Formalism, realism and conservatism in Russian law

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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.

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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.

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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.

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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-

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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

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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.

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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

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

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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,

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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

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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]

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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.

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

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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

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.