Formalism, realism and conservatism in Russian law

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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.