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Formalism, realism and conservatism in Russian law

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In the present study, we analyzed the formalist and decisionist elements, present in Russian legal thinking, and examined the impact of conservatism on the interplay of these elements. The focus of this study was on the conceptualization of rights in Russia: in legal theory (Chapter 1), in legal community (Chapter 2), in social philosophy (Chapter 3) and in case law (Chapters 4 and 5). This is one of the aspects in which the foundational narratives of Russian law underscore its civilization distinctiveness and legal exceptionalism. In case law, the argument of distinctiveness is frequently referred to as the rationale for crafting exceptions to the constitutional equal-protection principle as it is applied to religious, sexual and other minorities. In their turn, such discussions about distinctiveness reveal certain features of Russian legal culture and, specifically, the intellectual culture that is continually transmitted in Russian (previously: Soviet) legal education, scholarship and practice: there are legal rules that shall be obeyed by all the addressees, but some of these addressees might be given exceptional treatment to secure the best interests of the state. We examined the historical dimension, philosophical background and normative implications of this culture, paying particular attention to the prevailing understanding of rights, the validity of law and its application, and how this understanding influences legal practice. Our findings are summarized in the following pages.

The main research question, with which we undertook this work, revolved around the specific style of legal thinking in Russia and its impact on the practice of interpreting and applying the law. We identified the gap which exists between the wording of Russian laws, their interpretation and application which establishes that Russian judges in *penumbra* and *lacunae* cases sometimes decide them contrary to the letter of the law. To justify their decisions in such cases, Russian court judgments sometimes refer—directly or implicitly—to fundamentals of the social order such as cultural and civilizational distinctiveness, social cohesion around certain values or the collective interest understood as guiding principles of social development. Such approaches can be found in other legal orders. Therefore, it is not the tension between the prerogative and the normative or, in other words, between the decisionist and the formal elements in law which makes Russian law peculiar. This peculiarity concerns rather the specific interpretation and application of fundamental legal concepts and of the intellectual frameworks that lie behind these concepts.

In its turn, a conservative reading and interpretation of these fundamentals is a source for further identification of legal principles. In other words,

if the law is silent or ambiguous, or if the law seems to be bad (obsolete, intrusive, etc.), judges act (or are supposed to act) in the logic of the legal system so that their decisions maintain and reinforce the social order. For many other legal orders, this also is the general rule which can be dubbed as “justice”, “sustainability”, or “certainty” or by other terms which display the dialectic of rule-and-exception that is at work in a particular legal order.

In contemporary Russian law, it is often asserted that a correct balancing of rule and exception is attainable if judges follow tradition, protect the collective interest and defend the cultural specificity of their country. Such is the main message of the conservative philosophy that can be revealed behind the texts of court decisions in *lacunae*/penumbra cases and in the narratives of senior judges as well as of other legal or political actors. The situation is complicated by the fact that Russian constitutional law and a number of statutory laws, adopted in the 1990s, are liberal in both letter and in spirit. We argued that this tension between liberal laws and their conservative reading and application in contemporary Russian law can be seen as one of its distinguishing features.

At face value, Russian legal theory largely continues to adhere to the methodological premises of legal positivism dating from the turn of the 19th-20th centuries. For a number of practical and ideological reasons, Soviet law—from the late 1930s on—continued to utilize pre-revolutionary positivist theories of law, distilling them with ideological assertions but without changing them profoundly. Soviet (Russian) textbooks usually reproduced the formalist approach to law, and this suggested to a number of researchers that the Soviet (Russian) law-enforcement and legal scholarship by-and-large are positivistic. This suggestion seems to be oversimplified. On the one hand, formalism required fidelity to the letter of the law. On the other, Marxist ideology considered the law practically to be a means of the class struggle and exploitation—viewing it epistemologically as an epiphenomenon of production relations. In its core, this Marxist approach rendered senseless any respect for the letter of the law and added much ambiguity to the positivist side of the Soviet theory of state and law, introducing into legal theory the prerogative element under the cover of “class will”.

Our analysis led us to the conclusion that formalism cannot serve as the only theoretical hallmark of Russian (and previously, Soviet) law; that there was, and still is, a collateral tendency which one can dub “Russian legal realism”.⁵⁴¹ This tendency entails three main hypotheses. *First*, in high-

541 Despite the conceptual reservations made in Introduction above, we have retained this term in the title of the present volume as it grasps two essential elements characterizing American and Scandinavian versions of legal realism: its decisionist (“law is what judges say law is”, insofar as legal texts do not factually determine court decisions), ideological aspects (law is the means for implementing state policies and for educating citizens about these policies) and the function of “social engineering” implicitly attributed to judges—to use the law and the legal order to push social life forward, to attain certain ideals, and to change it accordingly. Similar “realist” elements—albeit with different implications and ideological messages—also can be identified in Soviet law as well as in contemporary Russian law.

profile cases judges are not bound by words of the law (legal texts, “law in books”) and can decide—independently or counseled by state officials, party members or higher judges—about exceptions to the law in order to attain certain ideological objectives. *Second*, court decisions and proceedings must educate lay people and transmit to them knowledge about such objectives, showing how rights and obligations should be exercised for the common good. *Third*, judges and their decisions must contribute to building and maintaining a better social order. In the 21st century Russian context, “better” usually is interpreted to mean “backward”: *i.e.*, to some facts of Russia’s glorious past. But such value preferences also can be projected forwards: *e.g.*, to the “bright future” as was the case with Soviet legal ideology.

Naturally, analogous facts can be identified in other legal systems where conservative narratives recurrently infer the need to make a country “great again” or similar slogans, which have some evident implication for law and which influence its application. In order to avoid misunderstandings, we underscore here once again the following: our analysis is not to be taken in the sense of asserting that a conservative combination of decisionist and formalist elements is peculiar only to Russian law or that the impact of conservative philosophies on law is only a Russian specificity. On the contrary, our initial thesis—on which this research builds—is that comparable combinations and impacts also can be seen in other legal orders. Yet, the present volume does not contain any comparative analyses of the Russian situation with other legal orders and legal cultures. Such an ambitious project would go far beyond the limits of this work and require a more detailed examination than that which we have included here.

The subject matter of our research has been an examination of institutional, cultural, political and other factors of the Russian situation and of the particularities which shape the style of legal thinking in Russia. We hope that this analysis can help to remove artificial academic barriers, be they the logic of “the West and the Rest” or the unending quest to uncover legacies of “socialist law” in various transitional systems—the barriers that may, conceptually, impede comparative lawyers from drawing insightful parallels and comparing different legal cultures in new perspectives. Using similitudes and differences in this respect, one can employ different combinations of decisionism and formalism and the variable role of conservative and liberal philosophies in law as a *tertium comparationis* for viewing Russian law along with other legal systems.

Furthermore, another of our assertions was that value choice (conservative, liberal, socialist or something else) is a secondary variable in the respective style of legal thinking. Very roughly sketched, the conceptual scheme prevailing in Russian law can be described as “norms plus facts yield the decision” (the formalist element) “unless sovereign will mandates otherwise” (the decisionist element). At the same time, this “sovereign will” does not always mean “the will of political leaders”. One hardly could imagine a person or persons (be they the President, senior members of the

Presidential Administration or other authorities) who could be in a position to specifically express their will about the tens millions of cases annually decided by Russian courts. In most of the cases in which an impact of such "sovereign will" can be reconstructed, it will be judges who anticipate the dispositions and moods of their superiors and of the political authorities standing above these superiors, and who engage in guesswork about what this "sovereign will" might be in some of the cases they hear ("high-profile cases") or whether there is any room for thinking about "sovereign will" in other cases ("ordinary cases"). There is an array of examples where judges, in their anticipations, go far ahead. In such cases, their decisions (e.g., prohibiting some religious texts, as illustrated in Chapter 5) in fact can strike against the will of the political leadership. Consequently, defining this "sovereign will" is vital for interpreting and applying law, and it highlights the importance of the debates about sovereignty in Russian law.

There can be two main theoretical solutions of the sovereignty issue along with sundry possible combinations. On the one hand, sovereign will can be formulated by legislative, administrative or other actors of the state (*the first part of the formula*) and, therefore, can be attributed to parliament or another competent authority to which formally belongs the lawmaking function or a respective part thereof (*the second part of the formula*). This second part can become redundant, as sovereign will is tantamount to that which is established by the lawmakers. On the other hand, as the power to decide about exceptions from rules, sovereignty can factually be shared among various actors (judges, party bosses, the executive or presidential power, secret agencies, the clergy, sundry lobbying forces, etc.). This factual power remains formally unwritten in the law. Consequently, there are no clear demarcating frontiers between factual powers and competences of different actors to "act on behalf of the sovereign"; no established rules for drawing these frontiers *ad hoc*. In such a case, "sovereign will" indicates the frames of reference for identifying and interpreting the real unwritten rules factually determining actions and decisions of judges and other legal actors.

This latter case characterizes the conceptual state of affairs in contemporary Russian law where the sovereign power of exception *de facto* is shared by different actors and is a contentious issue for a number of reasons. Any explicit assertion of this power is beyond and contrary to constitutional statutory and law. Pursuant to the generally accepted principle of legality, exceptions almost always are formally excluded; yet, practically are often inevitable. The lack of explicit rules for exception-making has been compensated in court practice by implicit rules that are based on a conservative

philosophy,⁵⁴² including references to the prevailing ideology (in the Soviet era) or to the collective interest, cultural and civilizational distinctiveness, fidelity to tradition and national identity, the inviolability of state sovereignty, as well as to a number of other variables, in post-Soviet law. Already in Soviet law, supreme courts at the levels of the Union and of the republics were granted the power to provide “guiding directions” (*rukovodiashchie raz’iasneniia*) so that some coherence was brought into this “gray zone”.

Under Russian law, the only legitimate organ formally empowered to make exceptions from legislative rules (also through “ascertaining their constitutional meaning”)—or to annul their legal effect—is the RF Constitutional Court. However, this Court only deals with an infinitesimal number of cases as compared with the judicial load of other courts across the Russian Federation. The RF Constitutional Court took the lead in formulating these implicit rules that, as a result, are regularly being brought to the surface—despite that fact that there are no explicit rules for constitutional interpretation which could contribute to the transparency of exception-making in Russian law. In any case, even after concretization on the case-by-case basis of so-called “constitutional values” (*konstitutsionnye tsennosti*)—serving as the justification for exceptions in the argumentation of the RF Constitutional Court—implicit rules do not become entirely explicit as this argumentation, to a large extent, is doublespeak.

This is quite explicable in terms of normative unity: creating a parallel system of such rules would plainly contradict the Constitution and would introduce a dualist divide into the legal system (similar to the divide which was seen in English law, in the past, between common law and the law of equity). At the same time, the strategy of doublespeak—adopted by the RF Constitutional Court and other actors who practically formulate such rules, naming them in metaphysical terms (such as constitutional values, the fundamentals of law-and-order, etc.) and introducing them as interpretations of posited law—could not fail to produce a divisive effect in Russian law in which formal, general rules co-exist with informal (or semi-formal) rules of exception.

The decisionist tendency was not clearly visible in pre-revolutionary Russian law (before 1917) and mostly developed in the first years of Soviet rule. It was the time when legal formalism was condemned by the Bolsheviks as a part of bourgeois legal ideology and when Soviet lawyers were

542 We prefer this term of “philosophy” (in the sense of a system of ideas) to that of “ideology”, as it would be too strong a proposition to say that, in Russian reality, judges may introduce ideologies, given the explicit prohibition of state ideology under Art.13 of the RF Constitution. At the same time, it is plausible that judges—especially when balancing different principles at high courts—have in a mind a certain *Weltanschauung* and embody it in their decisions; sometimes, also in their writings and discussions. Another reason is that one can find quite different (and, sometimes, contradictory) ideas and assertions in grand narratives of Russian leaders. Therefore, these narratives are not so much similar to conventional definitions of ideology as they are a more or less coherent compendium of ideas that can be dubbed “philosophy” (or “theory”).

called upon to find law, immediately, in the social reality. Mikhail Reisner, Piotr Stuchka, Evgeny Pashukanis and many other Soviet legal theoreticians of that time insisted that the formal law always lagged behind social development, especially in periods of revolution. Fidelity to the letter of the law is only a trick for diverting the working class from political struggle and revolution, and there is no practical or ideological value to keep it up to date. Social reality itself—correctly identified and interpreted in the light of Marxist-Leninist teaching—would point to the exceptions that judges and other law-enforcement officials could make from the general rules when the literal application of general rules resulted in purported damage to the collective interest (class interest, national interest, etc.) as this interest was defined by the political power. To a certain extent, the formal (posited) law could be entirely replaced by the living law identified by bearers of the revolutionary legal consciousness (*revoliutsionnoe pravosoznanie*), as the 1917 Soviet Decree No.1 “On Courts” attempted to do. Yet, according to Marx’s writings, law was doomed to wither away soon after the proletarian revolution. This “soon” became the object of theoretical discussions among Soviet lawyers after the 1917 Revolution; in the course of these discussions, it turned into “anytime soon”, “after the full and decisive victory of the revolution”, “after the full suppression of hostile classes”, and other conceptually flexible formulations.

In the 1930s, “anytime soon” was projected into the undiscernible future, while this anti-formalist (decisionist) tendency of Marxism began to be balanced with legal formalism. When Vyshinsky coined the Soviet theory of state and law in the late 1930s, he combined these two tendencies, inevitably bringing into this theory a significant measure of inconsistency.⁵⁴³ After the end of Soviet rule in the early 1990s, the ideological element was removed from Russian law. But the cited combination of formalism and decisionism—and its applications in legal reasoning—largely remained the same and still constitutes the intellectual framework in which many Russian lawyers understand their law and its machinery. After some years of Yeltsin’s attempts to reshape Russian law according to Western patterns, the liberal spirit of constitutional and statutory law gradually has been replaced with a conservative philosophy which bears a striking resemblance to the communitarian ideologies of Soviet law and of the preceding legal system of Imperial Russia: the individuality and her rights are largely molded by community relationships and, therefore, are not a value *per se*. It implies that individual rights cannot be used against the majority or against the state which acts as the personification of the social community.

The prevalence of the collective interest over individual rights in Russian law has a long history and, occasionally, is perceived as a sort of “Russian legal tradition” supposedly distinguishing Russia from the West. Such romanticism in the legal sphere reminds one of Russian conservative authors

543 Kelsen, *op.cit.* note 66.

such as Karamzin, Ilyin or Berdyaev (and the philosophical origins of their inspiration in the German philosophy of Hegel, Schelling or von Savigny). The main tenets of (post-)Soviet legal theory with its anti-individualist background can also be seen as coextensive with this communitarian trend.⁵⁴⁴

This tension between formalism and decisionism nowadays has become one of the main discussion-points about “legal politics” (*pravovoiia politika*) in Russian legal scholarship. Quite often, justices of the Russian higher courts and other leading Russian legal actors make references to Russian “traditions” so as to assert their power to decide upon exceptions when dealing with the protection of minority rights. In Russia and elsewhere, references to “tradition” usually involve the philosophical paradigm prioritizing organic historical development over revolutionary changes, majority opinion over dissenting minority views, established patterns and mind-sets over innovations in religion, morals, gender and other main symbolic spheres of the social; according preference to stability of the social structure over attempts to make this structure more just, equitable or simply better. In short, this paradigm refers to a conservatism which, by definition, is hostile to new patterns of behavior—especially in such susceptible spheres as family or religion.

At face value, the conservative logic—as applied to the issue of rights—is simple: Russia does not endorse the Western accentuation of individual rights to the possible detriment of collective rights and interests, as in the “Russian legal tradition” individual rights never have been accepted as constitutive elements of the legal order. Prioritizing individual interest can split the organic collective whole and lead to the destruction of the whole of society which cannot survive if it loses its integrity and cohesion; or, at least, it can impede organic social development. This argument is not new: it can be traced from Plato and Thomas Aquinas to Soviet international lawyers or to Valerii Zorkin who have made similar arguments about the correlation between the collective and the individual.

However, oversimplifications about this conservatism can be misleading as it has several implications for legal thinking. As we mentioned above, this legal thinking comprises two main contradictory elements: formalism

544 A renown Russian expert with the long experience in various Western projects concerning the modernization of ex-USSR legal systems, points out at what he calls the “theoretical deformation of the legal framework”: Leonid Golovko, “The Space for Legal Reform in Central Asia: Between Political Limits and Theoretical Deformations”, *OSCE Yearbook 2010* (Baden-Baden: Nomos, 2011), 105-115, implying that obsolete legal knowledge is being reproduced at law schools in the ex-USSR. Professor Golovko has good reason to assert that “without proper theoretical preparation, a one-time normative measure that aims to remove a complex deformation will not be understood or will be distorted at either the law-enforcement or the judicial level. The theoretical basis is also vital to ensure the coherence of subsequent legislative steps” (*ibid.*, 111). Citing some exemplary “deformations”, he refers to the aberrant distinctions between public and private law, between criminal and administrative law, between police and judicial functions, and insists that “the reform most urgently needed is the removal of this historical deformation at the theoretical level. Otherwise, all efforts to “normalize” legal systems, in order to overcome their protracted “transition state”, are misplaced and futile” (*ibid.*, 115).

endorsing the sovereign's commands in law; and decisionism justifying the prevalence of collective morality over legal texts. In Russian law, this tension is intensified by the discrepancy between the universalist language of the Constitution (commitment to universal human-rights standards which are prioritized as the supreme standards of legality under Article 18 of the RF Constitution) and official narratives about how Russia is not ready to sacrifice its civilizational distinctiveness for the sake of such universal standards.

In the historical perspective of its naissance in the 1920s, this decisionism was epistemologically based on Lenin's idea that law (as all other elements of "superstructure") mirrors the existing social relations in the prism of the ideology of the ruling class. This idea was developed by Piotr Stuchka and became one of the cornerstones of the Soviet theory of state and law in the 1930s. In the Soviet era, this relationship of basis (economy) and superstructure (law) implied that the cognition of law necessitates addressing the real economic structure of production relations (especially in Evgeny Pashunian's commodity exchange theory) or the ideology of the working class which reflects laws and objectives of historical development of mankind.

This ideology expectedly drew from the Marxist-Leninist philosophy which was supposed to form correct mind-sets and, thereby, to uncover social processes and regularities in an appropriate perspective. According to this philosophy, production relations create a social structure (an interaction of classes and their struggle), and this structure creates the system of political power while the latter, organized as the state, creates its law. Such a conceptualization, only sketched here in general lines, logically led to the conclusion that the correct interpretation and application of law must be based on the correct ideology introduced and ascertained by the political power. In this sense, law reflects production relations, the system of class domination and the class struggle that are the immanent results of these relations.

In cases where judges were not sure of fully understanding the ideological implications of high-profile cases, the internal logic of the Soviet legal system nudged them to consult with party officers who were supposed to be familiar with the esoteric philosophical knowledge of dialectical materialism (*diamat*) and its correct practical applications. The practice of interference of the CPSU into judicial processes, on one hand, and the strategy of Soviet judges asking advice from *partkoms*, on the other hand, are well documented in Soviet history. In Western scholarship, these Soviet practices were labelled as "telephone law" or "politicized justice".⁵⁴⁵ Surely, analogous schemes also can exist in other societies where ideological knowledge plays a similar role.

545 E.g., Maria Popova, *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine* (Cambridge University Press, Cambridge, 2012); Alena Ledeneva, *Can Russia Modernise? Sistema, Power Networks and Informal Governance* (Cambridge University Press, Cambridge, 2013); and Maria Popova, "Putin-Style 'Rule of Law' & the Prospects for Change", 146(2) *Daedalus* (2017), 64-75. For a more general perspective, see Tom Ginsburg and Tamir Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, New York, NY, 2008).

Contemporary Russian law has rejected Marxist-Leninist ideology: the *diamat* no longer is the prevailing social philosophy, but this style of legal thinking did not suffer any cardinal shifts. Law is still mainly taught at law schools as an “objective phenomenon” (*ob’ektivnoe iavlenie*) rooted in the social structure, collective mentality and historical tradition, and dialectically mirroring them. Implicitly, it means that a cleavage between the real/objective law⁵⁴⁶ which exists directly in social structure and collective mentality, on the one hand, and the formal law which is contained in legal texts and more or less mirrors the real/objective law on the other. Nowadays, this legal ontology supports the nationalist romanticism: the legal system of a country is not a result coincidence but, rather, a product of organic growth; if anything is transplanted from the outside, it must be brought into conformity with the native legal culture. Otherwise, the legal system will become dysfunctional because of the incongruity between formal law and real law.

Such methodological tenets are advantageous for great historical narratives and discourses about the civilizational role of Russia that, unsurprisingly, also become the foundational narratives for the legal system. Practically applied to law, this philosophy means that judges do not have unfettered discretion when they deal with high-profile cases. In order to make good decisions, they have to check how their decisions contribute to reaching the ultimate objectives of Russian organic development and whether these decisions fit the “collective consciousness” reflecting this development and revealing its objectives. As in the Soviet system, these objectives will be defined by those who have the factual political power (in a limited number of high-profile cases) or by judges themselves (in other cases).

It is evident that such a Herculean mission (in terms of Ronald Dworkin and his construction of the ideal judge Hercules) is hardly bearable for ordinary justice. Thence, it is practical that the power of formulation of exoteric knowledge about organic social development and the power of naming of its objectives belong to an “intellectual aristocracy”; to policy-makers from the executive or from the higher ranks of the judiciary. This decisionist (or realist) perspective of Russian law synchronizes with its formalist tenets: judges are bound by the formal commitment of legality to apply the laws to their letter.

This combination of two incompatible elements (legal formalism and decisionism) predictably leads to theoretical contradictions and to practical tensions between supporters of different political views who may find justification for their positions in either of these two elements. It happens

546 Not to be confused with the distinction between “objective law” and “subjective law” which, although is based on the same philosophical premises, refers to another conceptual distinction. Here, the definition of the “true” law as “real law” refers to another dimension of realism: that of a philosophic apriorism as it was formulated in the medieval polemic between realists and nominalists.

also in other legal orders: for example, the opposition of originalism and interpretivism in US constitutional law. In a number of important issues, tensions between decisionism and formalism suggest to Russian legal scholars and practitioners that they should take issue with the ensuing theoretical and practical problems. Some of these problems have been examined in the chapters of the present study. Without pretending to deal with them in all their possible implications and aspects, we concentrated on the problem of rights, examining the impact of the tensions between formalism and decisionism on the conceptualization of rights and the delimitation of the scope of their protection in Russian law.

As the first step, we sought to clarify methodological grounds and implications of the combination of decisionism and formalism in Russian legal thinking in Chapter 1 (“Formalism and Decisionism in Soviet and Russian Jurisprudence”). One of the important implications is that Russian legal scholarship still endorses “mechanical jurisprudence” requiring passivity from judges to act as the “mouth that pronounces the words of the law”. In this paradigm, judges only have to apply—but not change—the words of laws. Tense discussions are taking place in Russian legal scholarship about the limits of judicial discretion; about a judge’s fidelity to the words of the law and the right to reinterpret these words. Facing theoretical impasses of formalism, quite a few judges and prominent legal scholars have decided to move from this formalism toward a realist methodology, trying to get free from the statutory constraints in interpretation and insisting that judges and other law officers have the final say about the true meaning of laws.

Examination of this theoretical background of Russian law reveals a number of clues for understanding some current debates in Russian legal theory oscillating between two principal theses (excluding smaller methodological and conceptual issues): either the judge⁵⁴⁷ is bound by the law and shall in no case transgress the will of the legislator, or the judge is free to decide cases against the law, relying on considerations that she might extract from traditional values, conservative (or different) ideologies, or from other sources. In other words, the dilemma—apparent in many academic writings—is that the judge shall either abide by the legal rules also in the cases brought to courts by individuals against the state and its interests, or that she may depart from them in order to secure the best interests of the collective—even when these interests are contrary to individual rights and freedoms posited in the constitutional and statutory law and formally protected by it.

On the one hand, the official attitude to such decisionist narratives remains rather negative as they can potentially undermine the entire political

547 The term “judge” in this context does not mean that our conclusions are applicable only the judiciary. For the purposes of the present study, this term was utilized broadly as a shortcut to all law-enforcement officials and court clerks as they all are trained within the same system of legal education that translate similar values, conceptual ideas and theories.

system which, formally, relies on legislative rules. On the other hand, the strict observance of laws and a literal interpretation of legal rules can be cumbersome—from time-to-time—for attaining political goals in high-profile cases. At this point, the official attitude can change, nudging judges to look behind statutory texts in order to decide a case in accordance with the ultimate political objectives underpinning these texts (or, rather, construed as underpinning these texts). However, it would be dangerous to leave judicial discretion unbridled in these cases: for the sake of predictability and manageability of the legal system, this discretion needs to be framed within a certain *Weltanschauung* setting out priorities for the interpretation and application of law.

One of the technical difficulties for fixing such a *Weltanschauung* in statutory law lies in the general interdiction of Article 13 of the Russian Constitution against establishing a state or obligatory ideology. The only institution that may legitimately outline such a *Weltanschauung* in the legal sphere—through coining “constitutional values” or through other intellectual highways and byways—is the RF Constitutional Court. The identification of constitutional and other legal values, theoretically, also can be carried out by other Russian courts; but, as we showed in Chapter 1, the Constitutional Court jealously bans such attempts, asserting its exclusive competence in this symbolic sphere.

Our analysis showed how—in formulating a particular conservative *Weltanschauung*—the RF Constitutional Court has reinterpreted the conception of human rights so that, in fact, it excludes its application in sensitive high-profile cases. According to this reinterpretation, in a conflict between individual rights and the collective interests, the former shall be defeated as is well illustrated in the series of cases concerning YUKOS and, personally, Mikhail Khodorkovsky. To defend this reinterpretation, the Constitutional Court chose to deny the universality of human rights, arguing that national states have the unrestrained power to make exceptions with a view to national interest, cultural specificity and other similar reasons.

Following this strategy, the RF Constitutional Court pragmatically extended its scope of competences, *de facto* assuming an ideological function—at the same time, encapsulating itself from normative criticism from within or from without. In terms of competence, no other opinion can prevail over the Court’s opinion. This is the main premise in the long contentious debates with the ECtHR, culminating in the RF Constitutional Court’s famous 2015 Judgment 21-P concerning the prevalence of constitutional interpretations rendered by the Constitutional Court over international law and the ECtHR case law. To a certain extent, this conflict can be seen as a struggle for the decisionist power to make exceptions from legal rules—the power that the RF Constitutional Court unambiguously considers as its exclusive prerogative.

Comparing various versions of decisionism in Russia and in other countries, we suggested that decisionism in the Russian context is based on different methodological assumptions than the judicial or the administra-

tive powers of exception are to be found in realist jurisprudence in US or Scandinavian law (or in other legal systems). The apparent similarity of their theoretical conclusions—the ideological nature of law-enforcement and the *de facto* uncheckable discretion of judges—cannot hide the difference of the intellectual contexts in which the respective realist approaches are coined. Thus, the intellectual environment of pragmatism—common to American legal thinking—normally requires judges to provide a rational justification for their decisions thereby constraining their discretion by the limits of practical rationality accepted in the legal community and in society in general (public opinion). Similar intellectual constraints exist in the Nordic legal culture where the theoretical use of realist jurisprudence is also wide-spread.

Such pragmatism is not observed in Russian culture in general or in Russian legal culture in particular. This culture is mostly antirational and communitarian; historically rooted in *grands récits* about the superiority of “heart” (belief, intuition) over “reason”, about collective identity with assertions of its preeminence over individual choice. The state and its commands are supposed to have absolute priority over individual rights and interests since the state represents and defends the collective interest, while individual reason is supposed to be too weak to grasp the entire web of social life and to critically assess it. “Disenchantment”⁵⁴⁸ with state power can, in this sense, lead to its delegitimization in the Russian context—a concern that is consistently expressed by protagonists of the conservative legal philosophy in Russia. Thereby, the factual social structure (legal system inclusive) evades criticism and discards calls for change. At the same time, this logic provides for argumentation tools in situations of exception.

In the interplay of rule and exception that is common to all legal orders, exceptions from rules in Russian law usually are justified with reference to the social, cultural or sometimes the religious specificity of Russia, and finally to the sovereign power of the state. In this logic, the state is authorized to define this specificity and, also, Russian “limits of concession” to international standards. Argumentation from the standpoint of individual rational interests turns out to be of secondary relevance at best or irrelevant—even if formally they are cited in some court decisions. Viewed from this angle, the discussion about “margins of appreciation” predictably leads to the issue of sovereignty, this term in Russian legal parlance being applied to a wide range of phenomena and utilized with various adjectives (*e.g.*, cultural sovereignty, language sovereignty or even “alimentary sovereignty”, etc.).

We concluded Chapter 1 with the proposition that decisionist elements in Russian law are based on similar methodological premises as in Western legal culture but that their intellectual contexts differ. This difference was

548 In terms of Max Weber’s *Entzauberung* which refers to the modern style of thinking that demystifies the world and renders it transparent, removing theological and supernatural accounts and putting faith in the ability of science to explain the world in rational terms.

illustrated in Chapter 2 by the reasoning of Chief Justice of the RF Constitutional Court Valerii Zorkin. Zorkin explicitly builds his theory on a conservative social philosophy. This philosophy leads to a rejection of the alleged individualism of Western legal culture (or what Zorkin condemns as such “individualism”) in which the idea of human rights is rooted. This traditionalist conception of human rights is not meticulously elaborated in Zorkin’s writings, but its reconstruction provides an interesting perspective from which to evaluate the dualism of Russian legal thinking and the role of conservatism in shaping of the theoretical foundations of Russian law.

We argued that, in his conservative philosophy, Zorkin combines two perspectives of law. On the one hand, he endorses statist positivism which presupposes that the sovereign power of state is the source of rights and the supreme criterion of the validity of all legal rules and principles. Unsurprisingly, this positivism leads Zorkin to a dualist account of the relation between international and domestic law (existing as two independent systems) and, consequently, to the denial of the universal and absolute character of human rights. On the other hand, Zorkin is well aware that consistent positivism precludes judges from checking the validity of legal norms and principles from the standpoint of supra-statutory criteria of justice and the like; the power that belongs to his Court and that he is reluctant to give away.

Considering the Russian Constitution as a “living instrument”, he argues that the living substance in each constitution unveils its continued and variable relevance for maintaining the social order. Therefore, “living constitutions” (understood as tools of social control) are based on values and mind-sets which, generally, are accepted in corresponding societies. This suggests to Zorkin that constitutions be considered as statements of national distinctiveness; that preference be given to the social whole over the individual. In this conservative logic, distinctiveness is produced by the organic development of each country and touches not only on cultural but, also, on political and legal aspects, excluding subordination of domestic law to universal standards.

Zorkin’s starting point is the well-known conservative logic, pursuant to which the loss of distinctiveness in any of the existentially important spheres—including that of legal regulation—may cause death for a nation. From this perspective, Zorkin unleashes his merciless criticism of globalization and its effects in the legal sphere. Among such effects he counts the idea of the universality of human rights which undermines the principles of law-and-order and legality, threatening to bring national legal orders into chaos. Rights cannot be interpreted and protected in the same way in different countries precisely because of the national distinctiveness of each country. There are no universal legal principles that would be equally valid in every country. That is why legal universalism not only is theoretically unwarranted but, also, poses an existential menace to national law. Constitutional judges must be the final instance in defining which norms are valid in the Russian legal order and which are not. In this sense, they act as guardians of the “living constitution”.

In his numerous publications, the Chief Justice rejects the idea that human rights can be universal, considering conceptions of universality to be products of postmodernist, globalist and multiculturalist discourses that are unacceptable to Russian society and the Russian state.⁵⁴⁹ He justifies this criticism by contending that the inviolability of sovereignty—invariably interpreted, in terms of Westphalian sovereignty, as absolute and perpetual power—must remain unchecked if it is really sovereign power.⁵⁵⁰ In order to create legal (*i.e.*, binding) norms and principles, the political power must be sovereign; in other words, sovereign is the one who is unchecked by any norms or principles over which this power has control (in terms of exception-making). If state power ceases to be sovereign, it cannot maintain law-and-order (*pravoporiadok*) and no longer is state power properly speaking. Political entities that are not sovereigns (such as international organizations and supranational courts, NGOs, etc.) can neither create binding norms and principles nor challenge the power of the state to create legal norms. The validity of such norms and principles only is derived from the state's acceptance thereof. From this standpoint, any ideology which attempts to dissolve this system, and prioritize supranational legal regulation, will be considered to be destructive for law-and-order. This set of arguments became Zorkin's main analytical tool against the universalizing human-rights discourse and international criticism.⁵⁵¹ But the issue of human rights turned out to be more complicated from a practical perspective.

Following the statist positivism, Zorkin feels himself on the safe road and concludes that legal norms and principles only are created by the state; or, at least, need to be recognized by the state. There can be no superior authority (*i.e.*, the international community) above the state that might overrule legal commands issued by the state or invalidate them. The Westphalian sovereignty which lies in the foundation of Russian constitutional order is not compatible with universal human rights, as it cannot tolerate superior instances imposing legal rules and principles on states. On the other hand, human rights are established in the 1993 Russian Constitution with the status of supreme values standing above positive legal rules (Art.18, RF Constitution), and—as Russia acknowledged that the ECHR and other treaties ratified by Russia are integral parts of its law (according to para.4 of Art.15, RF Constitution)—human rights are directly applicable in Russian courts of law. However, taken as *ius cogens*, human rights conceptually undermine the perspective of legal positivism.

Here, Zorkin faced a dilemma. Human rights are not universally binding in the sense that there is no instance to check state authorities and prevent them from encroaching on human rights. The RF Constitutional Court has the right to repeal federal laws in case they contradict the Constitution and, in particular, if they violate human rights—including those which are

549 Nussberger, *op.cit.* note 95.

550 Antonov, "Theoretical Issues of Sovereignty in Russia", *op.cit.* note 369.

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

not mentioned in the Constitution (Art.55, para.1) or those established only in international law (Art.17, para.1). Therefore, human rights are crucial for the institutional survival of the RF Constitutional Court, in its present form, and are one of the main tools for maintaining and expanding the symbolic power of this Court, its legitimacy. At the same time, human rights are potentially dangerous for the existence of this Court and for the entire Russian state because of possible subjugation to supranational organizations and to the international community which can use human-rights narratives for criticizing the state authorities and, thereby, undermining their legitimacy. In this latter aspect, Zorkin is anxious that human rights not become a Trojan horse for international law insofar as their direct application can mean that national law is subordinated to international law; that the validity of national law is dependent on its congruency with international principles and standards.

At first sight, it seems that Zorkin found an easy way to solve this conundrum. Only after implementation into national law can human rights acquire legal validity and become a part of the national legal order. Before such positivation, human rights are simply a part of some extralegal ideology and are not directly binding on the state. To a certain extent, this interpretation coincides with the Soviet perception of human rights as a part of the “bourgeois ideology”⁵⁵² as argued by Professor Tumanov and numerous other Soviet legal scholars. For Zorkin, before being defined by the competent national court or introduced into national law by its legislation (including the Constitution), human rights serve only as a morality of the law (in the sense of “positive morality” as John Austin called norms of international law) but not as law properly said; to wit, not something that is posited and, therefore, binding. Still, in order to be utilized as arguments for repealing federal laws through constitutional justice, human rights need to be defined. This power of definition must, in Zorkin’s opinion, belong to national courts.

However, granting to ordinary (non-constitutional) national courts the power to define human rights and decide on their applicability against the posited law can be dangerous. This can lead to a difference of opinion between courts (which, in fact, happened in the mid-1990s between the RF Constitutional Court and the Russian Supreme Court about the direct application of the Constitution by ordinary judges) and, therefore, to the factual disintegration of “sovereign will”. This is the scenario Zorkin seeks to escape by conferring upon his Court the exclusive power to define human rights and decide about their prevalence over federal laws.

Employing Schmittean language, one can sum up Zorkin’s position: the Constitutional Court is the only “Guardian of the Constitution” who can decide on exceptions from legislative rules and from international law.

552 Vladimir A. Tumanov, *Contemporary Bourgeois Legal Thought: A Marxist Evaluation of the Basic Concepts* (Progress Publishers, Moscow, 1974).

In other words, this Court works as a normative gatekeeper which does not let in pernicious normative elements from the outside (or from inside via regional authorities or political opposition) and puts an end to internal normative discrepancies. The justification is rather trivial: there can be no nation without common values and no country without laws protecting these values, no law-and-order without sovereign state power keeping the country together and enacting binding laws. In this logic, in case of a conflict with constitutional law (which expresses the “living constitution”), human rights will be put on the back burner by constitutional judges for the sake of survival of the entire society, no matter what the wording of the Constitution may be about their prevalence.⁵⁵³

The theoretical framework of this conception makes clear that all the solemn declarations about fidelity to human rights and about their direct effect notwithstanding, in fact human rights work in Russian law rather as the “morality of law” providing only orienteers for developing national law; not as direct legal instruments for defending freedoms and for compelling the state to observe them.⁵⁵⁴ Several important cleavages between the ECtHR and the Constitutional Court have developed in recent years underscoring this problem. Such cases as *Markin*,⁵⁵⁵ *Anchougov*⁵⁵⁶ or *Yukos*⁵⁵⁷ have shown that international human-rights treaties and ECtHR jurisprudence do not, in fact, have direct effect in Russian legal system: their application only can be allowed within limits formulated by the RF Constitutional Court (sovereignty, traditional values, etc.). Zorkin’s discussions pertaining to these cases are illustrative of the consequences of this conception for legal practice. In this connection, one of Zorkin’s main theoretical challenges has been to insulate his Court and his country from international criticism for disobeying not only international law but, also, the spirit and the letter of the Russian Constitution itself.

For this effect, Zorkin emphasized the “civilizational argument” referring to a specific legal culture and to traditions in Russia that, presumably, differ from the Western ones. If international-law norms and their interpretations contravene so-called traditional (or constitutional) values, judges may give preference to national law in which these values are embodied or, even better, turn to the foundational narratives relying on the idea of

553 See, e.g., Zorkin, “The Essence of Law”, *op.cit.* note 81.

554 Most of the citations to ECHR and to the jurisprudence of the ECtHR were clearly decorative, with no real value for reasoning of Russian courts. See Burkov, *op.cit.* note 321.

555 *Op.cit.* note 176; ECtHR Judgment *Markin v. Russia* (Grand Chamber) (22 March 2012) Application No.30078/06; and RF Constitutional Court Ruling (6 December 2013) No.27-P, *op.cit.* note 176.

556 ECtHR Judgment *Anchugov and Gladkov v. Russia*, *op.cit.* note 177; and RF Constitutional Court Ruling No.12-P, *op.cit.* note 177.

557 ECtHR Judgment *Yukos v. Russia* (31 July 2014) Application No.14902/04; and RF Constitutional Court Ruling (19 January 2017) No.1-P.

organic development.⁵⁵⁸ It was exactly this legal romanticism and conservatism that Zorkin employed in his diatribes against the ECtHR in order to explain the reasons and criteria of the conservative interpretations which his Court gives to Russian federal laws and to Russia's international treaties. With this, he defended the exclusive right of his Court to decide about exceptions and, in doing so, eliminated the direct effect of the Constitution and of international law.

The next Chapter in this work ("Conservatism in Russia and Sovereignty in Human Rights") examined the foundational narratives about state sovereignty and their conceptual relation to conservatism and the interpretation of human rights in Russian law. In this Chapter, we argued that the move of Russia from the enthusiastic acceptance of human rights in the early 1990s to more reserved attitudes toward these rights in the 2000s can be explained through the prism of the normative incongruence of human rights with the basic conceptual premises of Russian law. Once incorporated into Russian law, human rights took the form of high ideals remote from the practice of Russian law. When it turned out that human rights are not only about lofty words but, also, impose positive obligations on state authorities and sometimes require that the respective societies reconsider their mind-sets and values in such sensitive issues as LGBT rights or freedom of expression, the normative incongruence between human rights and the conservative narratives became ostensible.

As we demonstrated in Chapter 1, from the formalist standpoint, human rights cannot become binding unless they are transformed into commands of the sovereign and, especially, they may lose their validity if at any moment they contradict the sovereign's will. In the decisionist perspective, international treaties, constitutions, laws and any other legal texts do not determine court decisions and, rather, only provide frames of reference for justifying decisions taken by judges discretionally and/or under influences of various sorts. Neither of these perspectives compels the state and its agencies (the judiciary inclusive) to unswervingly observe and protect human rights.

To understand this incongruence, our analysis turned to the context of Russia's legal development during last three decades. The breakdown of Soviet rule was accepted by many in Russia with enthusiasm. In the beginning of the 1990s, the main legal provisions of the Russian legal order were enacted formally creating a new normative framework.⁵⁵⁹ Among these laws is the 1993 Constitution, seen by its authors as a continuation of Russian liberal constitutional acts of the early 20th century (the 1906 Basic State

558 See the manifesto of this Kremlin's ideology "National Identity and the Future of Russia," *Valdai Discussion Club Report* (February 2014), available at <http://vid-1.rian.ru/ig/valdai/Identity_eng.pdf>.

559 See Ferdinand J.M. Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law* (Martinus Nijhoff Publishers, Dordrecht, The Netherlands, 1993).

Laws).⁵⁶⁰ There were no conceptual problems in relating the new legislation with human-rights discourses as long as the judiciary could stick to the literal interpretation of these laws and, at the same time, remain true to their spirit; to the liberal values enshrined in these laws. However, after Putin's coming to power in 2000, the political trends and objectives began changing quite significantly, marking a propensity to authoritarianism and isolationist attitudes.⁵⁶¹

For some important practical reasons, no attempts have been made by the Russian political authorities to change the liberal wording of the 1993 Constitution, even if there are many voices insisting that the liberal constitutional provisions must be abrogated or amended. It easily explains itself: touching upon the fundamentals of the constitutional order and bringing any substantial amendments into the RF Constitution through convocation of a Constitutional Assembly could be fraught with unpredictable outcomes (it would have been the first convocation of such an Assembly under the 1993 Constitution). So, the political strategy employed during in the last years has been to change the interpretation without changing the words of the Constitution;⁵⁶² similar to the living constitutionalism in the US and other countries.

This brought a performative contradiction into the Russian legal system. From the formalist standpoint, the enacted rules (the posited law) shall prevail and judges have to apply the law and only the law (the principle of legality). Meanwhile, political objectives in effect prevail over formal rules and create factual constraints for judicial decision-making (the principle of expediency).⁵⁶³ This tends to limit the rights of minorities (religious, political, sexual, etc.) with references to the political expediency of protecting sovereignty, maintaining traditional values, or evoking other similar reasons. As a result, such objectives—and the conservatism underpinning them—collide with the liberal values enshrined in the formal norms of the

560 Andrey Medushevskii, *Russian Constitutionalism. Historical and Contemporary Development* (Routledge, London, 2006).

561 The ideological rationale was that democracy, human rights and other Western liberal values can be utilized to undermine the Russian sovereignty and lead the Russian people astray. See, e.g., Viacheslav Morozov, "Western Hegemony, Global Democracy and the Russian Challenge", in Christopher S. Browning and Marko Lehti (eds.), *The Struggle for the West: A Divided and Contested Legacy* (Routledge, London, New York, NY, 2010), 185-200.

562 With all necessary reservations, this situation can be compared with that of Germany in 1930s when the German lawyers re-interpreted the Weimar laws in the way to fit them to the new ideology (so called "*Rechtserneuerung*"). See Karl Larenz, *Deutsche Rechtserneuerung und Rechtsphilosophie* (J.C.B. Mohr, Berlin, 1934).

563 This modality implies rather the pragmatic choice. In Russia, as in some other civil-law countries, the judiciary is dependent both on the executive power (the Ministry of Justice that provides material resources to courts) and on the presidential power that decides on appointments and on promotion of judges, so that pragmatically judges have all reason to avoid conflicts with these powers and, therefore, not to contravene the political objectives of these powers.

Constitution. This situation puts the RF Constitutional Court in an ambiguous situation where it has to bring its interpretations in line with the political objectives without losing face and without completely abandoning the wording and the spirit of the Constitution.⁵⁶⁴

At face value, the conservative philosophy employed by the Constitutional Court—collectively in its decisions and individually in the writings of its justices—often repeats the ideas of German and French conservative romanticism of the 19th century developed in Russia in the 19th century⁵⁶⁵ and by such exiled philosophers of the 20th century as Ivan Ilyin or Nikolai Berdyaev,⁵⁶⁶ among others. Basic constitutional principles such as the supremacy of human rights, the prevalence of international law, the values of democracy or rule-of-law, formally remain parts of valid Russian law. Yet, gradually they are being interpreted contrary to the literal text of the Russian Constitution and, also, to the initial interpretations of the Constitution by Russian courts in the 1990s. Practically, this situation now means that courts are motivated to depart from the literal meanings of legal texts and invest meanings in them that do not correspond either to their literal wording or to the intent vested in these laws by their authors (*i.e.*, in the early 1990s). Predictably, this development reshuffles the balance between the formalist and the decisionist elements of Russian law.

In this context, it unsurprisingly conflicts with the idea of human rights imposing normative limits on state power and, in turn, excluding for this power the unbridled possibility to make exceptions from universally recognized standards of freedom and non-discrimination. As such, sovereignty in the Russian conservative legal discourse is conceived as an integral component of traditionalism. In present-day traditionalist interpretations of sovereignty, it is called upon to resist multiculturalism and globalism of contemporary Western legal discourse and is a *conditio sine qua non* for maintaining “normal” social order. This theoretical scheme is cemented by a trivial chain of ideas: it is only living in a society that one can become a human being; no contemporary society can exist without a state; rejecting

564 See an important analysis by William E. Pomeranz, “Uneasy Partners: Russia and the European Court of Human Rights”, 19(3) *Human Rights Brief* (2012), available at <<https://www.wcl.american.edu/hrbrief/19/3pomeranz.pdf>>.

565 Alexander M. Martin, *Romantics, Reformers, Reactionaries: Russian Conservative Thought and Politics in the Reign of Alexander I* (Northern Illinois University Press, De Kalb, IL, 1997). It is quite common for Russian thinkers to find the specificity of Russian legal philosophy in this kind of holist and traditionalist discourse. See Pavel Nowgorotzeff, “Über die eigentümlichen Elemente der russischen Rechtsphilosophie”, 2 *Philosophie und Recht* (1922/1923).

566 President Putin has mentioned Ilyin, Berdyaev and some other conservatively minded philosophers in his presidential addresses in 2013 and 2014 as well as at some other occasions. See an interesting discourse-analysis of Putin’s references to Russian conservative philosophers by Michel Eltchaninoff, *Dans la tête de Vladimir Poutine* (Solin/Actes Sud, Arles, 2015). The role of the pre-revolutionary Russian conservative philosophy for the formation of the current Russian ideologies has already been underscored by Western scholars: *e.g.*, Bowring, *Law, Rights and Ideology in Russia*, *op.cit.* note 35.

state-created legal norms undermines the social order and leads to destruction of humanity; therefore, state legal norms are absolutely binding and cannot be trumped by any other reasons or values.

To be sovereign in the prevailing Russian legal parlance implies standing above the law. This language use is apparent in the exceptionalist rhetoric based on the sovereignty argument: being bound by any limitations—be they human rights or universal legal principles—would mean that the state is not sovereign and, therefore, no longer is a state. This approach is even more radicalized than those proposed by Jean Bodin or by Thomas Hobbes. Both accepted that, even having absolute power, the sovereign is subject at least to divine law and natural law. “Sovereign”—in the Russian official legal parlance of the Constitutional Court and, eventually, of other courts—implies that no checks or limits may be imposed upon sovereign power. In this Schmittean logic, the state is enabled to do whatever it wants to do—above international law and other supra-statutory rules and principles—and to transgress its commitments as this ability to act above rules is precisely what makes a power “sovereign”.

The poly-semantic use of “sovereignty” and the specific understanding of the concept of state (*gosudarstvo*) in the Russian legal culture add to this ambiguity. Unlike the Western linguistic meaning of the term “state” (the impersonal system of political power), in Russian language *gosudarstvo* indicates the personality of ruler (*gosudar’*)⁵⁶⁷ and, in this aspect, is closer to the Antique understanding of *politeia* or to the concept of autocracy (*samoderzhavie*). “Sovereign” is conceived primordially as a holder of autocratic power who stands above limitations. This linguistic aspect may explain why, in the Russian context, sovereignty is taken to be tantamount to the unlimited character of power. To the extent “sovereignty” coincides with the supreme and independent political power (*summa potestas*), there is no cognitive dissonance for Russian lawyers. In this light, the state and its agents are not subject to the legal control of other powers, and their actions remain unchecked—unless they themselves confer the power upon state courts to control their actions. But when the question comes to the limits of their power that are marked by absolute and inviolable rights, this obviously leads to a dissonance—representing such human rights as a threat to sovereignty.

If humans may have some *rights* inherent from the *moment* their lives begin, in the positivist perspective it implies that these rights are incorporated into the state legal order, and only due to this fact are these rights legitimated and validated as *legal* rights. This conception of human rights matches both the Westphalian conception of sovereignty and the philosophy of conservatism. The former implies that the state is a last resort; deciding which rights its citizens may have. According to the latter, each state is free to endorse the rights which it finds acceptable, while the cosmopolitan

567 Oleg Kharkhordin, “What is the State? The Russian Concept of Gosudarstvo in the European Context”, 40 *History and Theory* (2001), 206-240.

idea of universal rights—identical for all human beings—is destructive for society. If each country, each culture, and each civilization have their own standards of legality and legitimacy, it may decide to what extent it would (or would not) incorporate into its legal order (*i.e.*, validate) the values and norms which pretend to be universally recognized. These conclusions, in turn, seem to be rooted in a particular social philosophy which relies on a Hobbesian picture of society in the state of *bellum omnium contra omnes*, where dispersed individuals can be tamed and peace can be secured only by an almighty Leviathan. If the state falls apart, it will lead to destruction of society.

The concept of sovereignty in Russia is mainly understood in the Westphalian sense and even more particularly, depending in which pole of the tension between formalism and realism it is employed. Taken to the letter, it means that political power-holders have no normative limitations whatsoever. Here we notice the striking proximity of this conceptualization of sovereignty to decisionism: whatever competent bodies decide about the rights of citizens will be correct. The only remedy here is to appeal against such decisions within the national court system. In the Russian case, this system is headed by the Constitutional Court which considers itself to be the last instance to express and, eventually, to change the sovereign will. From this perspective, one gets more clues for interpreting the recent disputes between the RF Constitutional Court and the ECtHR. While the latter insists on the universality of fundamental human rights, the former warns that human rights can be utilized as a pretext for the interference of international organizations in the sovereign affairs of Russia. As these interferences are justified by the universal character of human rights, the natural reaction of the Constitutional Court is to keep its sovereignty shielded from such interference and to reject the universalism of human-right discourses.

The relativist argumentation—based on the presumption of cultural distinctiveness and organic development of every nation—comes as an expected conceptual rejoinder to universalist claims. In this context, a conservative philosophy effectively works as a conceptual ally of the doctrine of sovereignty. The latter is employed to strengthen the formalist element of Russian law (statutes adopted in the name of the sovereign are binding and do not tolerate competition with other sources of law, such as international principles, human-rights standards, and so on) and to promote the decisionist element (acting as sovereign agents on behalf of the people—the supreme bearer of sovereign power—political authorities can find better ways to implement the public interest as it is established by constitutional or statutory law). The logical conflict between these two elements is, thereby, practically solved through a balancing of sovereign power by the political leadership either in favor of legality (the formal requirement to abide by legal rules) or of exception (the prerogative power of exception).

This ambiguous attitude toward human rights—their formal acceptance and, at the same time, their factual rejection as checks on the state and on its sovereign power—was examined in Chapters 4 and 5. In Chapter 4

("Religion, Sexual Minorities and the Rule of Law in Russia: Mutual Challenges"), we turned to the specific understanding of rule of law which in the Russian context often is equated to legality (*zakonnost'*). Legality in Soviet law meant the uniformization of the application of the law and fidelity to its letter. The formalism that is at the foundation of this legality in Russian (and, previously, in Soviet) law hinges on the requirement that sovereign will must be executed to the letter. More complicated situations arise when there is a discord between sovereign will as it is expressed in statutory law and as it is expressed by state authorities and their representatives *ad hoc* relating to concrete high-profile cases. This problem was outlined in Chapter 1 with reference to "telephone law" and similar phenomena in Soviet and contemporary Russia. The case of sexual minorities can serve here as a paradigmatic example, and in Chapter 4 we tried to develop this analysis and illustrate it with some examples taken from case law.

Chapter 4 analyzed the cultural constraints that are factually imposed on actors in the Russian legal system by the prevailing conservative philosophy, this analysis being continued also in Chapter 5. Judges and other law-enforcement officials are subject to social pressure which in Russia, as in many other countries, is hostile to sexual minorities. In the light of the dichotomy between the formalist and the decisionist sides of Russian law, judges frequently face the dilemma of choosing between the legal requirement of equal protection and the prevailing social morality that denies equal protection to sexual minorities. The principle of legality can, therefore, require from judges two contradictory actions at the same time: to protect rights to the letter of the posited law and not to protect these rights because of the prevailing communitarian mentality that is supported and promoted by the state. Both actions can, to a certain extent, be congruent with the requirement of *zakonnost'*, while this latter can serve as an "empty signifier" in the Lacanian sense either for the lawful or for prerogative use of sovereign power.

Additionally, judges may experience the pressure of public opinion which, predominantly, shares these conservative opinions about gender and the family. In contemporary Russia, these opinions largely are imposed by the Russian Orthodox Church. Thereby, religious canons and dogmas can, indirectly, sneak into the legal system (as was illustrated by the 2012 *Pussy Riot* case) albeit formally secular and separated from the Church (Art.14, RF Constitution). This brings us back to a more general perspective of the fundamental mechanisms of legal regulation in Russia, and to the difference between law in books and law in action—between the letter and the spirit of law—as they are understood in Russian legal theory. In its turn, this difference can be easily grasped in terms of the dichotomy of the formalist and decisionist elements of law, as suggested in the present work.

The linguistic difference between *zakon* (the law, *loi*, *Gesetz*, *de wet*) and *pravo* (law, *droit*, *Recht*, *rechten*) is surely common to many Western languages and legal systems, but the specificity of Russian language usage is that—due to historical convolutions—*pravo* was not associated with

doctrines of natural law, social contract, common good, with the idea of rule-of-law or with other formulations of ideals of social or political justice. Historically, as opposed to official law, *pravo* referred rather to customary law. In Russian realities, this did not mean that *pravo* was necessarily better than *zakon* as far as the protection of individual rights is concerned. Rather, to the contrary, customary law—backed by the prevailing Orthodox religion and retrograde social tradition—favored communitarian values and tended to underplay individual rights and freedoms.⁵⁶⁸

In fact, *pravo* frequently is perceived by many Russians as something pertaining rather to morality or custom than to a legal order.⁵⁶⁹ Consequently, the law (*zakon*) and morality are often seen as detached from each other, with informal moral and religious commands normally standing above official legal norms.⁵⁷⁰ Harmonization of *pravo* and *zakon*, finding their ideal synthesis (a kind of natural law) never was the first issue on the agenda of Russian legal philosophers. For such Russian conservative think-

568 An illustrative example can be seen in a mid-2010s presentation of Chief Justice Zorkin devoted to the 1861 abolition of servitude (*krepostnichestvo*). He suggested that “servitude was that spiritual buckle that maintained the unity of nation” and, in this sense, that abolition undermined the fundamentals of the legal order and was, after all, against the living law of the Russian Empire. Zorkin, “Sudebnaia reforma Aleksandra II”, *op.cit.* note 151.

569 The ideas of Ivan Ilyin, one of the legal philosophers the most cited by the Russian authorities, are very representative for this rupture. Symptomatically, Ilyin draws a distinction between a “correct” legal consciousness based on conservatism, morality and religion (this consciousness leads to the contemplation of *pravo*) and a “formalist” legal consciousness that considers only the posited, rationalized law (*zakon*) and, therefore, gives no clues to understanding what law is. This idea was developed by other influential legal philosophers such as Vladimir Soloviev or Nikolai Berdyaev. In Soviet jurisprudence, Stuchka proposed differentiating between the “general” legal consciousness (it reflects the social structure and, therefore, is correct) and the “concrete” legal consciousness that people, based on statutory law, can have about their rights and obligations. This latter consciousness is not “objective” and, therefore, can be wrong.

570 See an analysis of the language use concerning the term “*zakon*” in Russian legal scholarship of the 19th century by E.G. Luk’ianova, *Uchenie o zakone v russkoi iurisprudentsii* [Understanding Law in Russian Jurisprudence] (Moscow: Norma, 2014). As shown by Professor Zolotukhina, after the acceptance of Christianity by Russia in 988, the term “*zakon*” received sacred meaning: the laws of God, the laws of the Old and New Testaments. The word “*zakon*” was not taken out of its former connotation but was accorded additional characteristics relating directly to God: verity, justice, eternity, and infinity. Meanwhile, the term “*pravo*” was not included in the vocabulary of the entire Russian Middle Ages. Its appearance is associated with the spread of the theory of “natural law” in Russia. N.M. Zolotukhina, “Srednevekovye mysliteli Rossii o pravde, zakone, spravedlivosti, istine i blagodati” [Medieval Russian Thinkers on Truth, Law, Justice, and Grace], 13(2) *Trudy IGPAN* (2018), 102-142. As narratives about Russia’s golden past frequently refer to the premodern era (prior to the reforms of Peter the Great), this semi-religious connotation of “*zakon*” endows it with prevalence over “*pravo*” and, at the same time, opens the way for reconstruction of statutory law (*zakon*) not only in accordance with its literal meaning but, also, against the backdrop of societal and occasionally religious values considered to be “traditional” to Russia.

ers as the Slavophiles, Dostoevsky, Tolstoy or Solzhenitsyn, the primary concern was to the contrary: how to protect moral and religious convictions against the decaying effect of rationalized law? One can mention, here, the famous idea of the Byzantinist Nikolai Danilevsky to “freeze” Russia in order to save it from putrefying Western liberalism. In his 1897 *Opravdanie dobra*, Vladimir Soloviev famously tried to justify law (*pravo*) as a “minimum of morality”—prioritizing the substantial value of morality in law and discarding the formal value of the posited law for societal regulation. This prioritization became the stumbling block in the debates between Soloviev and Boris Chicherin at the end of the 19th century. These philosophical connotations can be seen as some of the reasons why the political regimes believe moral and religious commands may trump the literal meaning of legal enactments or international legal obligations; there is no conceptual discrepancy if it is accepted that *pravo* stands above *zakon*.

The law is often formalistically considered by Russian lawyers as a closed system. Thus, when it collides with morality or religion, the task before the judge will be, at best, to choose between them; not to reconcile them. In positivistic doctrine, *pravo* does not have the same binding force as *zakon* and must cede to *zakon* in case of a conflict. But in certain situations, *pravo* can gain the upper hand and work against the rational disenchantment of the world (Max Weber). In these situations, the defenders of *pravo* can invoke fundamentals of social solidarity, century-long traditions, *Volksggeist* and similar frames of reference to resist the rationalization of legal regulation. When a question arises about sexual minorities and protection of their rights, the dialectics of *pravo* and *zakon* can suggest that even if the formal posited law (*zakon* in the broad sense, including ratified international treaties), goes against the prevailing sense of justice (associated with *pravo*), this latter shall prevail. This dialectic was analyzed in Chapter 4 through the prism of several decisions of the Constitutional Court and the Supreme Court based on the proposition that perversions and socially dangerous practices (LGBT and others) may not be protected under the banner of human rights.

This contrast between *pravo* and *zakon* can, in fact, be traced in a number of aspects of Russian law, including the protection of human rights. If human rights collide with state sovereignty or individual rights collide with communitarian morality, the choice between them might involve the philosophical perspective of *pravo* and *zakon*. If preference is given to *pravo*, in the Russian context this normally can either encourage disrespect of *zakon* or justify the strict application of *zakon*, without inciting discussions about the “best fit” to reconcile individual freedom and the collective interest. In this light, when constitutional justices depart from the statutory law (*zakon*) reasoning about *pravo*, it does not mean that rights will be better protected when statutory law is overridden with such references to *pravo*. This terminological equivocality reflects the inner rationality of Russian law and, in particular, the balance of the formalist and realist elements, as suggested in the present volume.

The last Chapter of this work (“Religious Beliefs and the Limits of Their Accommodation in Russia: Some Landmark Cases of the Russian Supreme Court”) was an analysis of case law of the Russian Supreme Court from a similar perspective. Referring to several widely discussed examples, we studied how this Court prioritizes rights of the traditional religious denominations and denies equal protection to religious minorities in analogous situations—despite the formal constitutional and statutory anti-discriminatory guarantees. This Chapter dealt with the same theoretical divide between “law in books” and “law in action” discussed in previous chapters. Law in books establishes the equality of religious organizations before the law, while law in action prioritizes Orthodoxy, a state-friendly Islam, and a number of other traditional confessions—restricting or even banning other confessions.

This divide confirms the concealed theoretical dualism between formalism and decisionism, and shows the conceptual significance of conservative philosophy for their reconciliation. The mentioned contradiction between anti-discriminatory laws and their discriminatory application is reconciled through the foundational narratives based on a conservative philosophy. This latter can be compatible both with legalistic formalism and nihilistic decisionism and, therefore, is able to mitigate the conceptual conflict between them.

The logic of exception, as described above, is illustrated by the choice of the applicable norms and principles in the case law on protecting religious freedoms. Relying on the formalist approach in ordinary cases where rights of followers of non-traditional religions are at stake, courts are reluctant to re-evaluate or reinterpret rules of prohibitive laws (such as anti-extremist legislation) from a viewpoint of reasonability, justice, or other non-formal criteria. Statutory laws, in such ordinary cases, are likely to be applied with inexorable strictness—sometimes, even contrary to common sense.

If there is no statutory law on certain religious matters, courts will simply refuse to protect non-traditional believers despite the possible unreasonableness of the results that can flow from such an approach. This fact was observed in a number of judgments of the ECtHR on religious freedoms in Russia. In such judgments, the ECtHR analyzed how Russian courts maintained fidelity to the letter of the 1997 Law on religious freedoms without taking account of the absurdity of applying the formal rules to the letter in certain concrete situations.⁵⁷¹

The literal wording of anti-extremist legislation leaves to the Russian Supreme Court no choice in subsumption: if a religious denomination insists on its spiritual excellence over other denominations and, in this sense, falls under the category of “extremism”—understood as propaganda of national or religious superiority over other religious groups—it shall be banned. This literal approach was followed in the controversial 2017 *Jehovah's Witnesses* case in which this large religious denomination was banned

571 E.g., the 2010 ECtHR Judgment *Jehovah's Witnesses of Moscow v. Russia*, *op.cit.* note 18.

from Russia. Quite evidently, the same subsumption can be made for any other confession—including Orthodoxy. But, in these cases, the Court adopts other strategies for interpreting the law.

Here again, the interplay of rule and exception—of legality and collective interest—comes to the fore, and makes the entire legal situation much more complicated than a simple formalist subsumption or ideological control. In some cases where the interests of the Russian Orthodox Church or other traditional denominations have been involved, the Supreme Court went far beyond the literal meaning of the rules and turned to weighing and balancing rights and restrictions. Explicitly, it does not recognize the substantial difference in protecting “traditional” and “non-traditional” religions, insisting, to the contrary, that the protection is equal—even if the normative conclusions from its decisions blatantly contradict this thesis. Here, the Russian Supreme Court employs the style of legal thinking and reasoning that strikingly resembles the doublespeak and metaphysical style of the RF Constitutional Court.

The analysis undertaken in the present research demonstrates what can be seen as one of the major paradoxes of Russian law. The Russian state has endorsed a lengthy list of liberal norms and principles that do not fit the actual political objectives of the state but is unwilling to change or repeal these norms and principles. To mitigate this paradox, the Russian state (the judiciary inclusive) interprets them in plain contradiction to their original and literal meanings. Political developments in Russia (the rise of authoritarianism) shattered the previous liberal ideas about prevalence of human rights⁵⁷² that once inspired the authors of the 1993 Constitution. The actual normative state of affairs in Russian law shows the distance between the normative and the factual regulations; as legal realists would put it, between “law in books” and “law in action”.⁵⁷³

This doublespeak in the 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 that are solemnly proclaimed but largely disrespected.⁵⁷⁴ Russian courts continue this strategy of doublespeak and, formally supporting liberal constitutional principles, courts reinterpret them in a conservative sense generally reflecting the conservative moods prevalent among the population.

572 We are aware of the multiplicity of possible meanings of the term “human rights” and, in this work, utilize it in the sense of the rights supported by the international community against potential abuses from the part of national states. For this understanding of human rights see Samuel Moyn, *The Last Utopia: Human Rights in History* (The Belknap Press, Harvard University Press, Cambridge, MA, 2010). In this way, human rights can be distinguished from civil rights and fundamental rights; the distinction which is ignored in the jurisprudence of the RF Constitutional Court and is largely neglected in Russian legal scholarship.

573 E.g., Hendley, *Everyday Law in Russia*, *op.cit.* note 47.

574 See some comments on this doublespeak by Antonov, “Conservative Philosophy and Doctrine of Sovereignty”, *op.cit.* note 458.

The present research had a modest task: to problematize this conceptual and methodological ambiguity of Russian law, and the role of the formalist and decisionist elements in it. Its author hopes that it succeeded in making a modest contribution to the discussion about philosophical aspects of Russian law and Russian legal culture.

