# Formalism, realism and conservatism in Russian law

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

## Foreword

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

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

## Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 1 Contestation of Rights through Religion

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

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

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

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

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

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

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

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

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

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

## 2 Traditional Values versus Posited Legal Rules in Court

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This stratagem can be seen as a way to equilibrate Western moral and legal standards—to which Russia has subscribed through numerous international declarations and conventions—with the prevailing sense of what is just and normal in Russian society (from the standpoint of the majority). Russian attitudes toward minorities differ, significantly, from what is considered just and normal in Western democracies. In particular, Russians in general are less tolerant toward the LGBT community than residents of Western countries[445] which also, unsurprisingly, impacts judicial practice.

This dialectic of passive/active regulation explains why Russian federal statutory law does not *de iure* prohibit "homosexual propaganda" or homosexuality (lesbianism and other non-traditional sexual orientations) directly although this prohibition works *de facto*—given the broad interpretation of the terms "non-traditional sexual relations" and "family values" in case law. In this normative ambiguity, other mechanisms of social control (primarily religion and traditional morality) are at work, shaping the attitudes both of ordinary people and of legal actors toward sexual minorities. With regard to the teachings of the main religious denominations in Russia (Orthodoxy, Islam, Judaism, and Buddhism)—and to the morality that is historically based on their dogmas—it is not surprising that this attitude is negative. References to "traditional", "national", and "authentic" values can easily become decisive factors in the adjudication process while statutory provisions are silent and can be interpreted as tacitly prohibiting those behavioral patterns that are not directly allowed.[446]

In the absence of explicit legislative rules, the judiciary has gradually coined an implicit rule that is contrary to the general principle of antidiscrimination: public performances, demonstrations, and mass actions that touch on the issues of gender and sexuality are tolerated insofar as they

445 According to a survey conducted by the Pew Research Center in June 2013: "The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries", *pewglobal.org* (4 June 2013), available at <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/>. Similar findings can be found in 2014 research conducted by two Russian sociologists. However, some authors find that Russians are progressively becoming more and more tolerant toward LGBT: Margarita Fabrikant and Vladimir Magun, "Semeinye tsennosti rossiian i evropeitsev" [Family Values of Russians and Europeans] *Demoskop* (6-19 October 2014), available at <http://demoscope.ru/weekly/2014/0613/demoscope613.pdf>. However, this increase in tolerance has so far not changed the balance of attitudes in Russian public opinion, and more recent polls have shown that 83% of Russians consider gay sex reprehensible. See "83 Percent of Russians Think Gay People Are Reprehensible", *pinknews.co.uk* (11 January 2018), available at <https://www.pinknews.co.uk/2018/01/11/83-percent-of-russians-think-gay-people-are-reprehensible/>.

446 Sergey Taskov, "Razresheno vse, chto ne zapreshcheno zakonom: pravovye i nravstvennye aspekty" [All which Is Not Prohibited by the Law Is Permitted: Legal and Moral Aspects], *Rossiiskaia iustitsiia* (2014) No.11, 50-51.

do not contravene established value standards.[447] This brings a drop of equivocality into the Russian legal system because this case law is at odds with the Constitution in at least two ways. *First*, according to prevalent legal doctrine and to constitutional law (Art.120, RF Constitution), the task of judges is to apply rules, but never to create them. This means that courts have no rule-making power: in attempting to establish such power, the judiciary would be contravening the constitutional principle of the separation of powers (Arts.10 and 11, RF Constitution). *Second*, constitutional law formally takes a favorable attitude toward various minorities, as it contains the same anti-discriminatory principles (Art.19, RF Constitution) that are common to Western constitutions.[448]

What is at play here is not so much positive law (in the sense of constitutional and statutory law) but, rather, the informal constraints and regulations stemming from the societal environment and based on social conventions. These conventions in Russia—as in other countries where religion has a significant impact on the social sphere—are essentially conservative, banning from the public sphere any attempts to justify behavior considered to deviate from established sexual and other models. Considering the judicial function from a sociological standpoint, one can assert that, in their routine work, judges tend to uphold and reinforce these underlying conventions—lest they risk facing social pressure.[449]

## 3 The Statutory-Law Framework

Properly stated, there are no laws or directives about the status of LGBT people in Russia, and legal regulation in this field has a passive character. Statutory law is simply silent on the rights of the LGBT community which does not mean that there is no legal regulation at all. On the one hand, there are some statutory rules that do not directly restrict sexual minorities but that, in reality, negatively shape the limits of LGBT rights. On the other

447 This is one of the major ideas of Russia's anti-extremism legislation and of how it is enforced in the courts, which is summed up in Decree No.11 of the Russian Supreme Court Plenum "O sudebnoi praktike po ugolovnym delam ekstremistskoi napravlennosti" [On Judicial Practice in Criminal Cases having an Extremist Character] (28 June 2011).

448 These arguments have been reiterated by LGBT activists in Russia but are ignored by the Russian courts. See Alexander Kondakov, "Resisting the Silence: The Use of Tolerance and Equality Arguments by Gay and Lesbian Activist Groups in Russia", 28(3) *Canadian Journal of Law and Society* (2013), 403-424.

449 Kathryn Hendley, Peter Murrell, and Randi Ryterman, "Law Works in Russia: The Role of Legal Institutions in the Transactions of Russian Enterprises", in Peter Murrell (ed.), *Assessing the Value of Law in Transition Economies* (University of Michigan Press, Ann Arbor, MI, 2001), 56-93; and Arina Dzmitryieva, "How the Law Really Works: The New Sociology of Law in Russia", 13(2) *Economic Sociology* (2012), 13-20. Surely, the law works through unofficial channels not only in Russia but in "classical democracies" too. See Richard Posner, *How Judges Think* (Harvard University Press, Cambridge, MA, 2008).

hand, the factual limits of the LGBT rights in Russia are formed by social attitudes toward their sexual behavior,[450] and this fact is gradually transforming into normativity (what the German legal scholar Georg Jellinek called "the normative force of the facticity") providing a kind of "soft law" that is not codified but that influences both political and judicial decision-making.[451] In Russian legalese, this system of regulation is referred to as "family values" or "traditional values", and in law-enforcement practice it might be placed even above constitutional law, which may prescribe rules contrary to the "tradition" or "customs" of family life.[452] In this aspect, the "living law" sometimes prevails over the "law in books"; with the approval of the political authorities and the popular majority but with the disapproval of international organizations or supranational courts.

Russian law contains two statutory rules containing a very powerful constraint on the rights of sexual minorities to declare their sexual orientation, to provide argumentation for this orientation, and to foster public discussions on this topic. The first rule usually serves as the normative justification for prohibiting gay-pride parades and other public LGBT actions; the second is applied when LGBT activists are punished when attempting to organize such unauthorized actions. These provisions (in the 2013 wording and further amendments) are as follows:

(1) Article 5 of Federal Law No.436 of 29 December 2010 on the Protection of Children from Information That Harms Their Health and Development. Para.2(4) of this article prohibits the dissemination of information that "negates family values, promotes non-traditional sexual relations or provokes disrespect toward parents and/or other members of the family". This interdiction is backed up by the penalty set forth in Article 6(17) of the RF Code of Administrative Offenses (CAO) providing for fines of up to RUB 50,000 for the dissemination of information that can harm children.

(2) Article 6.21 of RF CAO prohibiting "the promotion of non-traditional sexual relations among minors if said promotion results in the dissemination of information that is aimed at promoting non-traditional sexual patterns among minors, at interesting [minors] in non-traditional sexual

450 For an excellent analysis of the public opinion on homosexuality in Russia, see Alexander Kondakov, "Gomoseksual'nost' i obschestvennoe mnenie v Rossii: ot negativnykh otsenok do bezrazlichiia" [Homoxesuality and Public Opinion in Russia: From Negative Evaluations to Insensitivity], *Demoskop Weekly* (2013), 565-566, available at <http://demoscope.ru/weekly/2013/0565/analit05.php>.

451 Alexander Kondakov, "Injured Narratives and Homosexual Subjectivities in Russia: The Production of Rights Vocabulary in Post-Soviet Context", in Marianna Muravyeva and Natalia Novikova (eds.), *Women's History in Russia: (Re)Establishing the Field* (Cambridge Scholars Publishing, Cambridge, 2014), 101-117.

452 On the official strategy to use homophobia as a proxy for traditional values and to apply moral regulation instead of legal regulation, see Cai Wilkinson, "Putting Traditional Values into Practice: Russia's Anti-Gay Laws", *Russian Analytical Digest* (2013) No.138, available at <http://www.css.ethz.ch/publications/pdfs/RAD-138-5-7.pdf>.

relations, at perverting the social equivalence between traditional and non-traditional sexual relations, or at providing information about non-traditional sexual relations that provokes interest in such relations".

The prevalent interpretation of the first legislative provision is restrictive and tends to routinely support refusals to allow gay-pride parades or similar actions: there is always the probability that, at any public place where LGBT activists can gather, there will be at least one child passing by. In fact, this results in an automatic ban on public LGBT demonstrations in populated areas.

Along with these statutory texts, there are several federal and regional programs that touch on family values. These programs do not have any direct binding effect on ordinary social relations but can be seen as justification for judicial decisions seeking to protect these values from infringement by those minorities whose activities are deemed to be contrary to such values. Further, they serve as guidelines for the judiciary as to what the priorities of state policy are. These programs, thus, can indirectly influence judicial reasoning in this category of cases even if the courts do not directly cite them when adjudicating cases and justifying their decisions. A 2012 presidential Edict[453] states that social welfare is foremost endangered by such phenomena as alcoholism, drugs, and also by what is characterized as "the degradation of family and social values" (Chapter 1) calling for a program to propagate these family values (Chapter 5). Another Edict of the same year establishes national-policy priorities where "the revival of family values" is mentioned in point 21 as one of the main goals of the Edict.[454] The government's development program mentions that best efforts should be made in the media to promulgate family values and to promote them especially among young people.[455] One can easily imagine that any judge, attempting to deviate from these state policies, could be suspected of disloyalty to the ruling regime which would be fraught with negative professional consequences.

453 Ukaz Prezidenta Rossiiskoi Federatsii [Edict of the RF President] (1 June 2012) No.761, "O Natsional'noi strategii deistvii v interesakh detei na 2012-2017" [About the National Strategy of Actions in the Interests of Children in 2012-2017], *SZRF* (2012) No.23 item 2994. Since it has not been repealed or replaced by other strategies, this Edict remains formally in force.

454 Ukaz Prezidenta Rossiiskoi Federatsii [Edict of the RF President] (12 December 2012) No.1666, "O Strategii gosudarstvennoi natsional'noi politiki Rossiiskoi Federatsii na period do 2025 goda" [On the Strategy of State National Policy of the Russian Federation for the period up to 2025], *SZRF* (2012) No.52 item 7477.

455 Rasporiazhenie Pravitel'stva Rossiiskoi Federatsii [Order of the RF Government] (17 November 2008) No.1662-p, "O Kontseptsii dolgosrochnogo sotsial'no-ekonomicheskogo razvitiia Rossiiskoi Federatsii na period do 2020 goda" [On the Conception of the Long-Term Development of the Russian Federation Until 2020], *SZRF* (2008) No.47 item 5489.

## 4 The Constitutional-Law Framework

The Constitution contains a number of liberal principles, including on ideological diversity (Art.13: "In the Russian Federation ideological diversity shall be recognized; no ideology may be established as a state or obligatory [ideology]") and on secularity (Art.14: "The Russian Federation is a secular state; no religion may be established as a state or obligatory [religion]"). These articles are included in Chapter 1, "Fundamentals of the Constitutional System", implying that law creation and law enforcement in Russia are subject to these principles. Their pivotal significance is stressed in Article 16(2): "No other provision of the present Constitution may contradict the fundamental principles of the constitutional system of the Russian Federation".

These principles are echoed by a set of liberal rights and freedoms established in the following provision of the Constitution:

> "The rights and freedoms of man and citizen shall be directly operative. They determine the essence, meaning and implementation of laws, the activities of the legislative and executive authorities, local self-government and shall be ensured by the administration of justice." (Art.18)

Among these rights and freedoms are "freedom of conscience, freedom of religion, including the right to profess individually or together with others any religion or to profess no religion at all, to freely choose, possess and disseminate religious and other views and act according to them" (Art.28); "the freedom of ideas and speech" (Art.29(1)); the interdiction to force anyone to express [their] views and convictions or to reject them (para.2); "the right to freely look for, receive, transmit, produce and distribute information" (para.3); "the right to assemble peacefully, without weapons, hold rallies, meetings and demonstrations, marches and pickets" (Art.31); and "the freedom of literary, artistic, scientific, technical and other types of creative activity, and teaching" (Art.44).

Article 55 of the Constitution establishes a mechanism to balance fundamental rights and freedoms with other constitutional principles and values. Para.2 of this article warns that "in the Russian Federation no laws shall be adopted cancelling or derogating human rights and freedoms". On the other hand, the next paragraph states that "the rights and freedoms of man and citizen may be limited by federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defense of the country and security of the State" (para.3).

The cited paragraph of Article 55 enumerates only a "necessity for protection" but, in fact, all laws in a democratic state (pursuant to Art.1, RF Constitution, Russia is proclaimed as a democratic state) are intended to provide such protection. A strictly positivist reading of these provisions

cannot offer a clear answer to this question. In practice, such a "necessity" means "where the Constitutional Court finds it necessary". However, this is not a solution to the problem since there should be criteria for the Constitutional Court itself to decide about the necessity in question. The Constitution is silent on this point.

Being careful about the limits of interpretation, the authors of the Constitution stressed the universality of human rights: "the listing in the Constitution of the Russian Federation of the fundamental rights and freedoms shall not be interpreted as a rejection or derogation of other universally recognized human rights and freedoms" (Art.55(1)). Article 15(4) states that:

> "The universally recognized norms of international law and international treaties of the Russian Federation are component parts of its legal system. If an international treaty of the Russian Federation establishes other rules besides those envisaged by law, the rules of the international agreement shall be applied."[456]

Thus, constitutional law is supposed to provide guarantees against any particularism or exceptionalism in the interpretation and application of these rights and freedoms. The "violation of the principle of equality of citizens before the law" by public officials can be punished by up to five years in prison. Such a contravention constitutes the *corpus delicti* described in Article 136, Russian Criminal Code.

However, the applicability of these principles and rules is largely limited by two major constraints: the authoritarian political system along with its traditionalist ideology, and the formalist legal training of judges and law officers who have been (and still are being) taught to see the law as nothing but a set of commands from the sovereign and to consider the subjects of law (human beings) as merely the addressees of these commands with no rights independent of, or prevailing over, these commands.[457] Religion,

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456 This language of the Constitution notwithstanding, under prevailing Russian legal doctrine, an ECtHR decision is not deemed to contain norms or principles of international law. See Postanovlenie Plenuma Verkhovnogo Suda RF [Decree of the RF Supreme Court Plenum] (26 July 2013) No.21 "O primenenii sudami obshchei iurisdiktsii Konventsii o zashchite prav cheloveka" [On the Application of the ECHR by General Jurisdiction Courts].
In a judgment handed down two years later (14 July 2015) No.21-P, *op.cit.* note 16, the RF Constitutional Court ruled that decisions of the ECtHR are not self-executing and are not endowed with supreme force above the 1993 RF Constitution. There, the Court stressed, in particular, that the ECtHR can deviate from its proper function of protection of human rights, and national constitutional courts should limit the negative impact of such ECtHR judgments on their domestic laws. At the end of 2016, as a logical development of this trend, a new constitutional law (28 December 2016) No.11-FKZ was adopted conferring the power on the RF Constitutional Court not to execute decisions of the ECtHR when they are deemed contrary to the Constitution.

457 Antonov, "Theoretical Issues of Sovereignty in Russia", *op.cit.* note 369. This orientation coincides with the autocratic policies of the political regime and its understanding of the rule of law. See Jeffrey Kahn, "Vladimir Putin and the Rule of Law in Russia", 36(3) *Georgia Journal of International and Comparative Law* (2007-2008), 511-558.

morality, and the law work together in Russia in a rather specific manner—with no prevalence on the part of the law (which is expected from a state based on the rule of law) and with rights being subject to concerns of sovereignty.[458]

Russia is a secular, democratic state that is based on the rule of law and that promotes value pluralism. But, in fact, moral and religious principles often prevail over legal principles not only in politics but, also, in court proceedings. Judges, scholars, and politicians in Russia sometimes admit that "liberal" constitutional human rights are binding only insofar as they do not contravene "public" morality, social dynamics[459] or, in some opinions, also religious values.[460] Such opinions are legitimized by Article 55(3) of the Constitution, which makes it possible to limit human rights for the sake of national security and, also, several other collective interests. This conservative logic is rather primitive: the law can exist only insofar as there is a state, the state is a political form of national integration, and national integration is possible only if there are common basic values that bring the nation together. Consequently, legal rules and principles (human rights included) are not as important as collective values and, thus, should cede in the case of a conflict.[461]

## 5 Case Law of the RF Constitutional Court

Russian courts have profited a great deal from this conceptualization of the legal effect of the constitutional principle of non-discrimination, balancing it against other constitutional principles and refusing to confer legal protection on sexual minorities. The RF Constitutional Court has had numerous opportunities to confirm its negative attitude toward LGBT culture and its readiness to support informal restrictions on this culture.

458 Mikhail Antonov, "Conservative Philosophy and Doctrine of Sovereignty: A Necessary Connection?", *Archiv für Rechts- und Sozialphilosophie* (2017) No.153, 45-59.

459 Nikolai Bondar', "Sotsioistoricheskii dinamizm Konstitutsiii bez perepisyvaniia konstitutionnogo teksta" [The Social and Historical Dynamism of Constitution without Rewriting the Constitutional Text], *Zhurnal konstitutsionnogo pravosudiia* (2014) No.2, 22-34.

460 Boris Kurkin, "Ideologema prav cheloveka i ee interpretatsiia v sovremennoi otechestevennoi pravovoi teorii" [The Ideologeme of Human Rights and Its Interpretation in Contemporary Russian Legal Theory], *Pravo: Zhurnal VSE* (2008) No.2; and Mikhail Krasnov, "Khristianskoe mirovozzrenie i prava cheloveka" [A Christian World Outlook and Human Rights], *Rex russica* (2013) No.5, 465-477.

461 Compare with the communitarian conceptions that are promoted by some prominent specialists in constitutional law. See Vladimir Kruss, "Doktrinal'nye innovatsii v kontekste konstitutsionalizatsii rossiiskoi pravovoi sistemy" [Doctrinal Innovations in the Context of Constitutionalization of the Russian Legal System], *Konstitutsionnoe i munitsipal'noe pravo* (2013) No.4, 2-11; Boris Ebzeev, "Konstitutsiia, gosudarstvo i lichnost' v Rossii: filosofiia rossiiskogo konstitutsionalizma" [Constitution, State and Personality in Russia: the Philosophy of Russian Constitutionalism], *Konstitutsional'noe i munitsipal'noe pravo* (2013) No.11, 14-23.

Back in 2006, the RF Constitutional Court ruled out the possibility of gay marriages in Russia, reasoning that it was up to the Russian Parliament to decide whether or not it was appropriate to introduce gay marriages.[462] Remarkably, this 2006 ruling was rather short and devoid of the traditionalist narrative that would become typical of the Court's reasoning in the years to come. In denying a claim concerning the unconstitutionality of the RF Family Code that permitted only heterosexual marriage, the Court abstained from any criticism of liberal principles and the ECtHR case law evoked in the claim, concluding formalistically that, under international treaties, Russia had never assumed the obligation to introduce gay marriages. No mention of traditional culture or religious beliefs was made in the ruling.

In 2010, in response to a claim by a well-known gay activist, Nikolai Alekseyev, the Constitutional Court considered administrative penalties for promoting homosexuality among minors. These penalties had been introduced, in 2006, by the local legislature in the city of Ryazan and Ryazan *Oblast'*.[463] When the relevant regional laws were challenged in 2010,[464] the Court reasoned that the remedies provided under Article 29 of the Constitution should cede to communitarian morality:

> "Family, maternity and childhood in their traditional understanding inherited from [our] ancestors shall guarantee the uninterrupted change of generations; therefore, they are a condition for preservation and development of the multinational people of Russia and must have special protection from the state."

This meant that the non-discrimination remedies provided under Article 29 of the Constitution were not valid when their use could harm the health, morals, and spiritual development of minors. In the Court's opinion, this "harm" was implicitly present in any statement about the normalcy of

462 Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii [Ruling of the RF Constitutional Court] (16 November 2006) No.496-O "Ob otkaze v priniatii k rassmotreniiu zhaloby grazhdanina E. Murzina na narushenie ego konstitutsionnykh prav punktom 1 stat'i 12 Semeinogo kodeksa Rossiiskoi Federatsii" [On the Refusal to Accept for Consideration the Complaint of E. Murzina on a Violation of his Constitutional Rights by Point 1 of Article 12 of the RF Family Code].

463 As Russia is a federal state, its constituent members (regions, republics, etc.) are empowered to enact local regulations including administrative penalties for infractions of local regulations.

464 Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii [Ruling of the RF Constitutional Court] (19 January 2010) No.151-O-O "Ob otkaze v priniatii k rassmotreniiu zhaloby grazhdan N.A. Alekseeva, N.V. Bayeva i I.B. Fedorovoi o narushenii ikh konstitutsionnykh prav stat'ei 4 Zakona Riazanskoi oblasti 'O zashchite nravstvennosti detei' i stat'ei 3.10 Zakona Riazanskoi oblasti 'Ob administrativnykh pravonarusheniiakh'" [On the Refusal to Accept for Consideration the Complaint of N.A. Alekseev, N.V. Bayev and I.B. Fedorova on a Violation of their Constitutional Rights by article 4 of the Law of Riazan Oblast' "On the Protection of the Morality of Children" and on Article 3.10 of the Law of Riazan Oblast' "On Administrative Offenses"].

LGBT culture that could eventually reach children. Based on these grounds, the RF Constitutional Court found that the protection of family under Article 38 of the Constitution could be endangered by information about "parity between traditional and non-traditional families".

Unlike the 2006 ruling, this 2010 ruling contained indirect references to "normal" and "abnormal" sexual relations depending on their congruency with the prevailing culture and tradition. Even if religious feelings were not explicitly referred to in this ruling, they were present in the background. As has been shown above, on the one hand, Russian culture and tradition have always been significantly shaped by Orthodox Christianity which is hostile to LGBT culture (the same goes for Communist morality in the Soviet era). On the other hand, the new ideology of the ruling elites in Russia is explicitly based on adherence to Orthodoxy whereby President Vladimir Putin, and other members of the political establishment, overtly display their religiosity in spite of the secularity principle enshrined in Article 14 of the Constitution. The impact of the prevailing religious ideology can easily be seen in the words of the 2010 ruling about "normality" and "abnormality".

Affirming this approach in a 2013 ruling, the Constitutional Court stressed that Russia never had accepted any binding obligation under its constitutional law or under its international treaties to treat LGBT culture as equal to Russian traditional culture. Moreover, as far as concerns children and their rights, the Constitution and the international treaties to which Russia is a party should be interpreted in a way coextensive with the constitutional objective of protecting minors from the possible harmful impact of propaganda on their mentality and psyche.[465]

Until 2014, however, the Constitutional Court had not entered into substantial discussions about the limits of LGBT rights. In a 2014 judgment,[466] the Court tried to strike a balance between its jurisprudence and the case law of the ECtHR and considered the constitutionality of Article 6(21), RF CAO, which is applied to punish those who organize LGBT actions without authorization.[467] While finding this rule to be in compliance with the Constitution, the Constitutional Court called for the creation of a space for "unbiased public discussions about the status of sexual minorities and for the articulation of their position by representatives of these minorities" and

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465 Ruling of the RF Constitutional Court (24 October 2013) No.1718-O, *op.cit.* note 353.

466 The formal difference between an *opredelenie* and a *postanovlenie* is that the former is the form applied by the Constitutional Court for rejecting an inadmissible complaint while a ruling is a decision based on the merits of an accepted complaint. That is why the reasoning in judgments is usually more detailed and substantiated.

467 Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii [Ruling of the RF Constitutional Court] (23 September 2014) No.24-P "O proverke konstitutsionnosti chasti 1 stat'i 6.21 Kodeksa Rossiiskoi Federatsii ob administrativnykh pravonarusheniiakh v sviazi s zhaloboi grazhdan N.A. Alekseeva, Ia.N. Evtushenko i D.A. Isakova" [On Verification of the Constitutionality of para.1 of Art.6.21 of the RF Code of Administrative Offences in Connection with Applications of Citizens N.A. Alekseyev, Ia.N. Evtushenko and D.A. Isakov].

warned lower courts against a "formalist approach" (para.4). The Court found that gay-pride parades are not interdicted *per se* and must be allowed unless they take on an "aggressive and pervasive character" and, thereby, could endanger the rights and lawful interests of other people.[468] The Court agreed that state authorities have the right to monitor how "the contentious and delicate problem of non-traditional sexual orientation" is discussed in society in order to protect law and order, but this monitoring must be proportionate and must not be excessive.

These liberal considerations were, however, mitigated by the conservative statement that seemingly became the *ratio decidendi* of the case:

> "Russia may decide how to regulate spheres pertaining to sexual relations and interpersonal relations connected with sexuality, basing this regulation on traditional ideas about these values in the context of the particularities of the national and confessional composition of Russian society."

Here, along with its ubiquitous traditionalist rhetoric, the Court makes explicit reference to the "confessional composition" of the Russian people as one of the reasons for imposing restrictions on the LGBT community. Given the animosity toward this community from more than 95 percent of Russian believers (85 percent of whom are Orthodox Christians and 10 percent are Muslims, Jews, and Catholics[469]), the Court came to the not unexpected conclusion that the state should protect minors from the "imposition of social models that differ from the models commonly accepted in Russian society and that are sometimes perceived as unacceptable".[470]

This judgment was subject to a number of critical attacks of a sundry of Russian legal scholars and, also, was criticized by the ECtHR in its 2017 *Bayev and Others* judgment.[471] Proponents of the approach proposed by the RF Constitutional Court retort that rights and freedoms—even if they are proclaimed to be fundamental—cannot be limitless; that one constitutional right can restrain another right, a constitutional freedom can be in conflict with another constitutional value or with a principle; and that, in reality, these limits are established for each freedom in a particular concrete case in the view of the circumstances of the case, *i.e.*, the values and interests that

468 Judgement of the RF Constitutional Court (23 September 2014) No.24-P, *op.cit.* note 467.

469 See "Religious Belief and National Belonging in Central and Eastern Europe", *op.cit.* note 435.

470 See Ol'ga Kriazhkova, "Novyi raund bor'by za prava seksual'nykh men'shinstv: kommentarii k Postanovleniiu Konstitutsionnogo Suda Rossii ot 23 sentiabria 2014 g. No.24-P" [A New Round of the Struggle for the Rights of Sexual Minorities: Comments on the Ruling of the Russian Constitutional Court from 23 September 2014 No.24-P], *Sravnitel'noe konstitutsionnoe obozrenie* (2014) No.6, 123-131.

471 See the ECtHR judgment in *Bayev and Others v. Russia* (20 June 2017) Application Nos.67667/09, 44092/12 and 56717/12, available at <http://hudoc.echr.coe.int/eng?i=001-174422>.

are at stake in the case.[472] This is the work of judges in any developed civil-law society, and Russia is not an exception to this rule, some ideological differences notwithstanding.[473] It remains to be discussed, however, whether such considerations might justify placing religious and moral norms over constitutional rights.

This short case-law analysis demonstrates that, in recent years, the RF Constitutional Court has been evolving toward including the prevailing religious creeds and beliefs into the normative framework of Russian law. From the 2006 ruling where the issue of gay marriages was tackled in a strictly formalist manner, the Court (under the pressure of its direct or indirect discrepancies with the ECtHR and of the general tendencies in Russian policy) applied the traditionalist narrative and, in the end, shaped its approach to LGBT rights with a clear reference to religious dogmas. In the Court's opinion, they are an integral part of Russian law and even may overrule the statutory and constitutional guarantees of non-discrimination. To shed more light on the ideology behind the case law of the RF Constitutional Court, we should cite the opinions of its Chief Justice, Valerii Zorkin. In a 2014 speech presented at the Third Congress of the World Conference on Constitutional Justice, Zorkin insisted that:

> "The law, being the most complete reflection of the rational foundations of social rules, has to *promote the preservation and development of all mankind* and, at a minimum, not to undermine the foundations of its preservation and development. Meanwhile, real life shows that a *liberal-individualistic interpretation of human rights often contradicts this imperative*. One can see this in different spheres of human life: from the egocentric behavior of economic monopolies grabbing the planet's main life-supporting resources to the *aggressive struggle of sexual minorities for equality of opportunities for their self-realization, including such controversial issues as the upbringing of adopted children*. These facts, which seem to be

472 See, for example, the dissenting opinion of Russian Judge Dmitry Dedov at the ECtHR in the case of *Bayev and Others*, *op.cit.* note 471. There, he asserted that "states shall have [...] a wider margin of appreciation in respect of public morals, decency and religion" and that Russia may introduce positive discrimination against sexual minorities "to protect the traditional values of Russian society".
There are many Russian scholars who, similarly to Dedov, think that Russian traditional values are incompatible with LGBT culture. See Anatolii Diachenko and Evgenii Tsimbal, "Sotsial'naia obuslovlennost' zapreta propagandy gomoseksualizma" [The Social Determination of Prohibiting Propaganda of Homosexuality], *Lex russica* (2013) No.11, 1216-1223. These authors insist that the Russian mentality is different compared with that of people living in Western democracies. To support this position, they refer to numerous sociological polls.

473 We can refer here to the fortunate formulation by several respected authors about the Russia's current legal system: "the civil law tradition with some special Russian characteristics". Peter B. Maggs, Olga Schwartz, and William Burnham, *Law and Legal System of the Russian Federation* (Juris Publishing, Huntington and New York, NY, 2015, 6th ed.), 1-8, esp. at 7.

> very different from one another, have a common route: the *individualistic ideology that currently determines the dominant approach toward understanding the core meaning and content of human rights*. From the perspective of this approach, a person regards the world not as an environment that has inner connections and ties with this person, which is a precondition for the continuation and uplifting of mankind, but rather as the sum of external means that he or she can use for personal well-being and success."[474]

These conclusions speak for themselves: even if the Chief Justice did not mention religious creeds, he evidently had in mind the communitarian Russian culture based on Orthodox religious dogma. In the end, liberal rights are admissible insofar as they are compatible with this communitarian culture, and it is up to the sovereign state authorities to determine the limits of concession to these rights. The justification behind this reasoning is rather trivial: there can be no nation without common values and no country without laws that protect these values, and no law and order without the sovereign state that keeps the country together and enacts good laws. By this logic, in case of a conflict, national courts should abstain from applying human rights for the sake of the survival of the entire society.

For Zorkin, the Constitution is not only a text but "a living instrument" that evolves in accordance with communitarian religious morality, as he asserts in a 2017 speech: "From antiquity to modern times, good lawmakers have tried to create laws with the support of mass ideas about [what is] just. And the roots of these ideas have always been sanctified by a religious tradition of the corresponding culture and era", as far as "law, morality and religion constitute an internally interconnected socio-normative complex". That is why "protection of human rights should not undermine [the] moral foundations of society and destroy its religious identity". The criterion for evaluating the admissibility of human rights is the prevailing communitarian culture: "Norms of morality (*i.e.*, social morality), norms of individual morality and the rule of law which, in their totality, are determined either by the religious tradition or secular ideology, are rooted in culture and consonant with the soul of every reasonable person".[475] Evidently, LGBT rights fail to fit this criterion, and thus religious dogma and culture evidently have become an argumentative tool for justifying Russia's particularism about the protection of minority rights.

474 Zorkin's English-language report, presented at the Meeting of the Bureau of the World Conference on Constitutional Justice (29 September 2014), available at <http://www.venice.coe.int/WCCJ/Seoul/docs/WCCJ_report_Session_1-Zorkin_ENG.pdf>. Emphasis added.

475 Zorkin, "The Essence of Law", *op.cit.* note 81.

## 6 Case Law of the Courts of General Jurisdiction

The lower courts[476] generally abide by the approaches elaborated by the RF Constitutional Court and cite them when reasoning their decisions on limiting LGBT rights. For the most part, the cases heard in courts of general jurisdiction about LGBT rights concern gay-pride parades and other rallies where these communities publicly assert and defend their sexual orientation.

Before the 2013 legislative amendments, there were no federal laws that imposed penalties for such demonstrations. The main problem for LGBT people was to get authorization for demonstrations, as local authorities generally refused to provide such authorization. Upon the requests of LGBT activists, regional courts regularly hear complaints about groundless refusals that uniformly dismiss LGBT applications. The main rationale for dismissing these complaints is the fact that the local authorities have the competence to decide about mass gatherings based on issues related to security and public order. However, after the ECtHR condemned Russia for this formalist approach in the 2010 *Alekseyev* case (complaints No.4916/07, 25924/08 and 14599/09), such arguments were no longer valid. To retain control over the issue of gay-pride parades, local legislatures started passing laws about the prohibition of so-called LGBT propaganda among minors.

Before 2013, when this prohibition was also established in federal law, the RF Supreme Court had heard several cases where the validity of local laws was challenged. The subject matter of these cases was almost identical, and so it is enough for our purposes to provide a brief description of just one of these cases.[477] In 2012, the RF Supreme Court formulated defenses for these local laws, mainly reproducing the findings of the RF Constitutional Court in the case of Alekseyev, Bayev, and Fedorova (19 January 2010, No.151-O-O, as cited above). This 2012 case concerned antigay laws enacted in 2009 in the Arkhangelsk *Oblast'*. Citing the Constitutional Court's 2010

476 The Russian court system has two higher courts: the Constitutional Court and the Supreme Court, the latter being at the top of the system of courts of general jurisdiction. Along with these courts, there are constitutional courts (*ustavnye sudy*) of the subjects (constituent members) of the Russian Federation (regions, republics, etc.). But these courts do not have the competence to hear cases pertaining to the regulation and protection of human rights since this is within the exclusive competence of the Federation and its courts (Art.71, RF Constitution). Even if the Supreme Court is not formally subordinated to the Constitutional Court, given the hierarchy of laws (the Constitution as the supreme law of the country), the Supreme Court mostly follows the case law of the Constitutional Court, which is why one can consider, with some reservations, that the Supreme Court and its subordinated courts are "lower' than the Constitutional Court.

477 The most illustrative cases of Rulings of the RF Supreme Court were those concerning: Ruling (15 August 2012) No. 1-APG12-11 (a law of the Arkhangelsk Region No.113-9-OZ); Ruling of the RF Supreme Court (7 November 2012) No.87-APG12-2 (a law of the Kostroma Region No.193-5-ZKO); and Ruling of the RF Supreme Court (27 February 2013) No. 46-APG13-2 (a law of the Samara Region No.115-GD).

ruling, the Supreme Court argued that the non-discrimination remedy under Article 29 of the Constitution was not available to those whose behavior might endanger the constitutional values of family, maternity, and childhood that are protected under Article 7 of the Constitution.

It seems that the *ratio decidendi* in this case was that "Russian federal legislation does not consider homosexual relations to be family values pursuant to national traditions and with respect to norms of international law".[478] Tipping the scale in favor of a broader interpretation of Article 7 of the Constitution, the Supreme Court implicitly argued that civil and human rights (including the non-discrimination principle) should not be applied if they collide with family values. It goes without saying that in referring to "national traditions" and "family values", the Court had religious dogmas in mind—although, in fact, neither the Supreme Court nor the Constitutional Court has ever addressed any historical facts or entered into a substantial discussion about what "genuine Russian traditions" are from a historical point of view. The main point in the Court's argumentation was a kind of binary code—"acceptable/unacceptable"—where LGBT culture was unquestionably coded as unacceptable.

After RF Constitutional Court Judgment No.24-P of 23 September 2014, which legitimized identical federal antigay regulations, local legislatures repealed their local laws to avoid the *non bis per idem* problem. The crucial issue for the courts of general jurisdiction was to be seen in cases about the legality of local authorities' decisions to prohibit LGBT demonstrations. We will provide a brief analysis of two cases from 2016 to show that these courts, generally, follow the reasoning of the RF Constitutional Court.

In one of these cases, the St Petersburg City Court rejected the complaint, reasoning that the plaintiffs (LGBT activists) had failed to prove that they were going to assert their homosexuality in "an acceptable and neutral form".[479] However, the Court did not set out what this "form" had to be, making a meaningless reference to a "lack of neutrality" and shifting to the plaintiffs the burden to prove that LGBT culture can be publicly asserted in a form acceptable to society. Given the commonly shared animosity of traditionalist culture toward homosexuality, it remains unclear how this

478 Postanovlenie Verkhovnogo Suda RF [Ruling of the RF Supreme Court] (15 August 2012) No.1-APG12-11, "Ob ostavlenii bez izmeneniia resheniia Arkhangel'skogo oblastnogo suda ot 22.05.2012, kotorym otkazano v udovletvorenii zaiavleniia o priznanii nedeistvuiushchimi otdel'nykh polozhenii oblastnogo Zakona Arkhangel'skoi oblasti ot 15 dekabria 2009 g. No.113-9-OZ 'Ob otdel'nykh merakh po zashchite nravstvennosti i zdorov'ia detei v Arkhangel'skoi oblasti' i oblastnogo Zakona Arkhangel'skoi oblasti 'Ob administrativnykh pravonarusheniiakh'" [On a Restatement of the Decision of the Arkhangelsk Regional Court of 22 May 2012 Which Rejected an Application to Invalidate Certain Provisions of the Arkhangelsk Regional Law of 15 December 2009 No. 113-9-OZ "On Particular Measures to Protect the Morals and Health of Children in Arkhangelsk Region" and of the Arkhangelsk Regional Law "On Administrative Offences"].

479 Appellate Ruling of the St Petersburg City Court 22 June 2016 (No.33a-10916/2016) in case No.2a-2006/2016.

might be possible for the LGBT plaintiffs. This shifting of the burden of proof is not compatible with the principles set forth in a 2014 judgment of the RF Constitutional Court about the inadmissibility of a formal approach to banning gay-pride parades, let alone the ECtHR approach in the 2010 *Alekseyev* case.

In a similar case,[480] the Court was of the opinion that the plaintiffs failed to demonstrate that information about homosexuality had any cultural, artistic, or historical value and that this information was worth being disseminated publicly. Making an implicit reference to the narrative of Chief Justice Zorkin (as analyzed in Chapter 3 above), the Court found that information about LGBT culture was "aggressive because it prioritizes the individual autonomy of the administrative plaintiffs". In the Court's opinion, this information transmits "the subjective and inadequate idea about the socially recognized models of family relations commonly accepted in Russian society and contradicts moral values". Here, the Court suggested that there was "objective information" that is based on the values and ideas shared by the majority, whereas the opinions of minorities are "subjective" and, therefore, distort the "objective picture".

This supposed objectivity of prevailing opinions was justified with a reference to:

> "[…] the traditional ideas about humanism formulated in the context of the particularities of the national and confessional composition of Russian society, its sociocultural and historical background, and especially with a view to representations about marriage, family, maternity, paternity, and childhood that are commonly recognized in Russian society and shared by all traditional confessions".[481]

Having established this "objective truth" with direct references to prevailing religious doctrines, the Court concluded that the dissemination of information about sexual relations must not challenge the morality or religious beliefs of the majority—forming an integral part of the Russian legal order—and rejected the claim.

These rulings are demonstrative of the general attitude of the Russian courts to LGBT culture, which, in the end, has no legal protection because it is not part of Russia's traditional values. In turn, these traditional values are frequently defined by Russian courts with reference to prevailing religious ideas and to communitarian morality. On the whole, Russian case law is

480 Appellate Ruling of the St Petersburg City Court 30 May 2016 (No.33a-10894/2016) in case No.2a-1897/2016. This reasoning was so persuasive for Russian judges that it was copied and pasted into a number of other decisions in other Russian regions *e.g.*, Appellate Ruling of the Moscow City Court (4 October 2016) in case No.33a-35552/2016 and Appellate Ruling of the Moscow City Court (20 October 2016) in case No.33a-35769/2016.

481 *Ibid.*

rather homogeneous in this category of cases, and the ordinary (general jurisdiction) courts do not shy away from reproducing not only the rulings and judgments of the Constitutional Court but, also, copying phrases from speeches made by its Chief Justice.

## 7 Russia and Europe: A Discordant Dialogue

Criticism from human rights organizations and from the ECtHR and other European agencies of Russia for violations of human rights can be viewed, formally, as well founded in a number of situations—particularly, given that both the ECHR and Russia's Constitution grant almost exactly the same scope of rights and freedoms. Russian courts claim to protect some rights while limiting others, seemingly doing so in the same manner as the ECtHR but with a focus on different values.[482] Herein, the difference can be seen between the case law of the ECtHR and that of Russian courts. This difference becomes obvious in the polemic between the RF Constitutional Court and the ECtHR about justification of discrimination.[483] The theme of values inevitably comes to the fore when discussing differences of interpretation, providing one of the most viable sources for reassessing the "civilizational" disputes between European and Russian human rights institutions.

Conceptually, limiting human rights implies balancing individual values (autonomy, self-determination, personal choice, etc.) in favor of collective ones (security, justice, order, etc.). Currently, and in the foreseeable future, this balancing is one of the most important stumbling blocks in relations between Russian and European institutions, as individuality and individual choice are more highly valued in Western cultures than in Russia. Evidently, this difference in value cannot be overcome or at least smoothed over without engaging in a value dialogue, for which neither of the parties is fully prepared.

Some Russian legal scholars, including constitutional judges, have been searching for a solution in the Preamble to the Constitution which solemnly proclaims "respect for [our] ancestors". For example, Professor Valerii Lazarev insists that the Preamble justifies the traditionalist interpretation of human rights in the sense that human rights are respected within the "moral framework" of Russian statehood.[484] An acting RF Constitutional Court Justice, Nikolai Bondar', finds that the Preamble establishes certain

482 On the ECtHR's approach, see Paul Johnson, "Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the European Court of Human Rights", 11(3) *Human Rights Law Review* (2011), 578-593.

483 Andrey Makarychev, "Communication and Dislocations: Normative Disagreements between Russia and the EU", in Reinhard Krumm *et al.* (eds.), *Constructing Identities in Europe* (Nomos, Baden-Baden, 2012), 45-62.

484 Valerii Lazarev, "Konstitutsionnye ogranicheniia konstitutsionnykh tsennostei" [Constitutional Restrictions on Constitutional Values], in V. Golubtsov and O. Kuznetsova (eds.), *20 let rossiiskoi Konstitutsii* (Statut, Moscow, 2014).

implicit moral values of supreme importance that are "necessary regulators of practical life" and, therefore, justify bans on the "promotion of homosexuality." Such values, Bondar' assures us, protect Russian society from "attempts to impose and take to the constitutional level so-called values of sexual freedoms and of the equal rights of gays".[485] Another Constitutional Court Justice, Konstantin Aranovskii, pursues the same line, although more discreetly:

> "No legal protection can be granted to sexual perversions or same-sex marriages in a situation where the moral order of society considers homosexuality to be an oddity or unpleasantly exotic and if that society has not yet fully protected truly fundamental rights."[486]

In the same vein, RF Constitutional Court Chief Justice Zorkin reiterates that positive law is intertwined with the web of social regulation and calls for:

> "A good deal of sound conservatism in understanding the internal connection between law, morality and religious values […] when assessing the requirements for tolerance toward any sexual and gender permissiveness whatsoever."[487]

Other Constitutional Court justices have made similar assertions in their publications,[488] and it is no wonder that such opinions are systematically included in the texts of judicial acts.

Seemingly, the discrepancies between the Russian and European authorities are not so much about rules but, rather, about the values underpinning those rules and the practice of their implementation. The fact that the Russian courts systematically support bans on gay-pride parades can serve here as an illustrative example (several cases filed by Nikolai Alekseev can serve as an example (*Alekseyev v. Russia*, application Nos.4916/07, 25924/08, and 14599/09).[489] On the one hand, the ECtHR reiterates that

485 Bondar', "Bukva i dukh rossiiskoi Konstitutsii", *op.cit.* note 459, 9.

486 Konstantin Aranovskii, "Usloviia soglasovaniia praktiki mezhdunarodnogo i konstitutsionnogo pravosudiia" [Conditions for Reconciling the Practice of International and Constitutional Justice], *Zhurnal konstitutsionnogo pravosudiia* (2013) No.3, 1-10, at 6.

487 Zorkin, "Tsivilizatsiia prava: sovremennyi kontekst", *op.cit*. note 159, at 10.

488 At a 2016 round table y organized by the Institute of Philosophy of the Russian Academy of Sciences, Constitutional Court Justices Gadis Gadzhiev and Nikolai Bondar' stressed the creative role of the Court in shaping a specific conservative Russian attitude toward religious and sexual deviance. See "Pravo i natsional'nye traditsii": Materialy kruglogo stola s uchastiem: A.A. Guseinov, V.S. Stepin, A.V. Smirnov, G.A. Gadzhiev, N.S. Bondar', E.Iu. Solov'ev, V.M. Mezhuev, P.D. Barenboim, V.V. Lapaeva, S.L. Chizhkov" [Law and National Traditions: Materials of a Round Table with the Participation of: A.A. Guseinov, V.S. Stepin, A.V. Smirnov, G.A. Gadzhiev, N.S. Bondar', E.Iu. Solov'ev, V.M. Mezhuev, P.D. Barenboim, V.V. Lapaeva, S.L. Chizhkov], *Voprosy Filosofii* (2016) No.12, available at <http://vphil.ru/index.php?option=com_content&task=view&id=1541&Itemid=52>.

489 *Op.cit*. note 352.

such bans are discriminatory; on the other hand, the RF Constitutional Court stresses that Russian laws do not prohibit gay-pride parades as such and, therefore, that the systematic banning of these parades by the local authorities is due to some extra-statutory principles pursued by ordinary officials within their legitimate administrative discretion. It would be incorrect to explain this use of discretion as an abuse of power since officials (or judges) generally gain nothing (or only very little) from pursuing discriminatory policies toward the LGBT population. Entwined with the broader machinery of social regulation—in relation to which they are both active agents and passive recipients at the same time—judges perform not only their proper legal function (that of the application of laws) but, also, the societal function of maintaining the existing order. This order for many of them is synonymous with the communitarian religious culture.

This role of Russian judges is ambiguous and controversial. Their factual policies violate not only Russian constitutional law but, also, international humanitarian law manifestly based on the principle of non-discrimination.[490] Yet, their policies are congruent with the convictions of the overwhelming majority of the population and of the ruling elites, and one would hardly expect judges to go against this. Unlike the Anglo-Saxon judiciary, judges in civil-law countries take a less activist stance, due to various institutional constraints, and very seldom act as promoters of moral or legal changes. They do have tools, however, to avoid application of legislative innovations and they readily use them via conservative reinterpretations of constitutional principles. What is actually happening with the liberal principles of the Constitution is that they are interpreted in the style of the Soviet attitude toward human rights. Why it does not work the other way around (a liberal reading of conservatively formulated rules) is a question that requires a separate study, combining the political, cultural, and institutional aspects of the issue.

Evidently, the ECtHR is also engaged in a more complicated game than the modest interpretation and application of the ECHR, the text of which is silent on most of the topics discussed before this court. Whether a crucifix can be displayed in a public school or whether medical personnel can wear crucifixes around their necks: these and many other issues require going far beyond the text of the Convention and imply discerning and balancing basic values. If we accept moral pluralism in the sense that there is no universal moral system (be it Western, Christian, "civilized", or some other) but, rather, many moral systems in every society—each of which has its *raison d'être*—then courts engaged in these "penumbra" cases (to use the term of Herbert Hart[491]) are always responsible for their value choice and have

490 Eric Allen Engle, "Gay Rights in Russia? Russia's Ban on Gay Pride Parades and the General Principle of Proportionality in International Law", 6(2) *Journal of Eurasian Law* (2013), 165-186.

491 Herbert L. A. Hart, "Positivism and the Separation of Law and Morals", 71(4) *Harvard Law Review* (1958), 593-629, at 607.

to justify this with reference not to one single system (*e.g.*, that of liberal values implicitly present in the "necessity for a democratic society") but to various systems.[492] In other words, it means that the agency (be it a court or a parliament), assuming responsibility for making a value choice that is valid for different countries, should become a platform for intercultural dialogue and not so much a pulpit for moralizing by activist judges.

In fact, the role the ECtHR is playing in this regard seems to be different from the role of the Russian judiciary; their respective attitudes toward value innovations in society also differ significantly. This problematizes the role of the ECtHR for the Russian legal system and, more generally, for all national legal systems with which this court cooperates. This also creates an arena for discrepancies with national courts because of the different normative frameworks which frame the working of European and national institutions. Along with the potential conflict between international law and domestic laws, conflicts among regulatory backgrounds also occur. The national cultural environment protected and promoted by EU member states is not always in perfect harmony with the "common European (legal) culture" which the ECtHR and other European institutions are trying to forge. With all necessary reservations being made, one can state that the level of tension between the supranational jurisprudence of the ECtHR and the national legal orders of EU countries is directly proportional to the difference between the "common European culture" *in statu nascendi* and national legal cultures. The situation of Russia, Turkey, and other "peripheral" (in the sense of the cultures prevailing in these countries) civilizations can serve as an illustration. It is not unexpected that the greater the distance between such countries and the allegedly "pan-European" cultural core, the more they resist cultural uniformization by claiming that the ECtHR is not competent to articulate the prevalence of any values.

The stance consequently repeated both by the Russian authorities and by the Russian Orthodox Church is that, in the final analysis, nothing justifies the validity of the moral precepts sermonized by the ECtHR or their pretense to universality (at least, within the European area).[493] On the contrary, they maintain that a wider margin of appreciation is reasonably needed provided that there are significant differences among countries and cultures that, therefore, need to maintain their sovereignty. From this perspective, the question is not about the complete uniformity of the interpretation and implementation of human rights but, rather, about the practical

492 Sergei Belov, "Predely universal'nosti konstitutsionalizma: vliianie natsional'nykh tsennostei na praktiku priniatiia reshenii konstitutsionnymi sudami" [The Limits of the Universality of Constitutionalism: The Impact of National Values on the Practice of Decision-Making in Constitutional Courts], *Sravnitel'noe konstitutsionnoe obozreniie* (2014) No.1, 37-56.

493 Lauri Mälksoo, "The Human Rights Concept of the Russian Orthodox Church and Its Patriarch Kirill I: A Critical Appraisal", in Wolfgang Benedek *et al.* (eds.), *European Yearbook on Human Rights* (Neuer Wissenschaftlicher Verlag, Vienna, 2013), 403-416; and Kristina Stoeckl, "The Russian Orthodox Church as Moral Norm Entrepreneur", 44(2) *Religion, State and Society* (2016), 132-151.

reasonableness of the restraints which national legal orders may impose on the exercise of human rights in their countries.[494] This reasonableness can have two dimensions. One of them is universal: setting out to discover some rules valid for any nation or state. The other is relative: searching for contingent rules depending on the circumstances in each country. The debates about LGBT rights between the ECtHR and the Russian authorities can be described in the logic of these two dimensions of reasonableness.[495]

## Conclusion

This Chapter has analyzed the cultural constraints which are factually imposed on actors in the Russian legal system by the prevailing social philosophy, characterized by a significant degree of religious conservatism. This conservatism emphasizes collective interests and, predictably, is opposed to sexual minorities and to those who want to defend (or justify) them. Such a cleavage between the formally valid provisions of Russian law on non-discrimination, on the one hand, and the factual cultural constraints that nudge judges to refuse in the protection of sexual minorities, on the other hand, is demonstrative of the general dichotomy between formalist and decisionist elements of Russian law as they were elucidated in the Chapter 1 of the present volume. The specific development of Russian intellectual culture in this regard has been elucidated in Chapter 3 and was, therefore, beyond the scope of this Chapter. In the light of the analysis conducted in the Chapters 1-4, it can be asserted that this development—historically rooted in religious traditions—still shapes the general conservative attitudes of Russians. These attitudes cannot be ignored by judges and other actors in the Russian legal system who, to some extent, are subject to the general perception of what is just, acceptable, and reasonable in society. The example of sexual minorities examined in the present Chapter can illustrate the machinery of interaction between "law in books" and "law in action" in Russian law.

Such a dichotomy between the liberal wording of the laws (up to and including the RF Constitution) and its conservative interpretation has provoked debates not only between Russian and European authorities but, also, among Russian legal scholars. Fundamentally, these debates fall within the province of value discourse based on a pre-established cognitive and axiological choice. This province and its bearing for the mind-sets of Russian judges were examined in Chapter 2 on the example of Chief Justice Zorkin and his conservative philosophy. Rational arguments are employed

494 Chaim Perelman, *The Idea of Justice and the Problem of Argumentation* (Humanities Press, New York, NY, 1963); and Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, Cambridge, MA, 1996, William Rehg intro. & transl.).

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

too, but they come not at the point of choice but, rather, at the point of the justification of this choice.

This practical reasonableness—underpinning the judicial function in different countries—can become a *tertium comparationis* yielding a criterion for a charitable comparison of various regulative systems in Europe even if finding and formulating such reasonableness would be a much more difficult enterprise than a simple commentary on statutory law or a political assessment of legal systems. Such a thick description can be obtained from a historical perspective, providing the comparative background for drawing parallels in the development of human rights and religious freedoms in Russia and in the West. This perspective involves different religious and philosophical conceptions developed over the course of Russian history, as examined in Chapter 3 above.

One more aspect, concerning the role of religion in transitory societies, can be added here to that examination. In most Western countries, the secularization of the state was a painful and lengthy process connected with the struggle for individual liberties leading to the conviction that tolerance is a prerequisite for the protection of rights. The Russian experience has been somewhat different. The Soviet state was secular from the very beginning, and nothing fundamentally changed with *perestroika* in terms of legal regulation. This historical experience does not allow the unambiguous linking of positive or negative values: secularity is conceptually associated with Bolshevik repressions of the clergy and believers. For this reason, the principle of secularity in public discussions in Russia is often critically reassessed with reference to the anti-religious and atheist campaigns conducted by the Bolsheviks under the flag of secularity. The encroachment on religious freedoms seems to Western observers to be an indisputable and impermissible violation of civil rights; however, this is not the case for many Russians. The case law that indirectly promotes prevailing religious creeds has popular support. The authorities pragmatically endorse this case law and the value choice behind it to buttress their legitimacy. Judges, in their turn, pragmatically choose to follow the general political line and interpret the law conservatively. Judicial argumentation, examined in the present Chapter, provides some clues as to the philosophy that underpins Russian exceptionalism in matters concerning the rights of minorities. A closer look at this philosophy reveals its anti-universalist stances: the proponents of this conservative approach stress that Russia has religious, cultural, and other civilizational particularities which make the legal regulation of human rights in the country irreducible to the universalist humanitarian standards of the West.[496]

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496 On the influence of political, historical, and social forces on the autonomy of the judiciary in Russia in cases involving minorities, see James Richardson, Galina Krylova, and Marat Shterin, "Legal Regulation of Religion in Russia: New Developments", in James Richardson (ed.), *Regulating Religion: Case Studies from Around the Globe* (Kluwer Academic Publishers, New York, NY, 2004), 246ff.

The indeterminacy of the decision-making process cannot be fully eliminated even if the power to decide lies not in the hands of judges but, rather, of political actors. In the latter case, however, many more public debates would be required to justify the margins of appreciation in generic cases. Taking these debates from the secrecy of judges' chambers to the public sphere would lessen the feeling of disproportionality on the part of peripheral countries because of the constant bickering over whether this or that consideration should apply to this or that country. The lack of cogency of judicial discretion in determining values and standards would (and, in reality, already does) also affect their effectiveness, given that "*le gouvernement des juges*" is seen by many political actors as incongruent with the conservatively viewed ideals of democracy. Whether these ideals are "correct" or not is a question to be decided through public debates with the participation of all citizens or, at least, their representatives. From this viewpoint, the struggle for an enhanced equal protection of rights in Russia implies addressing the intricate combination of the underpinning conventions and shared values shaping Russians' attitudes to the limits of individual choice in terms of social morality. The case law on the protection of religious beliefs, examined in the following Chapter, provides a number of examples of such underpinning conventions.