Formalism, realism and conservatism in Russian law

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5 Religious Beliefs and the Limits of Their Accommodation in Russia: Some Landmark Cases from the Russian Supreme Court[497]

Foreword

As shown in the preceding Chapter, the Russian Constitution has established liberal principles for the exercise of freedoms by minorities, but Russian statutory law does not provide explicit rules on how to implement these principles or define the limits thereof. This puts Russian courts in an ambiguous situation in which they have to defend minorities pursuant to constitutional law but, in practice, are precluded in effect from granting accommodations to these minorities. If they were to do so, the courts could be viewed as snatching the legislative function from parliament or encroaching on the sovereign prerogative of the political leadership.

Meanwhile, Russia's legislative authorities and the political leadership are reluctant to legitimize such accommodations for minorities. For the courts, it means that they are empowered to considering the issue of equal protection rather on the level of a general principle, concretizing it in terms of case law and providing such protection only insofar as it is either expressly mandated by the statutory law or indirectly requested by the political leadership in official narratives or political programs. This introduces an important cleavage point between the formalist and the decisionist dimensions of Russian law: judges formally remain bound by the equal-protection and non-discrimination principles of the constitutional law but, at that same time, factually may make exceptions from these principles either by granting additional protection to the favored-religious denominations or striping the so-called "non-traditional" religious denominations of the protection which, otherwise, is formally granted to these denominations by constitutional law.

In this situation, Russian courts of general jurisdiction decide, in specific cases, on the factual limits of protection and thereby indirectly accept the idea of accommodation, which is not elaborated in statutory law. The courts are generally indisposed to recognize that their decisions develop statutory law and, therefore, tend to hide their approaches and criteria behind formalistic language. This Chapter examines some criteria and approaches which the Russian Supreme Court has formulated in some landmark cases concerning religious freedoms. The present Chapter underscores

497 The first version of this Chapter was published in 11(1) *Religion and Society in Central and Eastern Europe* (2018), 3-19. The present Chapter is an updated version of that work.

the relevance of such an analysis for comparative research projects aimed at understanding (dis)similarities of legal accommodations on religious grounds in different countries and their reasoning.

Based on the general theoretical background of Russian law as described in Chapters 1-3 and grounded in the analysis set forth in Chapter 4, the present Chapter studies a number of cases considered by the RF Supreme Court in which the same legal norms are accorded different interpretations depending on whether participants belong to a religious minority or the majority.

Introduction

Courts of law and law-enforcement agencies in various countries use different criteria when determining the extent to which a right or freedom can be restricted or extended. These criteria are of immense importance in the field of religious freedoms where, under some circumstances, a person may be released from a legal obligation because of her religious beliefs. In many countries, courts can also restrict a person's religious rights in order to avoid a possible negative impact on others or on society as a whole where a person asserts her religious rights allegedly to the detriment of the public interest. Such cases are heard regularly by supreme and constitutional courts in many Western countries and provoke vivid polemics in societies about what can justify such restrictions and whether they are justifiable at all.

National and supranational courts are not always consistent in imposing limitations on religious liberties and in allowing religious accommodations. Along with formal statutory provisions and abstract principles, courts normally take into consideration expediency and the acceptability of certain religious practices for entire societies, their reception in public opinion, and other criteria which, often, are quite subjective and circumstantial.[498] Religious freedoms cannot be put into a set of rigid normative statements in advance and, in this sense, fully formalized in statutory law. By this logic, religious freedoms precede—and, to some extent, may supersede—the official law in this field regardless of whether or not they are posited in the law. Historically, religious freedoms—in the Western legal tradition—asserted their primacy over the posited state norms; in the end, gaining the upper hand and, thereby, giving way to the idea of human rights. In other words, these rights are *prima facie* rights against the state and its laws that can sometimes become excessively restrictive. Therefore, the very nature

498 As one author suggests, this is exactly the case of the ECtHR, which adopts two different strategies for locally grown and imported religious rituals and practices. See Nehal Bhuta, "Two Concepts of Religious Freedom in the European Court of Human Rights", 113(1) *South Atlantic Quarterly* (2014), 9-35.

of these rights resists any formalization. Yet, at the same time, these rights need to have reasonable limits in order to make their exercise sensible in pluralist societies.

That is why an analysis of formal legal enactments hardly can fully describe the factual limits and constraints on religious freedoms existing in a society. These rights—albeit normatively limitless (or limited by too general formulations)—are always constrained by public opinion which might also affect case law and administrative practices. At the same time, a purely political analysis of purported influences and power structures does not provide sufficient clues to a proper understanding of the machinery of law which, in every society, builds up its own semi-autonomous mechanisms of regulation (autonomy of procedures, language, legal community, legal technique, etc.) although the degree of this autonomy, naturally, can vary in different countries. This suggests looking at the language in which courts describe their attitudes toward certain fields of regulation. In the present case, toward religious freedoms and consider what is behind this language. Such is the central task of this Chapter which considers the approaches of the RF Supreme Court concerning religious freedoms: the real limits of their protection and restriction as they are formulated in several mainstream cases.

A caveat should be added about our attitude to what is described herein. This Chapter is focused on analyzing Russian law (constitutional, statutory, and case law) and the social context of its application. Readers will not find herein our value judgments on the cases decided by Russian courts or a political critique of these cases. This is a deliberate choice to keep ourselves as far as possible on the *is* side of the philosophical *is-ought* divide, and to keep this Chapter at a manageable arm's length. Our intention here is not to praise nor to condemn any norms or practices involved in their application but, rather, to examine how the RF Supreme Court reasons in its decisions on religious freedoms, and how this reasoning can be representative of collective mindsets and attitudes. This analysis can help identify what William Ewald called "law in the minds";[499] doing so here with the RF Supreme Court in matters of religious freedoms. Potentially, it may be useful for subsequent political analyses, for a comparative-law examination of (dis)similarities in regulation of religious freedoms in Russia and other countries, and perhaps for normative judgments by policymakers or by those who aspire to become such.

499 Ewald, "Comparative Jurisprudence I", *op.cit.* note 54, 1889-2149; and *id.*, "Comparative Jurisprudence (II)", 489-510.

1 Constitutional Ambiguity

The Russian Constitution has established quite liberal, Western-style religious freedoms: "freedom of conscience, freedom of religion, including the right to profess individually or together with others any religion or to profess no religion at all, to freely choose, possess and disseminate religious and other views and act according to them" (Art.28). The Constitution also confirms that Russia is "a secular state where no religion may be established as a state or obligatory [religion]" (Art.14). The basic law governing religious freedoms, the 1997 Federal Law on Freedom of Conscience and on Religious Denominations,[500] was expected to develop mechanisms for implementing these liberal freedoms but it remains mostly declarative. In particular, the 1997 law does not specify the conditions under which a person may declare their conscientious objections and be released from certain legal obligations because of their faith, or what the criteria are for courts to decide thereupon. Article 2 of the 1997 Law provides that "nothing in this law can be interpreted in a manner that infringes or encroaches on the human rights guaranteed by the Constitution or by international treaties". Following this principle to the letter, the law did not add anything about conditions for, or limits of, the exercise of these constitutional and international-law principles—apparently considering these principles to be self-evident.

There could have been at least two rationales for such a declarative approach in the 1997 law. On the one hand, in the absence of statutory limits to these freedoms, a strictly formalist interpretation could easily result in the conclusion that religious freedoms have no limits except those mentioned in Article 55(3) of the Russian Constitution.[501] On the other hand, the Constitution establishes that it has direct effect (Art.15(1)) and that international law is an integral part of Russian law with primacy over domestic statutory law (Art.15(4)). In both these views, constitutional and international principles can be applied even if there are no statutory norms about implementation of these principles. These rationales were likely among the ideas that inspired

500 Federal'nyi zakon [Federal Law] (26 September 1997) No.125-FZ "O svobode sovesti i o religioznykh ob"edineniiakh" [On the Freedom of Conscience and Religious Associations], *Rossiiskaia gazeta* (29 September 1997) No.4465. For a commentary on the law, see Lauren B. Homer and W. Cole Durham, Jr., "Russia's 1997 Law on Freedom of Conscience and Religious Associations: An Analytical Appraisal", 12(1) *Emory International Law Review* (1998), 101-246.

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

the authors of the 1997 law. Under the conditions that exist in Russia, however, this approach—taken to the letter—has turned out to be destructive for religious freedoms.

As a matter of fact, the constitutional provision in Article 55(3) contains an empty formula which can be filled in with any restrictions whatsoever including those stemming from narratives about "traditional values"—currently popular and widely evoked by Russia's political leadership and the judiciary.[502] The problem of involving traditional values in discussions about human rights is not specifically Russian,[503] but, as shown in the previous Chapters, Russia takes exorbitant measures to protect its "constitutional identity" by banning "non-traditional" religious beliefs.[504] In the same vein, Russia continues to insulate itself from international law, utilizing the sovereignty argument examined in Chapter 3. The 2015 Ruling of the RF Constitutional Court and the ensuing statutory amendments have confirmed that, despite the plain meaning of Article 15(4) of the RF Constitution, international law has no primacy over domestic law when the Constitutional Court decides that the implementation of certain interpretations of international law poses a threat to Russia's sovereignty.[505]

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502 In recent years, especially after the beginning of the Ukraine crisis, the Russian authorities have frequently referred to traditional values to justify their exceptionalist attitudes toward the West. The term "traditional values" constantly appears in official narratives in Russia. Thus, it is no wonder that the ordinary courts grant protection to these values even if they are not formally included in the statutory law regulating matters of religious accommodations. In a certain sense, Russia pretends to be a leader in terms of defending traditional values in Europe. See, for example, Melissa Hooper, "Russia's Traditional Values' Leadership", Foreign Policy Centre (1 June 2016), available at <http://www.humanrightsfirst.org/sites/default/files/Melisssa%20Report.pdf>. Such traditionalist discourses also prevail at the RF Constitutional Court.

503 See, for example, Jacob W.F. Sundberg, "Human Rights and Traditional Values", in Peter Wahlgren (ed.), *Human Rights: Their Limitations and Proliferation* (Stockholm Institute for Scandinavian Law, Stockholm, 2010), 125-154.

504 See Alicija Curanović and Lucian N. Leustean, "The Guardians of Traditional Values: Russia and the Russian Orthodox Church in the Quest for Status", *Transatlantic Academy Paper Series* (2015) No.1, available at <http://www.transatlanticacademy.org/sites/default/files/publications/Curanovic_GuardiansTraditionalValues_Feb15_web.pdf>.

505 Thus, in a mid-2015 ruling (14 July 2015) No.21-P, *op.cit.* note 16, the Constitutional Court ruled that decisions of the ECtHR are not self-executing, as we have noted above at the text at note 471. There the Court stressed, in particular, that national constitutional courts must limit the negative impact of ECtHR judgments on domestic laws and ensure that the principle of subsidiarity is duly observed by the ECtHR. As a logical development of this trend, in December 2016 a new constitutional law was adopted (28 December 2016) No.11-Federal'nyi konstitutsionnyi zakon [Federal Constitutional Law] "O vnesenii izmenenii v FKZ "O Konstitutsionnom Sude Rossii" [On Introducing Amendments to the Federal Constitutional Law "On the Constitutional Court of Russia"], conferring the power on the Constitutional Court to refuse to enforce those decisions of the ECtHR deemed to be contrary to the Russian Constitution.

The Russian legal system turned out to be resilient to the idea of the direct effect of the Constitution. This idea first was rejected by the RF Constitutional Court and then by other courts despite the clear wording of the Constitution itself. The long-lasting struggle between the RF Constitutional Court and the RF Supreme Court about the direct applicability of the Constitution is illustrative in this sense. Prior to 16 April 2013, the RF Supreme Court had instructed its lower-level (general jurisdiction) courts to apply the Constitution directly when the courts found that a federal law (or a presidential edict) contradicted the Constitution and to refrain from applying such legislation or edicts.[506] In a 1998 Ruling, the RF Constitutional Court had condemned this practice, reasoning that no court can abstain from applying legislation unless such legislation has been deemed unconstitutional by the RF Constitutional Court.[507] In other words, the RF Constitutional Court's point was that ordinary judges may not consider whether a particular legislative provision is constitutional or not, and to refuse to apply such a provision in a specific court case on the grounds of the presumed unconstitutionality of this provision. This point was not supported by the RF Supreme Court which preferred the literal reading of Article 15 of the RF Constitution that endorses its direct effect. This discrepancy between these two jurisdictions lasted fifteen years until the RF Supreme Court abandoned its position and removed the controversial points from its 1995 ruling.[508]

This position of the RF Constitutional Court implies that neither international nor constitutional law can serve as suprastatutory criteria to ordinary (not constitutional) judges for deciding about restricting religious freedoms under Article 55 of the Constitution or for granting accommodations on religious grounds. As could have been expected, in this situation, courts have turned to traditionalist narratives to link national security and public morality with prevailing religious, moral, and other popular attitudes which, mostly, is based on conservative precepts of Orthodox Christianity and Islam and which are hostile to religious sects and new ("non-traditional") religious denominations.[509]

506 Para.2(b), (v), and (g), [Ruling of the Plenum of the RF Supreme Court] (31 October 1995) No.8, *op.cit.* note 342.

507 Ruling of the RF Constitutional Court (16 June 1998) No.19-P, *op.cit.* note 342.

508 Ruling of the Plenum of the RF Supreme Court, *op.cit.* note 342. More details on this discrepancy will be provided in Section 3 below.

509 For example, 80% of Russians support a ban on Jehovah's Witnesses in Russia although most respondents of a 2017 Levada poll have no idea about the religious teachings of Jehovah's Witnesses, available at <https://www.levada.ru/2017/07/13/svideteliegovy/>. Almost the same percentage of Russians (79%) supports a proposal to take children away from members of sects who teach their children about non-traditional religious beliefs, available at <https://wciom.ru/index.php?id=236&uid=116573>.

A controversial 2017 case—involving the banning of Jehovah's Witnesses as an extremist organization by the RF Supreme Court[510]—can be demonstrative of the dependence of the courts on this traditionalist narrative.[511] The basic argument for banning the Jehovah's Witnesses was their "extremism", understood as their claim of being the holders of a supreme religious truth. Such claims are theoretically applicable to almost any religious denomination, and this case suggests that the RF Supreme Court may face an uneasy dilemma in the future: either to reconsider its approach in the *Jehovah's Witnesses* case or enforce it in relation to other religious organizations that, for one reason or another, are not considered to be one of the traditional religions mentioned in the Preamble to the 1997 law. Some Buddhist, Christian, Hindu, and Muslim books also already have suffered from evidently disproportionate and inadequate judicial interference, but political or diplomatic pressure from within (or outside) Russia helped to set aside such decisions and calm the situation. The *Jehovah's Witnesses* case may be a harbinger of another, more restrictive approach.

In this Chapter, we do not endeavor to undertake a historical or cultural investigation into the particularities of the Russian (Orthodox) attitude to rights, and we will limit our analysis to the jurisprudence of the RF Supreme Court preceding its findings in the *Jehovah's Witnesses* case. This jurisprudence is very similar to the ideology of the Russian Orthodox Church as expressed in such documents as its 2000 *Social Doctrine*[512] or 2008 *Basic Teaching on Human Dignity, Freedom and Rights*.[513] This should come as no surprise since the Russian Orthodox Church exerts an important moral

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

511 Surely, it is not an easy task to formulate what this public morality really is, and we do not intend to attempt to do so here. Nonetheless, one can find remarkable coherence in statements by state authorities and other sociopolitical institutions such as the Russian Orthodox Church or political parties on what this morality is and what it should be. For example, the "opposition" parties in the Russian parliament (the Communists, the Liberal Democrats led by Vladimir Zhirinovsky and Just Russia headed by Sergey Mironov) are even more hostile to religious and other minorities than the governmental party, United Russia.

512 "Osnovy sotsial'noi kontseptsii Russkoi Pravoslavnoi Tserkvi" [The Foundations of the Social Conceptions of the Russian Orthodox Church] (19 July 2000), available at <https://mospat.ru/ru/documents/social-concepts/>.

513 "Osnovy ucheniia Russkoi Pravoslavnoi Tserkvi o dostoinstve, svobode i pravakh cheloveka" [The Basic Teachings on Human Dignity, Freedom and Rights of the Russian Orthodox Church] (26 June 2008), available at <https://mospat.ru/ru/documents/dignity-freedom-rights/>.

influence on society and on the political authorities,[514] and, profiting from this influence, it can fight those denominations whose teachings are hostile to its dogma and its institutional interests. Some researchers even claim that the mechanisms used to balance religious rights with other rights and privileges in Russia has some specific traits which contribute to state policies for the formation of new national identities.[515] Using the leeway provided by the gap between formalism and decisionism in Russian law, as examined in Chapter 1 above, Russian courts can indirectly utilize the creeds of the ROC in their decision-making to meet both political expectations and to satisfy public opinion.

2 Methodology

Building on the methodological considerations exposed in Chapter 1, we will depart from the hypothesis that there is a correlation between the legal formalism prevailing in Russian law and the restrained decisionism elaborated by the RF Supreme Court in the field of religious freedoms. This connection will be demonstrated below, in Section 3 based on the example of some mainstream cases heard in the RF Supreme Court.

This old-fashioned legal positivism—based on the presumption that laws contain responses to all possible legally relevant issues, so that the task of judges is to reveal these responses through careful interpretation of the laws and the legislator's will which is enshrined in these laws—might explain why Russian law does not explicitly recognize the doctrine of "religious accommodation". Formally, all rights and obligations are posited only in laws, so that judges may remain "mouths that pronounce the words of the laws" (according to Charles Montesquieu[516]) and have no discretion whatsoever. If a judge were to attempt to introduce an exemption to a legal

514 Kristina Stoeckl, "The Russian Orthodox Church as Moral Norm Entrepreneur", 44(2) *Religion, State and Society* (2016), 132-151.

515 Alexander Agadjanian, "Tradition, Morality and Community: Elaborating Orthodox Identity in Putin's Russia", 45(1) *Religion, State and Society* (2017), 39-60. See also, for example, Nikolas Gvozdev, "Religious Freedoms: Russian Constitutional Principles – Historical and Contemporary", *Brigham Young University Law Review* (2001), 511-536; Lev Simkin, "Church and State in Russia", in Silvio Ferrari and W. Cole Durham Jr. (eds.), *Law and Religion in Post-Communist Europe* (Peeters, Louvain, 2003), 261-280; John Garrard and Carol Garrard, *Russian Orthodoxy Resurgent: Faith and Power in the New Russia* (Princeton University Press, Princeton, NJ, 2008); Christopher Marsh, *Religion and State in Russia and China: Suppression, Survival, and Revival* (The Continuum International, New York, NY, 2011); Geraldine Fagan, *Believing in Russia: Religious Policy After Communism* (Routledge, New York, NY, 2012); and Roman Lunkin, "The Status of and Challenges to Religious Freedoms in Russia", in Allen D. Hertzke (ed.), *Future of Religious Freedoms: Global Challenges* (Oxford University Press, Oxford, 2013), 157-180.

516 Charles Louis de Montesquieu, *The Spirit of the Laws* (Cambridge University Press, Cambridge, 1989, Thomas Nugent transl.), Book 1, Ch. 3.

rule (*e.g.*, bakers must sell their cakes to everyone except when selling cakes to certain people whose behavior contradicts their beliefs), in Russian legal theory this could be taken as an expression of judicial activism and be condemned as a judge's expropriation of the legislative function. It is curious that the term "judicial discretion" in Russian legalese still has a pejorative meaning and is equated with arbitrariness.[517] Moreover, this formalism negates the idea of accommodation by referring to the secular character of the state and the constitutional principle of equality before the law (Art.19, RF Constitution) which is interpreted in such a way that it rules out any preferences based on an individual's religious status.

In spite of not being recognized in the prevailing doctrine, the idea of accommodation makes its way through Russian case law and jurisprudence: the courts show a clear proclivity to grant such accommodations to traditional religious denominations and, especially, to the Russian Orthodox Church and to state-recognized Muslim spiritual congregations (*dukhovnye upravleniia musul'man*). Analyzing key precepts of the prevailing formalist theory can bring to light the conceptual reasons behind the discrepancy between the constitutional principles on religious freedoms and the practice of their implementation or, more correctly, their non-implementation. In Russian law, the rule-based reasoning prevails, while principles generally work only if supported by relevant statutory provisions paving the way to the implementation of these principles in law-enforcement practice.[518]

The prevalent legal theory in Russia follows the first form of positivism that arose in the 19th century in the spirit of John Austin and Jeremy Bentham who saw the law solely as a set of commands from the sovereign.[519] Within this positivist paradigm, only subsumption (legal syllogism) can be accepted as the legitimate means of establishing and applying the law in concrete cases. In light of this theory, such procedures as balancing or proportionality tests are viewed rather as theoretical attempts to justify judicial discretion or arbitrariness or even latently to introduce "alien Western values" under the guise of liberal moral discourse.[520] As shown in Chapter 1, formalism is combined with decisionism, which does not require addressing legal principles and suggests revealing the true political will which is behind legal texts.

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517 Alexei Trochev, "Legitimacy, Accountability and Discretion of the Russian Courts", in Martin Brusis *et al.* (eds.), *Politics and Legitimacy in Post-Soviet Eurasia* (Palgrave Macmillan, Hampshire, 2016), 121-147.

518 From this point of view, Russia is similar to other post-Soviet countries. See, for example, Kühn, *op.cit.* note 122.

519 See Butler (ed.), *op.cit.* note 9.

520 See, for example, Mikhail Antonov, "Philosophy Behind Human Rights: Valerii Zorkin vs. the West?", in Mälksoo and Benedek, *op.cit.* note 70, 150-187.

Given the hierarchy of legal rules set out in Article 15 of the RF Constitution—the Constitution itself, international law, constitutional and ordinary statutes, bylaws—judges have no authority to introduce or apply principles except those expressly stipulated in laws, treaties, and other posited sources of the law, and, furthermore, they are prohibited from refusing to apply any laws because of their presumed opposition to such principles. This approach is dubbed "legality" (formerly, "socialist legality") and, in procedural codes, requires that judges be bound only by the law (*e.g.*, Art.195, RF Civil Procedure Code; Art.7, RF Criminal Procedure Code). This attitude was expressed, in particular, in the above-cited disagreement between the RF Constitutional Court and the RF Supreme Court about the direct effect of the Constitution, and it seems to be a result of the formalist interpretation of *Rechtsstaat* (law-bound state, *pravovoe gosudarstvo* in Art.1, RF Constitution) where the law is independent of other social regulatory mechanisms and where it prevails over them.[521]

Nonetheless, the reality in Russia and elsewhere is that legal norms cannot provide solutions for all possible cases. Therefore, judges inevitably have to go beyond posited norms to render reasonable decisions in the multitude of cases where the law might remain silent or ambiguous. Sometimes, judges also have to discard some posited norms if their application, under the given circumstances, would result in unjust or unreasonable decisions. This is especially true about such difficult cases as those connected with religious freedoms.

For its part, the RF Constitutional Court has continuously demonstrated its preference to formally abide by the principle of secularity and to abstain from coining any clear-cut principles or approaches in matters of religious freedoms. Until now, the most important case involving the intervention of the RF Constitutional Court in religious matters concerned a question that was rather formal: a 1999 ruling on the re-registration of religious denominations.[522] This ruling did not contain any substantial argumentation about legal principles or policies in the religious domain applying, instead,

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

522 In this case, the RF Constitutional Court (23 November 1999, No.16-P) rejected the claim about the unconstitutionality of the requirement that religious organizations must be periodically re-registered but ruled that those organizations that were incorporated in Russia prior to the adoption of the 1997 Law on Freedom of Conscience have no obligation to re-register. In another "positive" ruling (17 February 2015, No.2-P), the RF Constitutional Court legitimized the power of the Prosecutor-General's Office to monitor the observance of legislation by religious denominations and to obtain any information from these denominations that—directly or indirectly—may prove that they are violating the laws.

general principles of law. The abstention of the RF Constitutional Court[523] from interfering in religious matters led, as expected, to a lack of legal certainty (predictability) in these matters.

In this penumbra and lacunae situation, the ordinary courts (courts of general jurisdiction), headed by the RF Supreme Court, have developed jurisprudence that somehow fills this gap.[524] Below, we will analyze several rulings from the case law of the RF Supreme Court that might illustrate the main arguments which have been repeatedly applied in the Court's reasoning about religious freedoms. Our analysis of the practice of the RF Supreme Court will be limited to the aims of this Chapter: we will consider only cases published in the official journal of the Court, the *Biulleten' Verkhovnogo Suda Rossiiskoi Federatsii* (The Bulletin of the Supreme Court of Russia; hereinafter, "*The Bulletin*").[525] If case reports are published in the Bulletin, they have a much larger audience compared to unpublished decisions,[526] and consequently exert more influence on the practice of lower courts and on the entire legal system. Moreover, the RF Supreme Court uses *The Bulletin* to promulgate decrees of its Plenum and rulings of its Presidium that have

523 Nonetheless, there are some cases in which the RF Constitutional Court adjudicated matters concerning religious freedoms. If not to cite negative statements (*opredeleniia*) on the inadmissibility, the most important rulings (*postanovleniia*) are (besides the 1999 ruling cited above and rulings that were delivered prior to the enactment of the 1997 Federal Law on Freedom of Conscience): (1) a ban on the creation of religious political parties was held to be constitutional (Ruling of 15 December 2004, No.18-P); (2) the dismissal of a claim about the inapplicability of the rules on the liquidation of legal entities for liquidation of religious organizations (Ruling of 6 December 2011, No.26-P); and (3) denial of a claim about the unconstitutionality of the requirement that religious denominations must ask in advance for permission to conduct mass religious meetings (Ruling of 5 December 2012, No.30-P). See Mikhail Antonov, "Balancing Religious Freedoms: Some Examples from the Practice of the RF Constitutional Court", in Piotr Szymaniec (ed.), *The Principle of Proportionality and the Protection of Fundamental Rights in the European States* (Wydawnictwo Państwowej Wyższej Szkoły Zawodowej im. Angelusa Silesiusa, Wroclaw, 2017), 259-268.

524 When courts do provide *de facto* accommodations, their choice hinges rather on varying political expediency and on the general logic of constraints shaping the interrelation between the courts and other branches of state power. There are other mechanisms and organizations mitigating the relations between the state and religious denominations in Russia, the most important organ being the Presidential Council for Interrelations with Religious Denominations. The logic of their activities is rather political and goes beyond the scope of this Chapter.

525 *The Bulletin* is published monthly, available <http://www.supcourt.ru/documents/newsletters/>.

526 These unpublished decisions, nonetheless, are available on the official site of the RF Supreme Court: <http://www.supcourt.ru/indexA.php>. Decisions and acts adopted by courts of law in Russia are available on the government's *Pravosudie* website: <http://www.sudrf.ru>. It should be kept in mind, however, that the research engines on these sites are not easy to use and, by far, not all court acts are registered in these systems. It is also possible to use private-sector legal databases such as KonsultantPlus (<www.consultant.ru>) or Garant (<www.garant.ru>). These represent the Russian equivalents to databases such as Lexis-Nexis or Westlaw allowing the user to gain more convenient access to court practice. Full access to these private databases requires a paid subscription.

a normative character and are binding for lower courts and also, indirectly, for the entire Russian legal order. This normative character implies that if a decision of a lower court diverges from the position formulated in the decrees or rulings of the RF Supreme Court, it can be overturned on these grounds (point 3 of Art. 391(3) and point 5 of Art.392(4), RF Civil Procedure Code; point 3 of Art.341 and point 5 Art.350(1), RF Administrative Procedure Code). For our purposes, we have chosen to focus on some landmark cases and on normative decrees in order to give readers an idea about the case law of the RF Supreme Court prior to the 2017 *Jehovah's Witnesses* case cited above.[527]

This analysis clearly does not exhaust all the "law in action" on this matter in Russia, and here we will not devote any attention to the mass of court decisions that were pronounced by ordinary courts of law since their analysis would require much more extensive research.[528] We will also skip cases that were considered and decided by the RF Supreme Court but were included in the case reports published in *The Bulletin*.[529] It should also be mentioned that "electronic justice" in Russia is not as reliable a tool as one might wish it to be, especially in the courts of general jurisdiction. Even if the courts carry out a large amount of their workload nowadays in electronic form and numerous decisions are available through electronic resources, there still remains a trove of cases that are not entered into any databases because of concerns about national security, confidentiality, or simply due to irresponsibility on the part of court clerks and because of a lack of proper supervision over them. To our knowledge, no scholarly research has been conducted in Russia to establish the degree of reliability of legal databases in this regard.

In the following pages, we will provide a brief overview of the Court's argumentation retrieved from the case reports of the RF Supreme Court, mentioning the *ratio decidendi* of the relevant cases and describing the Court's reasoning in the general recommendations it provides to lower courts. As we have noted above, the highest instance of this Court (its Plenum) is entitled to issue binding decrees about how to interpret and apply the applicable laws. The commentaries made by the Plenum (decrees) are not necessarily connected with the particularities of concrete cases and

527 *Op.cit.* note 510.

528 To give readers an idea about the number of cases in this field, we accessed the *Rospravosudie* database (<https://rospravosudie.com>) using three combinations of keywords within a time frame from 1 June 2017 to 1 June 2018. The combination of keywords "freedom of belief' (*svoboda veroispovedaniia*) within this period of time yielded 594 results; the combination "freedom of consciousness (*svoboda sovesti*) yielded 1,394, and that of "religious freedoms" (*religioznye svobody*) yielded 14,932. The cases (court decisions, statements, and other acts) retrieved in the first two searches were mostly reproduced in the third search as well since it is the most comprehensive of the three.

529 A search for the keywords "religious freedoms" in the private database KonsultantPlus provided 379 results for cases considered by the RF Supreme Court in the timespan between 2002 and 2018.

are of a general nature. In Russian legalese, both general commentaries about court practice provided by the Court's Plenum and decisions made by the RF Supreme Court (by its Cassation Collegium or its Supervisory Collegium-Presidium) in individual cases are called *postanovleniia*. In order to avoid confusion, we will use two different terms in English: "decree" and "ruling" for these types of Court acts (general and individual ones). The RF Supreme Court sometimes considers cases as the first instance, and then its acts are made in the form of decisions (*resheniia*).

Not all of the retrieved cases are important for understanding the Court's approach in the mentioned category of cases. In some cases, "religious freedoms" are only occasionally mentioned in case reports and do not provide any specific recommendations or comments on this matter. We will omit these irrelevant results and focus on those that can contribute to elucidating the Court's principles and policies in "religious" cases. The comments given by the RF Supreme Court on judgments of the ECtHR in matters of religious freedoms are not provided here. Otherwise, we would have to substantially widen the subject matter of our research and to provide a comparative analysis of these comments and of the arguments of the ECtHR.[530] We will also skip rulings and decrees where only procedural aspects (which court fee is to be paid or which district court a claim should be addressed to, and so on), or aspects that are not relevant for this Chapter (extradition cases, real-estate disputes, custody discrepancies between parents, etc.) are examined. We only will discuss cases that concern principal issues involving the protection of religious beliefs.

The retrieved results will be organized chronologically. We warn readers that, as rule, certain details (like the names of the claimants or defendants, dates, addresses, names of judges, etc.) are not provided. The data-protection policy of the RF Supreme Court is such that anonymity is meant to protect the parties to court disputes and judges against illegal influence. This practice is different from the practice of the state commercial (*arbitrazh*) courts which publish their decisions online without hiding any of these details.

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530 Pursuant to Art.15(4), Russian Constitution, norms and universally recognized principles of international law constitute an integral part of Russian law and have primacy over domestic legislation in case of a collision of norms. As shown in the preceding Chapters of this volume, Russian scholars and judges have a different opinion as to the normative value of the jurisprudence of supranational courts (such as the ECtHR). But there is a consensus that such jurisprudence should be at least respected. As a result, the RF Supreme Court sometimes also publishes, in its Bulletin, judgments of the ECtHR and of other jurisdictional bodies (such as the United Nations Human Rights Commission) and courts cite (although rarely) this jurisprudence. See Anton Burkov, "Impact of the Convention for the Protection of Human Rights and Fundamental Freedoms on the Russian Legal System", *The EU-Russia Center Review* (May 2010) No.14, 30-35, available at <http://www.eu-russiacentre.org/wp-content/uploads/2008/10/EURC_Review_XIV_english.pdf>.

3 The Russian Supreme Court on Religious Freedoms: A Selective Analysis

We begin our analysis with an interesting dilemma, already mentioned above, which arose before Russian courts in the mid-1990s and concerned the question of young men avoiding obligatory military service by claiming that it contradicted their religious beliefs. Making such claims meant potentially facing criminal prosecution for draft evasion, and the RF Supreme Court needed to decide either to uphold this prosecution in accordance with statutory law or to absolve young men of criminal charges on the basis of their constitutional right to alternative civilian service. This dilemma even led to a confrontation between the two major Russian courts—the RF Supreme Court and the RF Constitutional Court—about whether conscientious objection could serve as the legal basis for releasing individuals from compulsory military service.

This situation was made even more complicated by the fact that before 2002 (when the law on alternative civilian service was adopted), there were no laws or regulations explaining what this alternative service could be, how (and under which conditions) it was to be carried out despite the fact that Article 59 of the RF Constitution already, in 1993, had introduced the right to alternative non-military (civilian) service for those not wishing to enroll in military service based on their conscientious objections. In order to justify not applying the applicable laws about criminal and administrative liability for those who avoided military service, the courts either had to introduce rules on alternative service themselves and, thus, take the place of legislators or to clear young believers of criminal charges on the basis of the direct effect of Article 59 of the Constitution. The RF Supreme Court chose the latter option and asserted that the courts should apply the Constitution even in the absence of laws and regulations (the issue of direct applicability of the Constitution has been reiterated by the RF Supreme Court on many occasions both before and after) and, therefore, that the courts should reject the presumably unconstitutional charges and acquit the conscientious objectors.

This approach has been embodied in a series of rulings by the RF Supreme Court. For example, in the *Overview of Court Practice* for the first (*The Bulletin* 1996: 10)[531] and second quarters of 1996 (*The Bulletin* 1997: 3), the Court indicated that in the absence of laws on alternative non-military service, the courts should apply Article 59 of the Constitution and, consequently, should not apply the Criminal Code or the 1993 Federal Law on Military Service imposing criminal liability on conscientious objectors. This position was confirmed in Decree of the RF Supreme Court No.8 (31 October 1995) on Certain Questions of the Application of the RF Constitu-

531 The first number is this (and later citations) refers to the year of publication; the second number after the colon to the issue in that year of *The Bulletin*.

tion in the Administration of Justice by the Courts (*The Bulletin* 1996: 1), where the RF Supreme Court instructed the lower-level courts to apply the RF Constitution when these courts determine that a federal law contradicts the Constitution and to refrain from applying such legislation (points b, v, and g of para.2, Decree No.8).

As already mentioned, the RF Constitutional Court disagreed with this position and, in 1998, implicitly condemned it as an encroachment on its exclusive competencies. It held that no court in Russia can abstain from applying federal legislation on the grounds of purported unconstitutionality unless such legislation has been deemed unconstitutional by the RF Constitutional Court itself. This implied that the RF Supreme Court and its subordinate courts cannot deviate from the application of federal laws even if these courts find that these laws contradict the Constitution. In such a case, the RF Constitutional Court preferred the courts to suspend proceedings and submit a query to the RF Constitutional Court. This approach underscores that constitutional principles in Russia do not function properly without mechanisms for their implementation established by statutory law.

The aforementioned Supreme Court Decree No.8 also touched on a number of other principal issues and, in particular, on balancing the freedom of religious activities with other human rights and freedoms. The courts were instructed to pay attention to a possible collision between values protected by the Constitution and to assume responsibility for choosing between them. However, this responsibility of the courts was about resolving possible value conflicts in light of the decrees and rulings of the RF Supreme Court.

As a starting point for analysis, the RF Supreme Court took the expression of religious beliefs: Article 28 guarantees the right to propagate and disseminate religious beliefs, but Article 13 of the Constitution prohibits the establishment of organizations fomenting religious strife. This latter prohibition, in the Court's opinion, is absolute and cannot be overridden on the basis of any religious freedom (point 11 of the decree). Therefore, the RF Supreme Court itself determined in advance which value has priority: this is characteristic of formalist jurisprudence which leaves ordinary judges with no room for activism and rules out the possibility of balancing various principles. In the second issue of *The Bulletin* in 1996, the Chief Justice of the RF Supreme Court, Vladimir Lebedev, published his commentary on this decree in which he also stressed that the constitutional right to create religious organizations is not absolute and is limited by the provisions of Article 13 of the Constitution. This reasoning signified that violations of religious freedoms could be remedied in a court of law if it is proven that the exercise of said freedoms does not contravene statutory laws against fomenting religious strife. In other words, religious freedoms can be discarded if said freedoms are considered dangerous in accordance with Russia's anti-extremism laws. Here, one can see the origins of the argumentation embodied in the 2017 *Jehovah's Witnesses* decisions.

This issue was also at stake when the RF Supreme Court considered a headscarf case (*The Bulletin* 2004: 2) in which several Muslim women challenged a police instruction that prohibited individuals from using passport photos while wearing a headscarf. Here, the Court's position was that traditional religions may claim exemptions. The first instance of the RF Supreme Court had denied the petition (using reasoning similar to that of the ECtHR in the 1993 case of *Karaduman v. Turkey*), following a formalist approach. However, the Cassation Collegium of the RF Supreme Court quashed the verdict and allowed the petition, ruling that the restriction was invalid (Ruling of 15 May 2003, No.KAC-03-166) because the main function of passport photographs is to depict a citizen in the way s/he usually appears in public. Therefore, if certain Muslim women usually wear a headscarf in their daily life in accordance with established traditions, there are good reasons for them to use a photo depicting them in their typical head covering. The Ruling stressed that Russian laws do not prevent women from wearing a headscarf in public places. Therefore, these limitations were unjustified and were held to violate the religious freedoms of Muslim women.

In a series of *hijab* cases considered by the RF Supreme Court between 2012 and 2016, the Court reasoned that wearing a *hijab* in schools is allowed not as a religious accommodation but, rather, as a tribute to national traditions. As the *hijab* is an Arab custom rather than a local one, there is no justification for allowing it in public schools of the Muslim regions of Russia tradition (Bashkir, Chechen, Dagestan, Tatar, etc. schools). The *ratio decidendi* in these cases was expressed by President Vladimir Putin, who interfered in the matter, saying publicly in 2004 that there is no good reason to allow the wearing of the *hijab* in schools since there has never been such a tradition in Russia's Muslim regions. This reasoning implied that religious accommodation could be legitimately conceded to "traditional" religions only provided that such religious practices are compatible with national traditions. This reasoning was repeatedly used afterwards when Russian courts struck down several regulations upon requests from Orthodox or Muslim communities paying a tribute to national traditions in public religious ceremonies, but at the same time turned down similar petitions from religious minorities.

This policy can be illustrated by another case considered in 2004 in which the Court used a broad interpretation of the 1997 Law on Issues of the Corporate Status of Local Religious Organizations (*The Bulletin* 2004: 10). Muslims living in a town in the Kamchatka *Oblast'* had established a local religious organization in which Muslims living in other neighboring towns were also members. The RF Ministry of Justice claimed that this organization was illegal since the members did not live in one locality as required by the 1997 law. The Ministry's petition to close down the organization was rejected by the RF Supreme Court (Ruling of 6 February 2004, No.60-G04-3), which argued that the term "local organization", according to the logic (but not pursuant to the literal text) of that law, implied the territory of a subject of the Russian Federation. Since all the members of the

Kamchatka Muslim Religious Community lived in the Kamchatka *Oblast'*, which is a subject of the Russian Federation, there was nothing to prevent them from establishing such a community. At the same time, Jehovah's Witnesses, Scientologists, and other religious minorities were desperately fighting to convince the Russian state to accept them as legitimate religious denominations based on similar arguments.

In its Ruling No.49-G04-48 (21 May 2004), the RF Supreme Court commented on religious educational activities and formalities to be observed when engaging in such activities (*The Bulletin* 2004: 11). In the case of the Church of Scientology's Dianetica branch office in Bashkortostan, the Court ruled that representing a religious dogma in the form of a scientific concept and regularly teaching that concept is a particular kind of education. Thus, teaching the concept of L. Ron Hubbard, the founder of the Church of Scientology, is not solely a missionary activity but, also, a process of transferring scientific and religious knowledge or an educational process that, according to Russian legislation, requires a license. In the opinion of the Court, a religious denomination providing religious education is fully eligible to receive a license since Russian laws do not introduce any exemptions for religious education in this regard. In addition to exercising psychological pressure, including hypnosis on adherents,[532] the Court held that the fact of illegal (*i.e.*, without a license) educational activity may serve as grounds for liquidation of this religious denomination.

In a judgment rendered a few years later, the RF Supreme Court (Ruling of 16 October 2007, No.31-G07-8) confirmed this finding and held that the mere fact of engaging in educational activities without a license constitutes sufficient grounds to close down a religious organization (the Biblical Center of the Evangelic Church in Chuvashia).[533] These findings are confirmed by the observation that other religious schools (Catholic, Lutheran, Orthodox, and other Christian denominations) normally obtain licenses for offering religious education at their theological seminaries. But Ruling No.31-G07-8 ignored the difference between professional education (such as theological studies at a religious university) and day-to-day meetings with discussions which are commonplace in many Russian public schools where traditional religions are studied. In the case of Dmitrii Bondar', who challenged the legitimacy of teaching ROC dogma at schools and its indirect inclusion in school curricula, the Court took an unfavorable position. Reasoning quite formalistically, the RF Supreme Court disagreed with the claimant's suggestion that the constitutional principle of secularity is a legal obstacle preventing the RF Ministry of Education from including religious

532 Similar arguments were made earlier by the RF Supreme Court in Ruling No.58-G2-38 (26 November 2002) against Dianetica in Khabarovsk.

533 This case was later reconsidered by the ECtHR, which found violations of the right to religious freedom in the licensing requirement applied to Sunday schools ECtHR Judgment. First Section, *Biblical Center of the Chuvash Republic v. Russia* (14 July 2014) Application No.33203/08.

dogma of the prevailing religious denomination (the ROC) as a part of school instruction (and allowing priests to visit school classes) and rejected Bondar's petition.[534]

As an example of this selective approach, the Cassation Collegium of the RF Supreme Court (*The Bulletin* 2005: 5) stressed that the constitutional right to freedom of religion also implies that prisoners should have an opportunity for exercising their religion in prisons and, for this purpose, for taking literature, icons, and other religious items to their cells. This right has been restricted by para.23 of a RF Ministry of Justice Regulation (2001) No.224. This restriction was challenged by a prisoner who claimed that his religious freedoms were being arbitrarily restricted since he was unable to pray without icons (which had been prohibited by the prison authorities pursuant to para.23 of Regulation No.224). The RF Supreme Court's First Instance Collegium invalidated this provision of the Regulation. Reconsidering this case on a cassation petition from the RF Prosecutor-General's Office, the RF Supreme Court's Cassation Collegium agreed (Ruling of 2 September 2004, No.KAS04-351) with the first instance's holding, stressing that human rights and liberties can be restricted only in order to assure national security, public morality, or the health or rights of other citizens (Art.55, RF Constitution) and finding that it was not the case concerning the right of prisoners to exercise their religion in line with established traditions. In the RF Supreme Court's opinion, this balance will not be affected if prisoners follow their religious practices in their cells so that the Prosecutor-General's arguments—that prisons have prayer rooms and libraries for such practices—are unjustified. This case fits the reasoning of the RF Supreme Court in the previous cases where it confirmed that religious accommodation can be granted to "traditional" religions (to Orthodox icons in this case).

However, Russian courts do not always protect the interests of the Russian Orthodox Church. As an example, one can cite the controversial point of restitution where the interests of the state and of the Church seem to be in a permanent conflict. In a 2004 ruling (5 October 2004, No.GKPI04-1253), the RF Supreme Court turned down the application of the St. Elea-the-Prophet Orthodox temple in Moscow (*The Bulletin* 2005: 6), which claimed that of the RF Government's 2001 Regulation No.490 (point 8)—about the process for transferring former ecclesiastical buildings back into the ownership of the religious denominations possessing these buildings prior to the 1917 Revolution—was invalid. The basis of this claim was that the federal laws on this issue imperatively prescribed restitution of all ecclesiastical buildings to the ownership of churches. Nonetheless, the challenged regulation allowed the termination of restitution only under certain conditions. Therefore, in the claimant's opinion, the government exceeded the bounds conferred upon it by the law. The Court disagreed and rejected the petition, reasoning that the obligation of restitution was not absolute and the rights

534 Ruling of the RF Supreme Court in case No.AKPI13-810 (13 October 2013), available at <http://supcourt.ru/stor_pdf.php?id=565700>.

of religious denominations should be balanced with the ownership rights of the current occupants of buildings. In this case, the Court had to balance religious freedoms not only with historical traditions but, also, with the state interest. Equating the latter with the public interest, the RF Supreme Court prioritized it over other values. Later on, this argument will reappear in cases involving the Jehovah's Witnesses when Russian courts began confiscating this denomination's real estate subsequent to its liquidation.[535]

For several years, one controversial point related to tax legislation for Russian ultra-Orthodox adepts was the use of a taxpayer identification number (TIN). These adepts had fought for the right not to have a TIN, arguing that it is inadmissible to categorize human beings by numeric identifiers and, thus, to replace the names given to them at baptism. The Russian courts have regularly dismissed these claims. The RF Supreme Court in its Ruling (30 May 2000) No.GKPI00-402 held that this sort of tax identification is compatible with the believers' principal religious beliefs and, therefore, did not violate any freedoms. This finding was confirmed by the RF Constitutional Court in its Ruling No.287-O (10 July 2003).

New arguments—heard in 2004 by two courts in Tambov *Oblast'*—appealed to the freedom of conscience, to human liberty, and to reasonability in general. The petitioner insisted that the tax inspectorate should, first, inform a taxpayer about the TIN chosen for them and assign it only after the taxpayer confirms that this number does not contradict their beliefs. The courts of the first and the second instances allowed the petition, reasoning that in this situation there were no concerns about national security or public morality and therefore religious freedom could not be limited under Article 55 of the Constitution. The RF Supreme Court (*The Bulletin* 2007: 2) quashed these decisions and held (Ruling of 1 March 2006, No.13-V05-13) that the state authorities are not under any obligation to consider religious beliefs of taxpayers. It is enough that attributing a TIN is not contrary to the beliefs of the main (traditional) religious denominations in Russia, which was confirmed by the position expressed by the Holy Synod of the Russian Orthodox Church: in a statement of 7 March 2000, it came out in favor of the use of TINs.[536] In this case, the Court ruled that

535 In St Petersburg, for example, real estate belonging to the Jehovah's Witnesses was confiscated in 2018 following a decision of the Sestroretsk District Court. See Mikhail Telekhov, "Imushchestvo Svidetelei Iegovy na 881,5 mln rublei iz"iato v pol'zu gosudarstva" [The Property of the Jehovah's Witnesses Valued at 881,5 Million Rubles Is Confiscated in Favor of the State], *rapsinews.ru* (5 March 2018), available at <http://www.rapsinews.ru/judicial_news/20180503/282635534.html>. A similar decision was taken by a Petrozavodsk court in Karelia in 2018 and in a number of other regions: "Sud lishil Svidetelei Iegocy prava na zdanie v Petrozavodske" [The Court Dispossessed a Jehovah's Witnesses' Building in Petrozavodsk], *interfax.ru* (4 April 2018), available at <http://www.interfax.ru/russia/606962>.

536 In a decision from the end of the 2000s, the ECtHR rejected as inadmissible the subsequent petition of one of the claimants in this case: *Skugar v. Russia* (3 December 2009) Application No.40010/04.

the petitioners had failed to support their claim of using a tax identification number as being contrary to their own religious beliefs: they had not proven that an identification number was not congruous with national traditions or the religious creeds of "traditional" denominations.

Shaping its symbolic policy, the RF Supreme Court ruled that certain signs or images could not be displayed or worshipped; that the use of such signs or images could constitute grounds for banning a religious denomination (Ruling of 6 February 2007, No.18-G07-1). In this case, the Ingilistic Aryan Church of Old Believers had challenged the interdiction of the RF Prosecutor-General's Office preventing them from exercising their religion. The petitioner reasoned that the image of a swastika used in their rituals was an old Aryan Sun symbol serving as a cult object long before the National-Socialists in Germany had started using the symbol in their ideology. Dismissing the petition, the RF Supreme Court held that the image of a swastika has a clear cultural connotation in contemporary societies; that its use normally provokes a clear link with the ideology of Nazism; that the existence of any religious denomination worshipping the swastika is incompatible with the basic codes of public morality in Russia (*The Bulletin* 2007: 12). The sole fact of worshiping this symbol is enough to prohibit the activity of such denominations regardless of the historical context in which the "new Aryans" interpret the swastika or how they correlate this symbol with their beliefs. In vain, the applicant had argued that the ROC also utilizes a number of symbols similar to swastika, *e.g.*, on ceremonial dresses of Orthodox priests: the Aryan Church had no traditional background similar to that of the ROC to justify its right to the same use of this symbol.

Here, the RF Supreme Court also confirmed that it had evaluated the religious beliefs and symbols against the backdrop of prevailing tradition.

Conclusion

This analysis suggests that there are earlier cases connected with religious freedoms that paved the way to the 2017 *Jehovah's Witnesses* decision. Legal argumentation in Russia can be characterized as mostly rule-based—mostly relying on legal formalism and its technique. If there is a statute clearly regulating a matter, the courts—in cases about the rights of religious minorities—would be reluctant to re-evaluate or reinterpret the rules of the statute from the point of view of reasonability, proportionality, or other non-formal criteria. If there is no statutory law on religious matters, the courts likely will refuse to protect religious matters unless the case touches upon interests of the prevailing denominations. This fact is obvious in many of the judgments brought by the ECtHR against Russia in cases of religious freedoms where the Russian courts remained obsessively faithful to the letter of the 1997 Law "On Freedom of Conscience and Religious Associa-

tions" without taking account of the absurdity of applying the rules in some specific situations.[537]

In certain difficult cases, however, the RF Supreme Court decided to go beyond the literal meaning of rules and regulations; reasoning in terms of values and policies. The literal wording of Russia's 2002 anti-extremism law leaves the Court no choice but to ban almost all religious denominations because they insist on their spiritual superiority over other religions and, in this sense, fall under the category of "extremist', understood as claiming "national or religious superiority" over other religious groups. This literal approach was followed in the *Jehovah's Witnesses* case.

Nonetheless, the analysis in this Chapter shows that the RF Supreme Court has in its arsenal more flexible methods of reasoning allowing it to avoid applying this legislation to "traditional denominations"; even granting them exemptions from general legal obligations. Utilizing the technique of doublespeak, Russian courts shy away from making their argumentation transparent and from explicitly recognizing any substantial difference in protecting "traditional" and "non-traditional" religions. On the contrary, the courts insist that protection is equal; that they are abiding by constitutional principles which are interpreted restrictively, except for the situations where the courts would decide to introduce exceptions from this restrictive interpretation in favor of the ROC. Such an interpretative approach reveals once again the tension between formalism and decisionism that is specific to Russian law. As follows from the analyzed case law, this doublespeak predictably leads to contradictions in argumentation on the part of the RF Supreme Court and its subordinate courts.

This analysis can be demonstrative of what may be one of the major paradoxes of Russian law: the Russian state formally endorses liberal norms and principles which do not fit the current political situation, interpreting them selectively, in clear contradiction to their original and literal meanings. This doublespeak in official narratives touches upon the rule of law, democracy, non-discrimination, human rights, supremacy of international law, and other pillars of the Russian constitutional order; solemnly proclaimed but, by and large, not respected. As was shown in the example of Russia's anti-extremism laws or laws protecting the feelings of religious believers in the present Chapter or the equal protection principle for sexual minorities in the previous Chapter, the authorities introduce laws that make it possible to overrule the constitutional principles on freedom without repealing them. Russian courts, while formally supporting liberal constitutional principles, reinterpret them in a conservative sense generally reflecting the conservative mood prevailing among the population; implying the use of specific argumentation in referring to national values, traditions, popular mindsets, etc. The extent to which this court practice is a result of political interference and influence is not discussed in this Chapter and in this volume generally.

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537 See, for example, the 2012 ECtHR Judgment *Jehovah's Witnesses of Moscow v. Russia*, *op.cit.* note 18.

We can, however, reasonably suggest that even if such influence continues to persist in Russian law, it is not the only factor shaping court practice. There are also a number of informal mechanisms of "social control" in every society imposing common values upon the judiciary shared by the majority. It means that judges will sometimes make exceptions in rulings against religious minorities or in favor of the ROC, based on their own estimation of the communitarian values which serve as the intellectual background of Russian law or balancing these values with the political or public interest that might be involved in such cases. In turn, these values have an impact on the formation of the attitudes, prejudices, and biases of judges and, thus, can be expected to influence their decisions. Our general comments on the political, historical, and legal frameworks for the protection of human rights have been provided in the earlier Chapters of this volume. Therefore, here we will not revert to the broader cultural and social contexts surrounding the legal regulation of religious freedoms.

Summing up twenty-five years of development of the jurisprudence of the ECtHR in religious cases, one cannot fail to observe that the first case came to this Court from Greece,[538] and many other intricate and controversial issues on religious freedoms have been raised since then by Greece, Moldova, Romania, Russia, and other Orthodox countries (those in which the Orthodox denomination is prevalent and/or has a privileged status). It has been justly noted that religious identities may, to a certain extent, prefigure believers" attitudes toward legal regulations, and this is, for example, the case of Orthodox Christianity.[539] At the same time, proponents of Orthodox religious denominations tend to adopt some standard viewpoints and stances toward law and rights making the legal interpretation and application of laws in Orthodox countries somewhat more particular as compared with legal regulations in other societies.[540] When seeing to unveil the real policies behind the formalist language of court decisions, the example of Russia can provide an important basis for further research into the particularities of understanding the divide between the sacred and profane, the religious and non-religious in Orthodox societies. This final Chapter is intended to demonstrate, once again, that there are certain ideological or, more broadly, philosophical constraints which impede Russia from adhering to the liberal standards for the protection of religious freedoms. These constraints are based on conservative and communitarian mind-sets which predictably shape the legal reasoning of judges and nudge them to re-interpret liberal legal provisions so that these provisions will be in better harmony with these mind-sets.

538 ECtHR Judgment *Kokkinakis v. Greece* (25 May 1993) Application No.14307/88.

539 See an important collection of analyses, from different points of view, in Maria Hämmerli and Jean-Francois Mayer (eds.), *Orthodox Identities in Western Europe: Migration, Settlement, and Innovation* (Ashgate, Burlington, VT, 2014).

540 Kristina Stoeckl, *The Russian Orthodox Church and Human Rights* (Routledge, London and New York, NY, 2014).