bring its interpretations in line with the political objectives without losing face and without completely abandoning the wording and the spirit of the Constitution.[564]

At face value, the conservative philosophy employed by the Constitutional Court—collectively in its decisions and individually in the writings of its justices—often repeats the ideas of German and French conservative romanticism of the 19th century developed in Russia in the 19th century[565] and by such exiled philosophers of the 20th century as Ivan Ilyin or Nikolai Berdyaev,[566] among others. Basic constitutional principles such as the supremacy of human rights, the prevalence of international law, the values of democracy or rule-of-law, formally remain parts of valid Russian law. Yet, gradually they are being interpreted contrary to the literal text of the Russian Constitution and, also, to the initial interpretations of the Constitution by Russian courts in the 1990s. Practically, this situation now means that courts are motivated to depart from the literal meanings of legal texts and invest meanings in them that do not correspond either to their literal wording or to the intent vested in these laws by their authors (*i.e.*, in the early 1990s). Predictably, this development reshuffles the balance between the formalist and the decisionist elements of Russian law.

In this context, it unsurprisingly conflicts with the idea of human rights imposing normative limits on state power and, in turn, excluding for this power the unbridled possibility to make exceptions from universally recognized standards of freedom and non-discrimination. As such, sovereignty in the Russian conservative legal discourse is conceived as an integral component of traditionalism. In present-day traditionalist interpretations of sovereignty, it is called upon to resist multiculturalism and globalism of contemporary Western legal discourse and is a *conditio sine qua non* for maintaining "normal" social order. This theoretical scheme is cemented by a trivial chain of ideas: it is only living in a society that one can become a human being; no contemporary society can exist without a state; rejecting

564 See an important analysis by William E. Pomeranz, "Uneasy Partners: Russia and the European Court of Human Rights", 19(3) *Human Rights Brief* (2012), available at <https://www.wcl.american.edu/hrbrief/19/3pomeranz.pdf>.

565 Alexander M. Martin, *Romantics, Reformers, Reactionaries: Russian Conservative Thought and Politics in the Reign of Alexander I* (Northern Illinois University Press, De Kalb, IL, 1997). It is quite common for Russian thinkers to find the specificity of Russian legal philosophy in this kind of holist and traditionalist discourse. See Pavel Nowgorotzeff, "Uber die eigentumlichen Elemente der russischen Rechtsphilosophie", 2 *Philosophie und Recht* (1922/1923).

566 President Putin has mentioned Ilyin, Berdyaev and some other conservatively minded philosophers in his presidential addresses in 2013 and 2014 as well as at some other occasions. See an interesting discourse-analysis of Putin's references to Russian conservative philosophers by Michel Eltchaninoff, *Dans la tête de Vladimir Poutine* (Solin/Actes Sud, Arles, 2015). The role of the pre-revolutionary Russian conservative philosophy for the formation of the current Russian ideologies has already been underscored by Western scholars: *e.g.*, Bowring, *Law, Rights and Ideology in Russia*, *op.cit.* note 35.

state-created legal norms undermines the social order and leads to destruction of humanity; therefore, state legal norms are absolutely binding and cannot be trumped by any other reasons or values.

To be sovereign in the prevailing Russian legal parlance implies standing above the law. This language use is apparent in the exceptionalist rhetoric based on the sovereignty argument: being bound by any limitations—be they human rights or universal legal principles—would mean that the state is not sovereign and, therefore, no longer is a state. This approach is even more radicalized than those proposed by Jean Bodin or by Thomas Hobbes. Both accepted that, even having absolute power, the sovereign is subject at least to divine law and natural law. "Sovereign"—in the Russian official legal parlance of the Constitutional Court and, eventually, of other courts—implies that no checks or limits may be imposed upon sovereign power. In this Schmittean logic, the state is enabled to do whatever it wants to do—above international law and other supra-statutory rules and principles—and to transgress its commitments as this ability to act above rules is precisely what makes a power "sovereign".

The poly-semantic use of "sovereignty" and the specific understanding of the concept of state (*gosudarstvo*) in the Russian legal culture add to this ambiguity. Unlike the Western linguistic meaning of the term "state" (the impersonal system of political power), in Russian language *gosudarstvo* indicates the personality of ruler (*gosudar'*)[567] and, in this aspect, is closer to the Antique understanding of *politeia* or to the concept of autocracy (*samoderzhavie*). "Sovereign" is conceived primordially as a holder of autocratic power who stands above limitations. This linguistic aspect may explain why, in the Russian context, sovereignty is taken to be tantamount to the unlimited character of power. To the extent "sovereignty" coincides with the supreme and independent political power (*summa potestas*), there is no cognitive dissonance for Russian lawyers. In this light, the state and its agents are not subject to the legal control of other powers, and their actions remain unchecked—unless they themselves confer the power upon state courts to control their actions. But when the question comes to the limits of their power that are marked by absolute and inviolable rights, this obviously leads to a dissonance—representing such human rights as a threat to sovereignty.

If humans may have some *rights* inherent from the *moment* their lives begin, in the positivist perspective it implies that these rights are incorporated into the state legal order, and only due to this fact are these rights legitimated and validated as *legal* rights. This conception of human rights matches both the Westphalian conception of sovereignty and the philosophy of conservatism. The former implies that the state is a last resort; deciding which rights its citizens may have. According to the latter, each state is free to endorse the rights which it finds acceptable, while the cosmopolitan

567 Oleg Kharkhordin, "What is the State? The Russian Concept of Gosudarstvo in the European Context", 40 *History and Theory* (2001), 206-240.

idea of universal rights—identical for all human beings—is destructive for society. If each country, each culture, and each civilization have their own standards of legality and legitimacy, it may decide to what extent it would (or would not) incorporate into its legal order (*i.e.*, validate) the values and norms which pretend to be universally recognized. These conclusions, in turn, seem to be rooted in a particular social philosophy which relies on a Hobbesian picture of society in the state of *bellum omnium contra omnes*, where dispersed individuals can be tamed and peace can be secured only by an almighty Leviathan. If the state falls apart, it will lead to destruction of society.

The concept of sovereignty in Russia is mainly understood in the Westphalian sense and even more particularly, depending in which pole of the tension between formalism and realism it is employed. Taken to the letter, it means that political power-holders have no normative limitations whatsoever. Here we notice the striking proximity of this conceptualization of sovereignty to decisionism: whatever competent bodies decide about the rights of citizens will be correct. The only remedy here is to appeal against such decisions within the national court system. In the Russian case, this system is headed by the Constitutional Court which considers itself to be the last instance to express and, eventually, to change the sovereign will. From this perspective, one gets more clues for interpreting the recent disputes between the RF Constitutional Court and the ECtHR. While the latter insists on the universality of fundamental human rights, the former warns that human rights can be utilized as a pretext for the interference of international organizations in the sovereign affairs of Russia. As these interferences are justified by the universal character of human rights, the natural reaction of the Constitutional Court is to keep its sovereignty shielded from such interference and to reject the universalism of human-right discourses.

The relativist argumentation—based on the presumption of cultural distinctiveness and organic development of every nation—comes as an expected conceptual rejoinder to universalist claims. In this context, a conservative philosophy effectively works as a conceptual ally of the doctrine of sovereignty. The latter is employed to strengthen the formalist element of Russian law (statutes adopted in the name of the sovereign are binding and do not tolerate competition with other sources of law, such as international principles, human-rights standards, and so on) and to promote the decisionist element (acting as sovereign agents on behalf of the people—the supreme bearer of sovereign power—political authorities can find better ways to implement the public interest as it is established by constitutional or statutory law). The logical conflict between these two elements is, thereby, practically solved through a balancing of sovereign power by the political leadership either in favor of legality (the formal requirement to abide by legal rules) or of exception (the prerogative power of exception).

This ambiguous attitude toward human rights—their formal acceptance and, at the same time, their factual rejection as checks on the state and on its sovereign power—was examined in Chapters 4 and 5. In Chapter 4

("Religion, Sexual Minorities and the Rule of Law in Russia: Mutual Challenges"), we turned to the specific understanding of rule of law which in the Russian context often is equated to legality (*zakonnost'*). Legality in Soviet law meant the uniformization of the application of the law and fidelity to its letter. The formalism that is at the foundation of this legality in Russian (and, previously, in Soviet) law hinges on the requirement that sovereign will must be executed to the letter. More complicated situations arise when there is a discord between sovereign will as it is expressed in statutory law and as it is expressed by state authorities and their representatives *ad hoc* relating to concrete high-profile cases. This problem was outlined in Chapter 1 with reference to "telephone law' and similar phenomena in Soviet and contemporary Russia. The case of sexual minorities can serve here as a paradigmatic example, and in Chapter 4 we tried to develop this analysis and illustrate it with some examples taken from case law.

Chapter 4 analyzed the cultural constraints that are factually imposed on actors in the Russian legal system by the prevailing conservative philosophy, this analysis being continued also in Chapter 5. Judges and other law-enforcement officials are subject to social pressure which in Russia, as in many other countries, is hostile to sexual minorities. In the light of the dichotomy between the formalist and the decisionist sides of Russian law, judges frequently face the dilemma of choosing between the legal requirement of equal protection and the prevailing social morality that denies equal protection to sexual minorities. The principle of legality can, therefore, require from judges two contradictory actions at the same time: to protect rights to the letter of the posited law and not to protect these rights because of the prevailing communitarian mentality that is supported and promoted by the state. Both actions can, to a certain extent, be congruent with the requirement of *zakonnost'*, while this latter can serve as an "empty signifier" in the Lacanian sense either for the lawful or for prerogative use of sovereign power.

Additionally, judges may experience the pressure of public opinion which, predominantly, shares these conservative opinions about gender and the family. In contemporary Russia, these opinions largely are imposed by the Russian Orthodox Church. Thereby, religious canons and dogmas can, indirectly, sneak into the legal system (as was illustrated by the 2012 *Pussy Riot* case) albeit formally secular and separated from the Church (Art.14, RF Constitution). This brings us back to a more general perspective of the fundamental mechanisms of legal regulation in Russia, and to the difference between law in books and law in action—between the letter and the spirit of law—as they are understood in Russian legal theory. In its turn, this difference can be easily grasped in terms of the dichotomy of the formalist and decisionist elements of law, as suggested in the present work.

The linguistic difference between *zakon* (the law, *loi*, *Gesetz*, *de wet*) and *pravo* (law, *droit*, *Recht*, *rechten*) is surely common to many Western languages and legal systems, but the specificity of Russian language usage is that—due to historical convolutions—*pravo* was not associated with

doctrines of natural law, social contract, common good, with the idea of rule-of-law or with other formulations of ideals of social or political justice. Historically, as opposed to official law, *pravo* referred rather to customary law. In Russian realities, this did not mean that *pravo* was necessarily better than *zakon* as far as the protection of individual rights is concerned. Rather, to the contrary, customary law—backed by the prevailing Orthodox religion and retrograde social tradition—favored communitarian values and tended to underplay individual rights and freedoms.[568]

In fact, *pravo* frequently is perceived by many Russians as something pertaining rather to morality or custom than to a legal order.[569] Consequently, the law (*zakon*) and morality are often seen as detached from each other, with informal moral and religious commands normally standing above official legal norms.[570] Harmonization of *pravo* and *zakon*, finding their ideal synthesis (a kind of natural law) never was the first issue on the agenda of Russian legal philosophers. For such Russian conservative think-

568 An illustrative example can be seen in a mid-2010s presentation of Chief Justice Zorkin devoted to the 1861 abolition of servitude (*krepostnichestvo*). He suggested that "servitude was that spiritual buckle that maintained the unity of nation" and, in this sense, that abolition undermined the fundamentals of the legal order and was, after all, against the living law of the Russian Empire. Zorkin, "Sudebnaia reforma Aleksandra II", *op.cit*. note 151.

569 The ideas of Ivan Ilyin, one of the legal philosophers the most cited by the Russian authorities, are very representative for this rupture. Symptomatically, Ilyin draws a distinction between a "correct" legal consciousness based on conservatism, morality and religion (this consciousness leads to the contemplation of *pravo*) and a "formalist" legal consciousness that considers only the posited, rationalized law (*zakon*) and, therefore, gives no clues to understanding what law is. This idea was developed by other influential legal philosophers such as Vladimir Soloviev or Nikolai Berdyaev. In Soviet jurisprudence, Stuchka proposed differentiating between the "general" legal consciousness (it reflects the social structure and, therefore, is correct) and the "concrete" legal consciousness that people, based on statutory law, can have about their rights and obligations. This latter consciousness is not "objective" and, therefore, can be wrong.

570 See an analysis of the language use concerning the term "*zakon*" in Russian legal scholarship of the 19th century by E.G. Luk'ianova, *Uchenie o zakone v russkoi iurisprudenstsii* [Uniderstanding Law in Russian Jurisprudence] (Moscow: Norma, 2014). As shown by Professor Zolotukhina, after the acceptance of Christianity by Russia in 988, the term "*zakon*" received sacred meaning: the laws of God, the laws of the Old and New Testaments. The word "*zakon*" was not taken out of its former connotation but was accorded additional characteristics relating directly to God: verity, justice, eternity, and infinity. Meanwhile, the term "*pravo*" was not included in the vocabulary of the entire Russian Middle Ages. Its appearance is associated with the spread of the theory of "natural law" in Russia. N.M. Zolotukhina, "Srednevekovye mysliteli Rossii o pravde, zakone, spravedlivosti, istine i blagodati" [Medieval Russian Thinkers on Truth, Law, Justice, and Grace], 13(2) *Trudy IGPAN* (2018), 102-142. As narratives about Russia's golden past frequently refer to the premodern era (prior to the reforms of Peter the Great), this semi-religious connotation of "*zakon*" endows it with prevalence over "*pravo*" and, at the same time, opens the way for reconstruction of statutory law (*zakon*) not only in accordance with its literal meaning but, also, against the backdrop of societal and occasionally religious values considered to be "traditional" to Russia.

ers as the Slavophiles, Dostoevsky, Tolstoy or Solzhenitsyn, the primary concern was to the contrary: how to protect moral and religious convictions against the decaying effect of rationalized law? One can mention, here, the famous idea of the Byzantinist Nikolai Danilevsky to "freeze" Russia in order to save it from putrefying Western liberalism. In his 1897 *Opravdanie dobra*, Vladimir Soloviev famously tried to justify law (*pravo*) as a "minimum of morality"—prioritizing the substantial value of morality in law and discarding the formal value of the posited law for societal regulation. This prioritization became the stumbling block in the debates between Soloviev and Boris Chicherin at the end of the 19th century. These philosophical connotations can be seen as some of the reasons why the political regimes believe moral and religious commands may trump the literal meaning of legal enactments or international legal obligations; there is no conceptual discrepancy if it is accepted that *pravo* stands above *zakon*.

The law is often formalistically considered by Russian lawyers as a closed system. Thus, when it collides with morality or religion, the task before the judge will be, at best, to choose between them; not to reconcile them. In positivistic doctrine, *pravo* does not have the same binding force as *zakon* and must cede to *zakon* in case of a conflict. But in certain situations, *pravo* can gain the upper hand and work against the rational disenchantment of the world (Max Weber). In these situations, the defenders of *pravo* can invoke fundamentals of social solidarity, century-long traditions, *Volksgeist* and similar frames of reference to resist the rationalization of legal regulation. When a question arises about sexual minorities and protection of their rights, the dialectics of *pravo* and *zakon* can suggest that even if the formal posited law (*zakon* in the broad sense, including ratified international treaties), goes against the prevailing sense of justice (associated with *pravo*), this latter shall prevail. This dialectic was analyzed in Chapter 4 through the prism of several decisions of the Constitutional Court and the Supreme Court based on the proposition that perversions and socially dangerous practices (LGBT and others) may not be protected under the banner of human rights.

This contrast between *pravo* and *zakon* can, in fact, be traced in a number of aspects of Russian law, including the protection of human rights. If human rights collide with state sovereignty or individual rights collide with communitarian morality, the choice between them might involve the philosophical perspective of *pravo* and *zakon*. If preference is given to *pravo*, in the Russian context this normally can either encourage disrespect of *zakon* or justify the strict application of *zakon*, without inciting discussions about the "best fit" to reconcile individual freedom and the collective interest. In this light, when constitutional justices depart from the statutory law (*zakon*) reasoning about *pravo*, it does not mean that rights will be better protected when statutory law is overridden with such references to *pravo*. This terminological equivocality reflects the inner rationality of Russian law and, in particular, the balance of the formalist and realist elements, as suggested in the present volume.

The last Chapter of this work ("Religious Beliefs and the Limits of Their Accommodation in Russia: Some Landmark Cases of the Russian Supreme Court") was an analysis of case law of the Russian Supreme Court from a similar perspective. Referring to several widely discussed examples, we studied how this Court prioritizes rights of the traditional religious denominations and denies equal protection to religious minorities in analogous situations—despite the formal constitutional and statutory anti-discriminatory guarantees. This Chapter dealt with the same theoretical divide between "law in books" and "law in action" discussed in previous chapters. Law in books establishes the equality of religious organizations before the law, while law in action prioritizes Orthodoxy, a state-friendly Islam, and a number of other traditional confessions—restricting or even banning other confessions.

This divide confirms the concealed theoretical dualism between formalism and decisionism, and shows the conceptual significance of conservative philosophy for their reconciliation. The mentioned contradiction between anti-discriminatory laws and their discriminatory application is reconciled through the foundational narratives based on a conservative philosophy. This latter can compatible both with legalistic formalism and nihilistic decisionism and, therefore, is able mitigate the conceptual conflict between them.

The logic of exception, as described above, is illustrated by the choice of the applicable norms and principles in the case law on protecting religious freedoms. Relying on the formalist approach in ordinary cases where rights of followers of non-traditional religions are at stake, courts are reluctant to re-evaluate or reinterpret rules of prohibitive laws (such as anti-extremist legislation) from a viewpoint of reasonability, justice, or other non-formal criteria. Statutory laws, in such ordinary cases, are likely to be applied with inexorable strictness—sometimes, even contrary to common sense.

If there is no statutory law on certain religious matters, courts will simply refuse to protect non-traditional believers despite the possible unreasonableness of the results that can flow from such an approach. This fact was observed in a number of judgments of the ECtHR on religious freedoms in Russia. In such judgments, the ECtHR analyzed how Russian courts maintained fidelity to the letter of the 1997 Law on religious freedoms without taking account of the absurdity of applying the formal rules to the letter in certain concrete situations.[571]

The literal wording of anti-extremist legislation leaves to the Russian Supreme Court no choice in subsumption: if a religious denomination insists on its spiritual excellence over other denominations and, in this sense, falls under the category of "extremism"—understood as propaganda of national or religious superiority over other religious groups—it shall be banned. This literal approach was followed in the controversial 2017 *Jehovah's Witnesses* case in which this large religious denomination was banned

571 *E.g.*, the 2010 ECtHR Judgment *Jehovah's Witnesses of Moscow v. Russia*, *op.cit*. note 18.

from Russia. Quite evidently, the same subsumption can be made for any other confession—including Orthodoxy. But, in these cases, the Court adopts other strategies for interpreting the law.

Here again, the interplay of rule and exception—of legality and collective interest—comes to the fore, and makes the entire legal situation much more complicated than a simple formalist subsumption or ideological control. In some cases where the interests of the Russian Orthodox Church or other traditional denominations have been involved, the Supreme Court went far beyond the literal meaning of the rules and turned to weighing and balancing rights and restrictions. Explicitly, it does not recognize the substantial difference in protecting "traditional" and "non-traditional" religions, insisting, to the contrary, that the protection is equal—even if the normative conclusions from its decisions blatantly contradict this thesis. Here, the Russian Supreme Court employs the style of legal thinking and reasoning that strikingly resembles the doublespeak and metaphysical style of the RF Constitutional Court.

The analysis undertaken in the present research demonstrates what can be seen as one of the major paradoxes of Russian law. The Russian state has endorsed a lengthy list of liberal norms and principles that do not fit the actual political objectives of the state but is unwilling to change or repeal these norms and principles. To mitigate this paradox, the Russian state (the judiciary inclusive) interprets them in plain contradiction to their original and literal meanings. Political developments in Russia (the rise of authoritarianism) shattered the previous liberal ideas about prevalence of human rights[572] that once inspired the authors of the 1993 Constitution. The actual normative state of affairs in Russian law shows the distance between the normative and the factual regulations; as legal realists would put it, between "law in books" and "law in action".[573]

This doublespeak in the official narratives touches upon the rule of law, democracy, non-discrimination, human rights, supremacy of international law and other pillars of the Russian constitutional order that are solemnly proclaimed but largely disrespected.[574] Russian courts continue this strategy of doublespeak and, formally supporting liberal constitutional principles, courts reinterpret them in a conservative sense generally reflecting the conservative moods prevalent among the population.

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572 We are aware of the multiplicity of possible meanings of the term "human rights" and, in this work, utilize it in the sense of the rights supported by the international community against potential abuses from the part of national states. For this understanding of human rights see Samuel Moyn, *The Last Utopia: Human Rights in History* (The Belknap Press, Harvard University Press, Cambridge, MA, 2010). In this way, human rights can be distinguished from civil rights and fundamental rights; the distinction which is ignored in the jurisprudence of the RF Constitutional Court and is largely neglected in Russian legal scholarship.

573 *E.g.*, Hendley, *Everyday Law in Russia*, *op.cit.* note 47.

574 See some comments on this doublespeak by Antonov, "Conservative Philosophy and Doctrine of Sovereignty", *op.cit.* note 458.

The present research had a modest task: to problematize this conceptual and methodological ambiguity of Russian law, and the role of the formalist and decisionist elements in it. Its author hopes that it succeeded in making a modest contribution to the discussion about philosophical aspects of Russian law and Russian legal culture.

Samenvatting (Dutch summary)

Formalisme, realisme en conservatisme in de Russische wet

In deze studie worden het formalisme en het decisionisme in het Russische denken geanalyseerd, evenals de invloed van conservatisme op het samenspel van deze beide elementen. De wijze waarop in Rusland rechten worden geconceptualiseerd geeft uitdrukking aan 's lands juridische specificiteit en meer in het algemeen: geeft mede vorm en uitdrukking aan de Russische cultuur. Deze studie onthult een eigenaardige combinatie van formalisme, decisionisme en conservatisme in het Russische recht. In de jurisprudentie wordt deze culturele eigenaardigheid regelmatig gebruikt ter rechtvaardiging van uitzonderingen die worden gemaakt op de grondwettelijke principes van non-discriminatie van politieke, religieuze, seksuele en andere minderheden.

Analyse van discussies over culturele verschillen geven zicht op deze bijzondere kenmerken van de Russische cultuur, en bieden meer specifiek zicht op de intellectuele habitus die in de (Sovjet-)Russische juridische opleidingen wordt overgedragen, en die ook thans de rechtswetenschap en de rechtspraktijk in Rusland kenmerkt. De historische en filosofische achtergronden alsmede de normatieve gevolgen van deze cultuur worden in dit proefschrift geanalyseerd; bijzonder onderwerp van studie zijn de heersende rechtsidee, de wijze waarop rechten worden verleend en—door die rechtsidee beïnvloed—de wijze waarop in de praktijk recht wordt gedaan.

In dit proefschrift wordt onderzocht wat de specifieke stijl van het juridische denken in Rusland is. Wordt het Russisch recht gekenmerkt door de (specifieke) wijze waarop rechten in Rusland worden begrepen? Wat zijn in dat geval de verschillen met de manier waarop rechten in andere juridische tradities worden begrepen? Er wordt gewezen op de kloof die bestaat tussen de wetstekst in Rusland en de interpretatie en toepassing daarvan. Russische rechters—in penumbra en lacuna zaken—beslissen soms in tegenspraak met de letter van de wet. Ter rechtvaardiging van zulke beslissingen verwijzen Russische rechtbanken soms—direct of indirect—naar grondkenmerken van en basisvoorwaarden voor de sociale orde, zoals (respect voor) verschillen in cultuur, de wenselijkheid van sociale cohesie rond bepaalde waarden, of naar het algemeen belang als richtlijn voor sociale ontwikkeling.

Conservatieve lezingen en interpretaties van deze grondkenmerken dienen zelf weer als bronnen voor verdere ontwikkeling van juridische principes. Als de wet zwijgt of als de wet onduidelijk is, of als de wet slecht lijkt te zijn (verouderd of te ingrijpend), zullen rechters handelen volgens die logica van het juridische system die er toe strekt met hun beslissingen het

sociale systeem te handhaven of te versterken. En zulk handelen (oordelen) met het oog op het handhaven of versterken van het sociale systeem—van de sociale orde—wordt ook van rechters verwacht.

Het onderzoek levert een aantal conclusies op. Een belangrijke conclusie is dat de (on)geldigheid van rechten in de Russische juridische cultuur voornamelijk wordt gerechtvaardigd met verwijzing naar gemeenschapsbelangen, meer dan naar individuele belangen. In mensenrechtenzaken kan deze van 'de westerse' afwijkende Russische lijn ook gedeeltelijk verklaard worden door een afwijkende waardering van (het relatieve gewicht van) individuele en collectieve belangen.

Men zou deze afwijkende waardering kunnen zien als een voorzetting van conservatieve vertogen van vóór de revolutie en van de latere Sovjetideologie betreffende mensenrechten. Anderzijds kan worden gesteld dat de overheersende Russische rechtstheorie is gebaseerd op een combinatie van formalisme en decisionisme, die de formele vereisten van legaliteit in overeenstemming zoekt te brengen met de behoefte aan handhaving van de sociale orde.

Deze dualistische juridische theorie sluit goed aan bij (eerdere) conservatieve vertogen, wat weer verklaart waarom een liberaal rechtsbegrip weinig opgeld doet in Russische rechtbanken (en in het algemeen in de Russische juridische denkwijze), hoewel individuele liberale rechten wel in de Russische Grondwet zijn opgenomen. De combinatie van formalisme en decisionisme leidt tot tegenstrijdigheden in de rechtstheorie, die worden 'opgelost' door een overkoepelend conservatief vertoog. Het Russische recht heeft zijn eigen logica—of zo men wil een gebrek daaraan—een eigen rationaliteit en traditie. Onderzoek naar (de werking van) het recht in Rusland dat alleen oog heeft voor de actuele politieke dienstbaarheid van het rechtsbedrijf doet te weinig recht aan de eigenheid—en ook de zelfstandigheid—van het rechtsbedrijf in Rusland. Ook toekomstige onderzoekers valt aan te raden het Russische recht (inclusief zijn theoretische tegenstrijdigheden) te bestuderen vanuit een ruimer (historisch) perspectief.

Curriculum Vitae

Mikhail Antonov (1973) studied law and graduated from the Saint-Petersburg State University (Russia) in 2000. In 2005 he obtained a Master's Degree in social sciences from Paris-V-René Descartes University. In 2006, he received a candidate of sciences degree in law from Saint-Petersburg State University, and since then has been teaching history of Russian legal philosophy at Law Faculty of Saint-Petersburg State University. From 2011 on, he is a law professor associated with the Law Faculty of the Higher School of Economics in Saint Petersburg. His research and teaching are focused on theory of law, comparative law and legal philosophy. Since 2011, in addition to his academic career, he practices as an advocate of the Saint-Petersburg Bar Association. In 2013 he was awarded with an Aurora Fellowship at Law Faculty of the University of Tartu (Estonia) where he was active until May 2016. Mikhail Antonov became an external PhD candidate at Leiden Law School of Leiden University where he conducted his research under the supervision of Professor William Simons. He was also a G.F. Kennan Fellow at the Woodrow Wilson International Center for Scholars (Washington, DC) in 2016, a Visiting Professor at the Institut d'Études Politiques d'Aix-en-Provence (France) in 2016, and a Humboldt Research Fellow at the Institute of Eastern European and Comparative Law of University of Cologne (Germany) in 2019.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2018 and 2019:

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