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Formalism, realism and conservatism in Russian law

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

Foreword

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

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

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

284 *Ibid.*, 420.

285 *Ibid.*, 459.

286 *Ibid.*, 458.

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

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

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

287 *Ibid.*, 457.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

305 *Ibid.*, 345ff.

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

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

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

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

307 *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

327 *Ibid.*, 418.

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

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

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

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328 *Op.cit.* note 176.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 The Philosophical Background of Discussions on Sovereign Democracy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

375 *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

384 *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

5 The Roots of Exceptionalism in Russian Social Philosophy

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

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

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

393 *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

406 We admit that that the contemporary Russian conservative ideologists around Putin are not fully aware of this connection with the Slavophiles or fail to understand all its implications (like those formulated by Aksakov (see footnotes 403 and 404 above)). After President Putin's Fall 2013 Valdai Speech (*op.cit*. note 392), political analysts intensively began analyze this connection. *E.g.*, the right-wing political analyst Anatoly Stepanov in his 2013 on-line publication "*Ideologiia razvitiia nevozmozhna bez opory na traditsiiu*" [An Ideology of Development Is Impossible Without Reliance on Tradition], available at <http://ruskline.ru/analitika/2013/10/16/ideologiya_razvitiya_nevozmozhna_bez_opory_na_tradiciyu/>, in which characterized this speech as "a prologue to formulation of a state ideology" and offered thirteen "postulates" explaining why this new state ideology must necessarily be based on the philosophical tradition of the Slavophiles and other Russian conservative thinkers of the 19th century.

In his remarks, Stepanov even came up with a proposal to create a Slavophile party ("a neo-Slavophile popular movement") based precisely on the theses of Putin's Valdai Speech. A Round Table was held in Moscow, on 15 October 2013, where this proposal was accepted and "the participants of the Round Table found it necessary to inform the RF President Vladimir Putin about their intention to set up a popular movement which will be able to help the President to carry out his objectives", available at <http://ruskline.ru/news_rl/2013/10/18/sozdat_dvizhenie_russkih_tradicionalistov/>.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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