NATIONAL RESEARCH UNIVERSITY
HIGHER SCHOOL OF ECONOMICS

Mikhail Antonov

THE PHILOSOPHY OF SOVEREIGNTY, HUMAN RIGHTS, AND DEMOCRACY IN RUSSIA

BASIC RESEARCH PROGRAM

WORKING PAPERS

SERIES: LAW
WP BRP 24/LAW/2013

This Working Paper is an output of a research project implemented at the National Research University Higher School of Economics (HSE). Any opinions or claims contained in this Working Paper do not necessarily reflect the views of HSE.

Mikhail Antonov[1]

THE PHILOSOPHY OF SOVEREIGNTY, HUMAN RIGHTS, AND DEMOCRACY IN RUSSIA

This paper examines the correlation between the concepts of sovereignty, human rights, and democracy in Russian legal and political debate, analyzing this correlation in the context of Russian philosophical discourse. It argues that sovereignty is often used as a powerful argument which allows the overruling of international humanitarian standards and the formal constitutional guarantees of human rights. This conflict between sovereignty and human rights also recurs in other countries, and many legal scholars demand the revision or even abandonment of the concept of sovereignty. In Russia this conflict is aggravated by some characteristic features of the traditional mentality which frequently favors statism and collective interests over individual ones, and by the state building a "power vertical" subordinating regional and other particularistic interests to the central power. These features and policies are studied in the context of the Slavophile-Westernizer philosophical divide. This divide reveals the *pros* and *contras* put forward by the Russian supporters of the isolationist (conservative) policy throughout contemporary history, and especially in the sovereignty debates in recent years. The Russian Constitution contains many declaratory statements about human rights and democracy, but their formulations are vague and have little concrete effect in court battles where the application of international humanitarian law is counterbalanced by the concerns of the protection of sovereignty. These concerns coincide with isolationist and authoritarian policies, which led in 2006 to their amalgamation into the concept of "sovereign democracy." This concept is considered in this paper to be a recurrence of the Russian conservative tradition. Even though the concept in its literal meaning has been abandoned by its author and supporters, most of its ideas are still on the cusp of the official political discourse which reproduces the pivotal axes of the Russian political philosophy of the 19th century.

JEL Classification: K1
Key words: sovereignty, human rights, legal mentality, democracy, sovereign democracy, Constitution, international law, Constitutional Court, Slavophiles, Westernizers, conservatism, individual liberties.

[1] National Research University Higher School of Economics (St. Petersburg); Associate Professor of Law, e-mail: mantonov@hse.ru.

Introduction

The celebrated phrase used by the Chief Justice of the Constitutional Court of Russia Valery Zor'kin in his polemic against the ECtHR "The limits of compromise",[2] demarcates one of the key trends in Russian legal policies in 2000s with regard to the relations between the Russian authorities and supranational organisations and international law in general. In Zor'kin's words, Russia shall decide on its own whether to cooperate with international courts and agencies or not, to take their values and principles in consideration or not, because it possesses sovereignty immunizing it from any pressure on such issues as human rights or democratization. This isolationist strategy was based on the so called "Westphalian" concept of sovereignty to which Zor'kin dedicated his apology in 2006.[3] Nevertheless, in his recent speech "*Constitutional and legal problems of the judicial system of Russia*" given on 18 December, 2012 before the Congress of Russian Judges, Zor'kin made his argumentation softer. He still stresses that "the participation of Russia in various international conventions and treaties does not imply refusing or abandoning the principle of state sovereignty (in favor of so called soft sovereignty and other doctrines which are popular nowadays)". But "in a globalized world… we can no longer orientate ourselves to the older Westphalian model of sovereignty…" Zor'kin calls for the creation of a new "legal concept of national sovereignty based on formal equality" and for "defending it in all the international forums where decisions important for Russia are taken."[4] It remains uncertain what exactly the contents of this new model of sovereignty will be, but undoubtedly it will affect judicial practice in politically charged cases connected with human rights. In the following the conceptual roots of this idea are analyzed. This idea was first formulated several years ago under the title of "sovereign democracy" which "arose as a label for the governing team's thinking about Russia's path of political modernization".[5] In this context it will be important to first examine whether there are any normative restrictions in Russian constitutional law to prevent implementing this idea. To understand the philosophical background of the problem, we will then address the controversy between the Slavophiles and the Westernizers which reveals the main *pros* and *contras* for the Russian supporters of the (conservative) isolationist policy.[6]

The word 'sovereignty' is one of those powerful words that work as an active force for social and political development. As Louis Henkin insists, "the meaning of sovereignty is confused and its uses are various, some of them unworthy, some destructive of human values… its application to

[2] Valery Zor'kin, "Predel ustupchivosti*"* [The limit of compromise], *Rossijskaia gazeta* (29 October 2010). [In Russian]
[3] Valery Zor'kin, "Apologia Vestfalskoj sistemy" [Apology for the Westphalian System], *Rossijskaja gazeta* (22 August 2006). [In Russian]
[4] Valery Zor'kin, "Konstitutsionno-pravovye problemy sudebnoj sistemy RF" [Constitutional and legal problems of the judicial system of the RF], available at http://rapsinews.ru/judicial_analyst/20121218/265821471.html#ixzz2PToA6OFO. [In Russian]
[5] Patrick McGovern, John P. Willerton, "Democracy Building Russian Style: Sovereignty, the State, and a Fledgling Civil Society" (18-22 March, 2009), 23; available at http://wpsa.research.pdx.edu/meet/2012/willerton.pdf.
[6] Zor'kin's intellectual background lies in the history of Russian legal philosophy. His PhD thesis of 1964 was dedicated to the analysis of the legal philosophy of Boris Chicherin, the great Russian liberal philosopher of the turn of the 20th century. In 1978 Zor'kin critically reassessed the history of legal positivism in Russia, especially in the 19th century (his habilitation thesis was published in 1978 under the title "Pozitivistskaja teorija prava v Rossii" [The Positivist Theory of Law in Russia], MGU, Moscow).

modern states has inevitably brought distortion and confusion."[7] In fact, in Western legal doctrine, international law has not always been accepted as binding states in the exercise of their political power. According to traditional positivist legal doctrine, there is no higher political entity above sovereign states. For this reason John Austin, the founding father of legal positivism, was reluctant to consider international law as "law properly so called" (insomuch as law is identified only with the commands of sovereign states), and agreed to accept it only as law in a figurative sense.[8] Whether international law has binding force on national policy, whether this force is derivative from the free choice of the concerned state, or it is mandatory and imposes absolute obligations on states irrespective of their acceptance – these debates form one of the focal points in legal theory of the 20th century.[9] These issues are especially pertinent in such legal matters as human rights or democracy: if the state is the only agency which creates law, it (or, in reality, the discretion of its agents) therefore stands above the law, and "rule of law" means a license for the state to rule over society with the help of *any* legal commands. No legal limits for state activities can be logically inferred in the framework of this approach to law, so that discourse on human rights and democracy serves as an ideological camouflage for various political games where the power-holders or their opponents play this card. Only the superiority of international law and the monist model of the relationship between international and domestic law can constitute an effective mechanism for the legal protection of individual liberties against the omnipotent state, as was persuasively argued by Hans Kelsen in his different works.[10]

In regard to these issues, Russia represents a particular case for studying the connection between the conceptualization of sovereignty and the practical steps taken by politicians and lawmakers in the field of human rights and democratic institutions. In the Western legal tradition the accent in a liberal democracy as a system is put on the protection of individual liberty. In Russian political debates references to "genuine" (antique, medieval) democracy the accent is put on the well-being of the polity, and not of the individuals as members of this polity. From this perspective, democracy can also be viewed as the instrument for protection of national rather than individual interests – this is the main thesis of the theory of "sovereign democracy" analyzed below, and reiterated by many influential politicians and judges in Russia.

Naturally, not only Russia confronts these issues in the changing world, and if we focus our attention on the Russian problem here, it does not imply a disregard of similar problems in the US or in the EU (which nevertheless are not as acute as in Russia due to the different political and legal contexts, as well to somewhat different cultural mindsets). For the sake of brevity we will skip a

[7] Louis Henkin, "That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera", 68 *Fordham Law Review*, 1 (1999), 1-14, at 1-2.
[8] John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, Cambridge, 1995).
[9] See a brilliant summary made half a century ago by Hans Kelsen, *Principles of International Law* (Holt, Rinehart and Winston, New York, 1967). See also: André Nollkaemper, "Rethinking the Supremacy of International Law", *Zeitschrift für öffentliches Recht*, March 2010, Volume 65, Issue 1, p. 65-85.
[10] See Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen*, Oxford, 2010.

comparative analysis of the impact that various concepts of sovereignty exercise on lawmaking and politics in different countries.[11] In the following we will analyze the traditional concept of state sovereignty largely accepted by some Russian senior judges, the challenges to this concept, the reactions to these challenges which have been expressed in the concept of "sovereign democracy", and some philosophical theories which underpin the particular attitude to sovereignty in Russia.

The treaty of Westphalia in 1648 marked the beginning of the contemporary doctrine of state sovereignty as an absolute unrestricted power. In the 16th century Jean Bodin defined "sovereignty" as "absolute and perpetual power." The sovereign is one who exercises such power; the sovereign has the right to arbitrarily decide on any domestic issue. This understanding is still the dominant doctrine in the Russian theory of international law; few things have changed since the 19th century.[12] Even if this traditional concept also still holds sway in the theory of international law worldwide,[13] there are some important signs that the attitude of the Western lawyers towards it is changing.[14] (This process is also recognizable in Russian legal theory, but it is developing much slower for political, legal and philosophical reasons that we investigate below.) Nowadays, many theoreticians claim the end of the would-be monopoly of the nation-state scale on sovereignty.[15] It is asserted that the necessary connection between state and "Westphalian sovereignty" is no longer relevant in the contemporary world. Human rights, global security, trade and commerce, and many other important social fields are regulated and protected on the global level so that particular national states are bound with the international standards (rules, principles) in these fields and cannot do whatever they want with human rights, even with recourse to the argument of sovereignty.[16] As Helmut Steinberger puts it: "Human rights are no longer considered an exclusively domestic affair, as before World War I, and have led to frequent diplomatic interventions by States or protests by international organizations which no longer can be blocked by the State concerned with the shield of domestic affairs."[17]

[11] For an attempt at such a general comparative research see: Utsav Gandhi, "State Sovereignty as a Major Hurdle to Human Rights" (March 17, 2013). Available at SSRN: http://ssrn.com/abstract=2234573.

[12] See the conclusions drawn by Maria M. Fedorova, "Sovereignty as a Political-Philosophical Category of Modernity", 52(1) *Russian Social Science Review* (2011), 29-43; also the general review of the development of the notion of sovereignty by Dieter Grimm, *Souveränität. Herkunft und Zukunft eines Schlüsselbegriffs* (Berlin University Press, Berlin, 2009).

[13] As we stressed above, only the Russian case will be studied here. The isolationist legal policy of the US toward the international law is a subject for another study where different contexts and the underlying reasons are to be examined. For a general theoretical perspective see, e.g., Stephane Beaulac, "The Social Power of Bodin's 'Sovereignty' and International Law", 4 *Melbourne Journal of International Law* (2003), 1-28.

[14] See: Ineke Boerefijn and Jenny E. Goldschmidt (eds.), *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flinerman* (Intersentia, Mortsel, 2008).

[15] See: John Agnew, *Globalization and Sovereignty* (Rowman and Littelfield, New York, 2009).

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

[17] Helmut Steinberger, "Sovereignty", in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. IV (Elsvier, Amsterdam, 2000), 515.

The Russian law faces a choice: international principles or national sovereignty

The idea of "the deconstruction of sovereignty" is discussed under the rubric of "globalization" which implies that there is a tendency towards a growing interconnection and interdependence between all countries and societies in the world. In the opinion of some theorists, this interconnection will result in the merger of all the national societies into one "global village".[18] Does Russia form a part of this globalized world, and if so, shall it therefore share the common standards and principles with the rest of the international community? Or can one still consider the national state as an independent actor freely deciding to what extent it will be subject to international law, and to dismiss the globalization discussion because of its ideological nature? The answer to these questions are crucial for shaping internal legal policies, especially in the domain of human rights where the "the general principles of law recognized by civilized nations" (to cite Article 38(1) of the Statute of the International Court of Justice) often are the only defense against unjust and disproportional legal norms issued by a state.

The formal provisions of Russian law yield quite an ambiguous solution to this dilemma. The correlation between state law and international law seems to be explicitly stated in Article 15 of the Constitution: "The commonly recognized principles and norms of international law and international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty of the Russian Federation stipulates rules other than those stipulated by Russian law, the rules of the international treaty shall apply." One can observe a certain discrepancy between these two phrases: (1) not only treaties, but *also principles* and norms of the international law are incorporated into the legal system of Russia. At the same time, pursuant to the literal text (2) *only treaties* gain priority in the case of conflicts with state law. A question thus arises: if international norms and principles are component parts of the legal system, what place do they occupy in the normative hierarchy of the Russian legal order?[19] Which is the source of their binding force: a discretionary recognition by state or an objective international legal order? And, what is a much more important issue with practical implications, can they overrule the norms of the domestic law and the principles (formulated by the judiciary) in the case of a conflict?

The discourses of political and legal practitioners in Russia show a propensity for the first option which implies the dualist concept of international order where the binding force of the norms of international law depends on their recognition by the authorities of the concerned state. In some way

[18] Gunter Teubner, Global Bukowina: Legal Pluralism in the World Society, in Gunter Teubner (ed.) *Global Law Without a State* (Dartmouth, Brookfield, 1997, 3-28. Cf. on the theoretical aspect of the globalization discussion Mikhail Antonov, "Global Legal Pluralism: A New Way of Legal Thinking", Higher School of Economics Research Paper No. WP BPR 10/LAW/2013. Available at SSRN: http://ssrn.com/abstract=2209809.

[19] For a discussion at length on this topic see: Gennady Danilenko, "Implementation of International Law in CIS States: Theory and Practice", 1(10) *European Journal of International Law* (1999), 51-69.

this question had already been posed in the USSR. Article 29 of the Constitution provided a similar statement that the USSR shall fulfill "the obligations arising from the generally recognized principles and rules of international law, and from international treaties signed by the USSR." But this statement did not mean a real incorporation of international law into the law of the USSR and remained only a "paper law" without any impact on adjudication in Soviet courts. The formal inclusion of this phrase into the new Russian Constitution is a symptom of the continuity of the previous legal development of the country. After, as before, the end of the Soviet Union the imperative international norms of human rights and other norms of *jus cogens* have had no serious impact on domestic legal practices. The USSR followed these norms (for example in the case of permission for Soviet Jews to emigrate) as a kind of trump played when needed to bargain oil contracts or other material items with the West. Nowadays, the policies of Russia in this sphere are oscillating likewise: having the oil and gas resources and a good price for them, the political leaders are tempted to ignore Western moralizing about legal values. However to join the WTO, the Russian authorities needed to concede to some "Western values", or at least, to refrain from violating them when bargaining. (This situation is evidently more or less common not only for Russia, but also for China and many other countries.) In claiming its fidelity to human rights, the Russian authorities feel free to dismiss any criticism connected with its anti-LGBT, "foreign agents", and other laws, in which the Russian Federation clearly follows a different understanding of human rights than the ECtHR and humanitarian agencies worldwide.

Nonetheless, in their literal form the provisions of the Russian constitution seem to be more favorable to international law than the Soviet ones, and Russian jurisprudence initially has been more open in this perspective. Resolution No. 5 of the Plenum of the Supreme Court of the Russian Federation of 10 October 2003 entitled "*On the application by courts of general jurisdiction of the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation*"[20] clearly explained that judges have to apply both the sources of international law, and the jurisprudence of the international courts which are a source of the principles of international law. Unfortunately, this Resolution had but an ideological effect, and judges still apply such jurisprudence rather as supplementary to the applicable rules of the state laws.[21] It is not surprising given that even if Russian courts are formally motivated to refer to international law and

[20] The English text of this Resolution is available at the site of the Supreme Court of Russia: http://www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=6801.

[21] In English, see the most comprehensive account of how Russian judges cite the doctrine of the ECtHR: Anton Burkov, *The Impact of the European Convention on Human Rights on Russian Law: Legislation and Application in 1996-2006* (Ibidem-Verlag, Stuttgart, Hannover, 2007). A careful analysis of these cases concludes that the impact (if any) was in fact reduced to argumentation for the decisions already matured on the political level (or on the level of judicial policies). The notable exception must be made only for the doctrine of the Constitutional Court which was influenced in several cases by the jurisprudence of the ECtHR (William B. Simons, "Russia's Constitutional Court and a Decade of Hard Cases: A Postscript", 28 *Review of Central and East European Law* (2003), 655-678, see also: William B. Simons, Rilka O. Dragneva, "Rights, Contracts, and Constitutional Courts: The Experience of Russia", in Ferdinand Feldbrugge and William B. Simons (eds.), *Human Rights in Russia and Eastern Europe: Essays in Honor of Ger P. van den Berg* (The Hague/London/Boston 2002), 35-63).

particularly to the doctrines of the ECtHR, most references in Russian court decisions are rhetorical and are employed as "additional argumentation in support of the conclusions based on the applicable constitutional provisions".[22] Adjudication in Russia is still in many regards shaped according to the old syllogistic model where the role of a judge is to subsume the facts of the case under an ideal model given in a positive norm, and to render a judgment as a logical sequence thereof.[23] There is almost no room for balancing principles, arguments, or reasons in this syllogistic framework, especially in the lower courts, let alone a comparison of domestic and international law, which is formally required from the judges according to the cited Resolution No. 5 but which the Russian judges are neither trained in, nor motivated to follow by the dominant judicial policies.

Lawmaking in Russia is conceived (pursuant to the Constitution) as one of the inalienable prerogatives of the sovereign people (whose will is represented by the parliament and the elected officials). From the perspective of the legal doctrine it implies that only the sovereign people can adopt legal rules – immediately, through a referendum, or by the intermediary of the elected parliament.[24] If the foreign powers (including the organizations of the international community) try to introduce any legal rules (or undermine validity of the Russian laws), they encroach on the sovereign rights of the people. Thus, attempts to counterbalance the reasons and arguments found in international jurisprudence against the rules of Russian law constitutes for many domestic lawyers (including judges) an inadmissible encroachment upon Russian sovereignty: the very possibility of influencing national lawmaking and law-enforcement constitutes a threat to the existence of the state (recall Max Weber's definition of the state as a decision-making sovereign). From this standpoint, the skepticism towards international courts progressed quickly. It is symptomatic that the (former) Justice of the Constitutional Court Tatyana Morschakova in 2007 stated that "Unfortunately, our country is coming into collision with a politicization of judicial decisions… undermining of trust in the international judicial system."[25]

The debates on this point in recent years have been marked by several controversies between the ECtHR, the Constitutional Court and the Supreme Court of Russia. The argument about sovereignty played the major role in the outstanding Markin case where the Russian government insisted that "By assessing Russia's legislation, the Court would encroach upon the sovereign powers of the Parliament and the Constitutional Court,"[26] even if the subject matter of this case was only about parental leave for men. The sovereignty argument was also used as the *prima facie* reason in the polemic of the Russian authorities against the Magnitsky Act whereby the adoption of the Russian children by US-

[22] Gennady Danilenko, "Implementation of International Law in CIS States" (note 18), 62.
[23] See, e.g., the characterization of this "syllogistic and non-problematic style of judicial writing" in Russia by Alexander Vereshchagin, *Judicial Law-Making in Post-Soviet Russia* (Routledge, Cavendish, 2007), 236.
[24] See, e.g.: Marat Baglay, *Konstitutsionnoe pravo Rossii* [Constitutional Law of Russia], 6th ed. (Norma, Moscow, 2007), 121-126.
[25] Cited according to: Bill Bowring, "Russia and Human Rights: Incompatible Opposites?", 1 *Gottingen Journal of International Law* (2009), 251.
[26] Application no. 30078/06, Konstantin Markin v. Russia [GC], Judgment of 22 March 2012, point 85.

citizens was banned to protect the national sovereignty.[27] The polemic around the case of judge Kudeshkina (dismissed for criticizing the Russian judicial system) also focuses on the issue of sovereignty, and the former Russian Justice of the ECtHR Anatoly Kovler has clearly expressed this concern in his Dissenting Opinion in this case: "A judge has specific responsibilities in the field of the administration of justice, a sphere in which States exercises *sovereign powers*… and performs duties designed to safeguard the *general interests of the State*."[28] In such argumentation the concern for the maintenance of sovereignty evidently has primacy over the concern for protection of the human rights of private individuals. The second case of Kudeshkina is now in the ECtHR (Application No.28727/11) and the main issue is whether an international court may rule about readmission of the national judges to protect their human rights.

It is not surprising that when facing criticism against unjust laws and court decisions, some Russian lawyers are tempted to look for a defense in the traditional concept of sovereignty as an absolute unrestricted power which is incompatible with the idea of the objectivity of international law.[29] The practical underpinnings of this defense are easily traceable, as this position allows for the justification of unlimited public interventions into individual liberties: there are no limits to sovereign power in the traditional concept of sovereignty where sovereignty is defined as unaccountable. Here one could make an allusion to the remarkable characterization that Martti Koskenniemi gave to the traditional theory of sovereignty of the 19th century regarding it as "especially useful for diplomats and practitioners, not least because it seemed to offer such compelling rhetoric for the justification of most varied kinds of State action."[30] The concept of sovereignty can be attractive simply as a tool for legitimizing the disciplinary power of the state,[31] which is seen as independent of endorsement by international law and immune to any critics "from abroad".

In its turn, this "immunization" leads to the legitimizing of the discretionary power of governors and judges who decide on the "limits of compromise" concerning human rights. These limits are to be defined by the judiciary when delimiting which human rights are to be protected, what the content of the protected rights are, and by the politicians when deciding whether the people are "ripe" enough to

[27] Federal Law No. 272-FZ of 28 December 2012 "About Measures to Influence Those Who Are Connected With Violation of Fundamental Rights and Liberties of Russian Citizens". (Texts of this and other laws cited in the present article can be found at the site: www.consultant.ru).

[28] Application no. 29492/05, Olga Kudeshkina v. Russia, Judgment of 26 February 2009, Dissenting Opinion of Justice Kovler and of Justice Steiner.

[29] The typical justification of strong federalism in the relations between the Federation and minorities with references to the sovereignty argument was advocated in 2003 by one of the Justices of the Constitutional Court, Vladimir Yaroslavtsev (http://www.tribunalconstitucional.ad/docs/10aniversari/J-RUSSIAN.pdf). In spite of the clear wording of Article 69 of the Constitution which guarantees the rights of indigenous peoples in accordance with the *universally recognized principles and norms of international law and international treaties*, the Justice Yaroslavtsev stresses that these rights can be restricted with reference to sovereignty of Russia (even if such an exemption is provided neither by the Constitution which refers only to international principles and norms, nor by these principles and norms themselves).

[30] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, Cambridge and New York, 2006), 89.

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

have human rights (not only basic, but also political and cultural ones).[32] Such a delimitation means counterbalancing the internationally recognized values of democracy and human rights against the value of national sovereignty, and this latter often turns out to have more weight in court battles. As Louis Henkin puts this argument, "We will engage in a minimal amount of cooperation, if we as sovereign states consent."[33] This argument is echoed by Dmitry Medvedev: "Still, we never handed over so much of Russia's sovereignty as to allow any international court or foreign court to render decisions that would change our national law."[34] The bill drafts No. 564346-5 and No. 564315-5 proposed in 2011 (still under consideration) by the Communist deputy Aleskander Torshin are illustrative for this tendency to set "filters" to protect national laws from reconsideration by the international courts – the drafts imply that the ECtHR decisions cannot be recognized and implemented in Russia without approval of the Constitutional Court.[35]

The practice of the Constitutional Court is rather inconsistent. In the recent case about mass meetings (Ruling of 14 February, 2013 No. 4-P "On Constitutionality of Federal Law About Amendments into Administrative Code and into the Law On Assembly, Meetings, Demonstrations, and Pickets", with the Dissenting Opinions of Justices Yaroslavtsev, Kazantsev, Danilov[36]) the Court implied that the international standards in the field of political democracy are not binding on Russia. The issue of the universality of human rights was intensively discussed, e.g. in the earlier case of prohibition to bury terrorists (Ruling of 28 June, 2007 No. 8-P "On Constitutionality of article 14.1 of Federal Law About Interment and Memorial Services") where worldwide humanitarian standards (the Dissenting Opinions of Justices Kononov, Gadzhiev, Ebzeev) had to cede to the concerns of national security and sovereignty. The new position of Valery Zor'kin seems to support this vigilant attitude towards the jurisprudence of the ECtHR which is suspected of endangering Russian national security. Confirming that Russia shall abide by the Human Rights Convention, by other international treaties and by the jurisprudence of the ECtHR, he insists that "At the same time, the Russian part shall have instruments to exercise influence on the decisions of such jurisdictional organizations which concern the legal system of Russia and which are in some way connected with its sovereignty."[37] The

32 An allusion to the words of the main ideologist of sovereign democracy, Vladislav Surkov, who asserted that "the people must also be ripe enough to reach such a [democratic] culture." (Vladislav Surkov, "Sovereignty is a political synonym for the ability to compete, "Speech to the Center for Preparation of the Staff of United Russia, 7 February, 2006 [In Russian]). This phrase has been many times articulated by Putin and other Kremlin officials.

33 Louis Henkin, *op.cit*, note 7, 5.

34 Dmitry Medvedev, "Neobkhodimo sokratit' tsislo obrazhenij rossijan v mezhdunarodnye sudy" [It is necessary to reduce the number of applications filed by Russians to international courts], 4 February 2010, (http://grani.ru/Politics/Russia/m.174350.html) [In Russian]. The translation cited according: Andrei Susarov, "The Constitution of the Russian Federation or the European Court of Human Rights?" *Russian Survey* (August 2011), available at http://www.russian-survey.com/main/47-the-constitution-of-the-russian-federation-or-the-european-court-of-human-rights). In Susarov's paper one can also see some interesting comments on Torshin's draft bills.

35 The texts of the bills and the assertive conclusions of Parliamentary committees can be found at the site of the State Duma (the lower chamber of the Russian parliament)at http://asozd.duma.gov.ru

36 Texts of this and other rulings of the Constitutional Court of Russia cited in the present article can be found at the site: www.ksrf.ru.

37 Valery Zor'kin, "Constitutional problems of the judicial system of Russia" (note 8). Such calls for communication between the European and the national jurisdictions is suggested also by some European lawyers (see Anthea Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law", 60 *International and Comparative Law Quarterly* (2011), 57-92).

authoritarian and isolationist trends in Russian internal policy used to favor such "argumentation from sovereignty" and its development into the concept of "sovereign democracy" to defend Russia against "Western moral imperialism".[38]

Putatively, this official rhetoric meets legal constraints in the text of the Constitution. Justification of the supremacy of the international standards of human rights can be found in Article 17 of the Constitution which provides that human rights in Russia are recognized and ensured "according to the generally recognized principles and norms of international law." Nonetheless, for many observers this reference to international law appears to be a mere statement of policy.[39] A strictly formalist reading of Article 15 of the Constitution (see above) can be interpreted as: only the treaties to which the state conceded its sovereign will are mandatory for the judiciary, the parliament and the government; and the not-ratified common norms and principles of international law have only a persuasive effect.[40] From this perspective one can conclude that the standards of human rights protection and the principles of democracy in certain circumstances can be abandoned for the sake of the protection of sovereignty under Article 4 of the Constitution. This conclusion is confirmed by Article 55 of the Constitution which sets out that individual rights and freedoms may be restricted in order to protect the foundations of the constitutional system, the security of the country, or the security of the government. Can Article 2 of the Constitution, pursuant to which human rights are declared to be the highest priority in Russia, can provide a defense against such a reading? Again, the wording of this latter constitutional provision does not define the scope of the protected human rights: Does it refer only to those mentioned in ratified treaties, or those which are internationally recognized, or even those which can be classified as "natural rights" and not fixed in any treaty or convention? The first approach preserves the force of the sovereignty argument, as ratification implies that state concedes the application of an international treaty on its territory. The second is problematic in view of the afore-mentioned ambiguities of the Constitution, which does not explicitly restate what shall be the balance between the concerns of human rights and those of sovereignty. At first glance, the last natural justice reading may seem favorable to universal humanitarian standards. Nonetheless, in the consequent logic of its implementation it can also result in discarding "internationally recognized human rights" which might be put aside in order to give a way to the "natural rights" found by the courts in the traditional values and patterns.

A typical example of this latter approach can be seen in the attitude of the courts to gays and lesbians who are prosecuted for expressing their opinions. There is no need to argue that such

[38] See: Derek Averre, "Sovereign Democracy and Russia's Relations with the European Union", 15(2) *Demokratizatsiya* (2007), 173-190.
[39] It was stated almost twenty years ago that with respect to the implementation of international human rights in Russia, Article 15 of the Constitution seems "to be more theory than practice." (*Report* on the Conformity of the Legal Order of the Russian Federation with the Council of Europe Standards, 15 *Human Rights Law Journal* (1994), 249-250.
[40] Boris Leonidovich Zimnenko, *International Law and the Russian Legal System*. Edited and translated with an introduction by William Butler (Utrecht: Eleven Publications, 2007), 150 ff.

prosecution stands in contradiction to international standards of human rights. Although, in Russia this prosecution is justified from both theoretical and practical standpoints with reference not only to the traditional family, gender roles, and religious commands, but also to the sovereignty argument: to defend the Russian society from the West.[41] The precedential judgment of the ECtHR in Alekseyev v. Russia of October 21, 2010 where the ECtHR unanimously found that there had been violations of the Convention in the restrictions imposed by the Moscow authorities on gay rights marches had almost no effect on Russian legal practice. The argumentation of the ECtHR has largely been rejected by Russian judges,[42] who even in the absence of applicable federal laws continue applying regional laws restricting sexual minorities. These laws stand in a plain contradiction to point 3 of Article 53 of the Constitution (human rights can be restricted only through a federal law), let alone the opinion of the ECtHR, but both the Constitution and the ECtHR judgment are overruled with the references to cultural tradition of the Russian people which is sovereign and can impose its values over those stemming from international law.[43]

Several months ago to the Russian parliament was brougth the draft bill on The Prosecution of Homosexual Propaganda (draft bill No. 311625-4), intended to introduce criminal liability. It is emblematic in the context of our analysis that the authors of this bill (probably, prefiguring the future Western criticism) decided to change the concept of the future law and to refer to the traditional values rather than attacking homosexuality directly. After the first reading the draft bill was revoked and instead a new draft bill No. 44554-6 was brought to the parliament to introduce administrative liability for propagating "untraditional sexual behavior" among minors. On June 11, 2013 the draft bill was adopted and a new article 6.21 was included into Administrative Code (Code of Administrative Offences) punishing the "propaganda of non-traditional sexual relations among minors which is aimed at the formation of non-traditional sexual patterns or at the formation of a disguised representation of social equivalence between the traditional and non-traditional sexual relations". After being officially published on July 2, 2013, this law probably will be challenged in the Constitutional Court, and one can expect a vivid polemic about correlation between the "internationally recognized human rights"

[41] A noteworthy theoretical analysis of the conflict between the ideology of natural rights and that of the liberal human rights can be found in Alexander Dmitrenko, "Natural law or liberalism? Gay rights in the new Eastern Europe" (2001), available at https://tspace.library.utoronto.ca/bitstream/1807/15216/1/MQ63077.pdf. Cf. the concerns recently expressed in one of the conservative Russian newspapers: Sergei Balmasov, "The West uses homosexuality to undermine Russian family traditions", *Pravda* (30 June 2011) [In Russian]

[42] Cf. Court 'Defends Russia's Sovereignty' from Gays and Lesbians, available at http://hro.rightsinrussia.info/archive/lgbt-rights/rainbow-house. It is not a coincidence that another main reference in these court judgments is to sovereignty.

[43] There are many judicial cases which can serve as examples for this attitude: e.g., The Decision of the Gagarinsky District Court of Moscow of 20.07.2010, case No. 2-2415/2010 Alekseev v. Ministry of Justice (about the registration of "The Movement for Equality of Marriage"); The Decision of Arkhangelsk Regional Court of 22.05.2011, case No. 3-0025 Vinnichenko v. Council of Deputies of Arkhangelsk (about the illegality of the regional law prohibiting gay propaganda).

(which, at least, in the practice of the ECtHR implies the "social equivalence" of different sexual orientations) and the "traditional natural law recognized in Russian culture".[44]

This confirms that discussions about the respective force of international, constitutional and natural law has some important implications for the protection of human rights. Is it admissible that human rights are protected differently depending on the extent the concerned state has agreed to follow international humanitarian standards? Does it undermine the very idea of human rights as "supralegal law" (Gustav Radbruch) standing above state laws, the discretion of the state government, and the shield of sovereignty? An affirmative answer is apparent in the perspective of the Universal Declaration of Human Rights which plainly states that "no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty" (Article 2). From this perspective human rights are conceptually independent of the sovereign will of particular states. As Jack Donnelly defines it, "human rights are simply the rights that one has because one is human."[45] Although, it is not this assertion which gains the upper hand in contemporary Russian justice.[46] As shown above, the most powerful counterargument is that of sovereignty; and this argument has more effect in Russia than in the Western Europe due to particular historical and cultural factors.[47]

Sovereign democracy as a philosophical legacy?

If one inquires into the theoretical underpinning of the official attitude to sovereignty, one can see certain traditions of legal thinking which have been interiorized at the very basic levels of culture, and naturally during legal education. Discussing the official position on the sovereignty issue in Russia, McGovern and Willerton find the main sources of this posture in "the Russian political philosophical tradition emphasizing statism, collectivism, and national sovereignty that has long

[44] Waiting until the law becomes effective, lawyers ironically tried to discern the criteria according to which "traditional sex" could be differentiated from "non-traditional". Naturally, it is not sex and gender issues which are at the stake with this law. The motivation letter which explains the reasons for adopting this law, paradigmatically sets out that "Family, motherhood and childhood in the traditional meaning inherited from the preceding generations constitute such values that procure an uninterrupted chain of generations and that are the condition for preserving and development of the multinational Russian people." (see the text of this letter at: http://www.rg.ru/2013/02/04/koap-homo-site-dok.html). The matter is therefore about the values considered to be basic to the Russian legal order, intended to protect the sovereign rights of the Russian people.

[45] Jack Donnelly, *Universal Human Rights in Theory and Practice,* 2nd ed. (New York: Cornell University Press, 2003), 7.

[46] Though it is possible to see some indicators which exemplify a farewell to the traditional strict positivistic approach to human rights, which are mostly based on the sovereignty argument. See Bill Bowring, "Positivism versus Self-determination: The Contradictions of Soviet International Law", in Susan Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press, Cambridge, 2008), 133-168.

[47] European lawyers also display their deep concerns about "loss of sovereignty" in the relations with the EU, the ECJ, the ECtHR. Finland is aggravated by the fact that "a transnational court [the ECtHR] is constantly redefining the normative substance of Finland's legal order" (Kaarlo Tuori, "Judicial Constitutional Review as a Last Resort", in: Tom Campbell, Keith Ewing, and Adam Tomkins (eds.) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, Oxford, 2010), 367). Although, the participation in the EU, the proximity of the legal cultures and other factors considerably smoothen this circumspect attitude in Finland, compared with Russia.

differentiated the country's political outlook and experience from that of many Western countries."[48] This conclusion leaves an ambiguous impression. On the one hand, the disregard of the differences in *Weltanschauung* can be listed as one of the main reasons for failure of the Western attempts to accomplish a *mission civilisatrice* aiming to educate Russians to respect the values of democracy, freedom, individual liberties without noticing that these values are perceived somewhat differently. On the other hand, such a difference should not be overestimated, as Russian history also shows strong tendencies towards democracy and self-government which can be compared (not identified!) with Western European ones.[49] Arguing that there is some specificity in the Russian culture of legal thinking, we do not share the dubious conservative conclusions that Russians have a mentality incapable of understanding the social value of law. The first proposal (a particular mentality) does not necessarily involve the second (legal nihilism). In spite of all the intricacies of the historical development (the Tartar yoke, the tsarist autocracy, or the communist rule), Russia on the whole belongs to the continental legal tradition of the Western civilization.[50] The difference is nevertheless perceptible, and as Bill Bowring argues, "there is a distinctively Russian tradition of thought and argument about human rights".[51] This tradition can be found not at the level of a mystique *Volksgeist*, but rather in the manner students are taught law, judges and law-enforcement officers are instructed to find, protect and enforce law.[52]

Historically, this *Weltanschauung* expressed itself in the philosophical ideas about a religio-mystical unity between society and individuality, in "the eternal conflict between the instinct of statehood's power and the instinct of freedom and sincerity of the people".[53] According to Berdyaev, one of the results of these ideas can be seen in the unhappy experiment with Russian Communism pretending to carry out the traditional Russian values of *Sobornost* or communitarism (the mystic idea of religious integration of an individual into the collective spirituality). An insight into these cultural patterns can explain some contemporary official ideologemes and their acceptance better than allusions

[48] Patrick McGovern, John P. Willerton, op. cit. (note 5), 3. As such, this approach to the issue is fruitful even if we cannot share the characterization of the Russian mentality as "decidedly traditional, and in many regards undemocratic" (ibid., 17), as a "collectivist mindset" (ibid., 26). This mentality is much richer and more diverse than is suggested by McGovern and Willerton, and can also be characterized by references to the intellectual legacy of Chicherin, Gradovsky, Kavelin and other Russian liberals (cf. the classical work by Andrzej Walicki, *Legal Philosophies of Russian Liberalism* (University of Notre Dame, Notre Dame, Indiana, 1992). From a historical standpoint one can also trace the common roots of Eastern and Western European legal cultures (e.g.: Mikhail Antonov, "Du droit byzantin aux pandectistes allemands: convergences de l'Europe occidentale et de la Russie", in Anna Karuso (ed.), *Identita del Mediterraneo: elementi russi* (AM&D Edizioni, Cagliari, 2012), 253-263).

[49] See: Nicholas S. Timasheff, "Free institutions and struggle for freedom in Russian history", 35(1) *Review of Central* and *East European law* (2010), 7-25.

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

[51] Bill Bowring, Russia and Human Rights: Incompatible Opposites? (note 25), 238. See also: Bill Bowring, "Rejected Organs? The Efficacy of Legal Transplantation, and the Ends of Human Rights in the Russian Federation", in Esin Orucu (ed.), *Judicial Comparativism in Human Rights Cases* (UKNCCL, BIICL, London, 2003), 159-182.

[52] Cf. a thoughtful examination of the particularities of the Eastern European legal mentality and of the connection between this mentality and the judicial practices in the monograph by a Czech lawyer: Zdenek Kühn, *The Judiciary in Central and Eastern Europe* (Martinus Nijhoff, Leiden, 2011).

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

to the interplay between the crafty politicians and the naïve people cynically manipulated by mass media,[54] or than the reiteration of the idea of the reappearance of the Soviet ideology.[55]

The emphasis on the collectivity which superposes the individuality has often been mentioned as one of the key elements of Russian culture. This cultural peculiarity is seen as promoting egalitarian values and community fellowship. For Margret Mead it means to shift the emphasis away from the solitary communicant to the congregational experience of community.[56] This shift for Russian ideal-realist philosophy does not result in the annihilation of individuality for the sake of universality, but ideally aims at a fuller development of the personality which can exist only as a part of the totality (the people, the Church, the rural community (*Mir [World]*), etc.). The gap between this ideal dimension and the historical reality of the domination of the collective over the individual for Berdyaev, Vladimir Soloviev and many other Russian intellectuals is explained by Orthodox religiosity where the individual existence is justified solely in the eschatological perspective of salvation which, in its turn, is possible only through a collective action.[57] This philosophical hypothesis of the union between the social and the individual could easily divert Russian thinkers from the "Western" model of democracy whose main function is to check the behavior of government against the people. The idea of the spiritual union of the people and government is undergirded by the "antique model" of democracy where state (polity) and people should work in a "symphony" (the old Byzantine idea penetrated into Russia in the early Middle Ages) to safeguard the totality from disintegration.[58] The organic relationship between the people and the government presupposes that they are spiritually united to accomplish a "national idea" (another powerful slogan in the vocabulary of the Russian conservators from Sergei Uvarov, Ivan Il'jin to Vladimir Putin[59]), this national idea holding up the collective concern for national sovereignty in the guise of "sovereign democracy".

Two major stages can be identified in the discussions about sovereignty in Russia. The first is connected with the "failing" model of federalism introduced in the Constitution of 1993.[60] The Constitutional Court has step-by-step annihilated the concept of shared sovereignty (formerly

[54] Ellen Mickiewicz, *Television, Power, and the Public in Russia* (Cambridge University Press, New York, 2009); Scott Gehlbach, "Reflections on Putin and the Media", 26(1) *Post-Soviet Affairs* (2010), 77-87.

[55] Ol'ga Kryshtanovskaya and Stephen White, "The Sovietization of Russian Politics," 25(4) *Post-Soviet Affairs*, (2009), 283-309. Such reappearance, on the one hand, is a trivial conclusion as the current political leadership largely grew up with this ideology, and on the other hand, it does not explain how the old ideologems get new content essentially different from the Soviet one.

[56] Margaret Mead, John Rickman, Geoffrey Gorer, *Russian Culture* (Berghahn Books, Oxford, 2002), 96.

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

[58] Cf. on this trend in the Russian legal philosophy Mikhail Antonov, *Istorija russkoja pravovoj mysli* [History of the Russian legal thought], (Vysshaja schkola ekonomiki, Saint Petersburg, 2012), 94-106 [In Russian]

[59] About the advantages of this symbiosis of ideas for the official ideology see Vladimir Soloviev, *Putin: putyevoditel' dlya neravnodyshnikh* [*Putin: A guide for the not-indifferent*] (Eksmo, Moscow, 2008) [In Russian]

[60] Many Western observers have noticed that the attempts of the federal government to restore the integrity of Russia resulted in the shrinking of activity of democratic institutes and the protection of human rights. E.g., Cameron Ross argues that Russia's weak and asymmetrical form of federalism has played a major role in thwarting the consolidation of democracy. Federalism and democratization in Russia exist in contradiction rather than harmony (Cameron Ross, *Federalism and democratization in Russia* (Manchester University Press, Manchester 2002). On the role of the Constitutional Court in balancing strong federalism and liberal democracy see Edward Morgan-Jones, *Constitutional Bargaining in Russia: Institutions and Uncertainty* (Abingdon, Routledge, 2010).

supposed to belong both to the federation and to its members), holding invalid the differently formulated sovereignty clauses in the regional constitutions; these steps were accompanied by the centralization reforms launched by Putin during his first presidency.[61] Once the integrity of the country was restored in mid-2000, the debates took another direction; this time, about the limits of independence of Russia in the sphere of international law and inside international organizations (the UN, the WTO, etc.). The controversies between Russia and European institutes (the PACE, the ECtHR, etc.) in such politically engaged cases as those of YUKOS, the Chechen and the Georgian campaigns, the Magnitsky case led to a reassessment of the attitude of Russian politicians and senior judges towards the standards of international human rights. The criticism was not against the standards as such but against the 'irresponsible behavior' of international organizations.[62] This criticism was not directed against "the International", its target was "the Western" with its pretention to supplant the International. Independence from the Western influence was seen in this aspect as the basic precondition for the normal development of Russia (in the sense of a development which would be congruent with certain cultural norms inherent to Russian civilization). In the official ideology it was the concept of sovereign democracy which was principally designed to protect Russian national sovereignty against the "Western liberal-democratic ideology".

The main ideologist of this idea is Vladislav Surkov, who in 2006 was the deputy head of the Administration of the Russian president. The rhetoric around sovereign democracy was developed by Surkov with reference to the set of ideas introduced by the famous neoconservative Francis Fukuyama. The most impressive contribution to the debates was made during the Round Table "The sovereign state in the conditions of globalization: democracy and national identity" (August 30, 2006) where referring to the Slavophile ideas ("The Russian people must develop themselves organically, must have a total representation of themselves"[63]). Surkov called for sovereign democracy which "appeals to the dignity of the Russian people and the Russian nation in general."[64] The position of the proponents of this concept was laid down in a collection of articles[65] where Surkov and other authors insisted that Russia has a special vocation to protect its national specificity against Western nihilism.

In the speech of 2007 "Sovereignty as Political Equivalent of Competition", Surkov posited "sovereign democracy" as a societal structure where the supreme power (*suprema potestas* of Jean Bodin) belongs to the Russian nation which is entirely independent on the external (that is: Western)

[61] On this first stage see: Mikhail Antonov, "Theoretical Issues of Sovereignty in Russia and Russian Law" 37(1) *Review of Central and East European Law* (2012), 95-113.
[62] See: Sinikukka Saari, *Promoting Democracy and Human Rights in Russia* (London and New York: Routledge, 2009).
[63] For interesting reflections on these debates viewed from the perspective of the Slavophile philosophy see Andrey Okara, "Reprivatizatsija buduzhego. Suverennaja democratija: ot poiskov novoj russkoj idei k missii korporatsii ZAO Rossija" [Reprivatization of the future. Sovereign democracy: from the search for a new national idea to the mission of CJSC Russia], 1 *Rossijskaja politia*, 2007, 85-95 [In Russian]. The abridged English version: Andrei Okara, "Sovereign Democracy: A New Russian Idea or a PR Project?", 5(3) *Russia in Global Affairs* (2007), 8-20, available at http://eng.globalaffairs.ru/number/n_9123
[64] Georgy Il'ichev, "Narod dolzen znat' kuda i zatchem my idem" [The people shall know where we go and why], *Izvestia* (31 August 2006), available at http://izvestia.ru/news/316793. [In Russian]
[65] *Suverennaja demokratija: ot idei k doctrine* [Sovereign democracy: from idea to doctrine] (Evropa, Moscow, 2006) [In Russian]

forces. There are three basic conceptual premises of sovereign democracy: sovereignty legally prevails over (liberal) democracy; one can correctly balance the sovereign rights of the state with individual human rights because there is an "organic relationship" between the people and the government, and because an individual is nothing more than a part of the collective; the democratic tradition shall not be introduced to Russia from abroad but shall be found in the Russian thousand-year culture of statehood which is based on the communitarian traditions. Individual interests cannot stand above societal ones, and in the case of a conflict, the rights of certain individuals can be sacrificed on the altar of national, collective rights (i.e. the rights of the people/nation to be sovereign – politically, economically, culturally and in many other aspects). The main political conclusion of this doctrine is the connection between maintaining state sovereignty and the preservation of the state control, including the introduction of a strong state ideology to insulate political power from international criticism. The primary task of this conservative ideology is to secure the country's integrity, which requires promptly averting any threat coming from the West and from its insiders in Russia.[66] Russia must move toward democracy cautiously, under the permanent parental control of the government.[67] It is questionable whether this political concept undermines the universal idea of democracy,[68] and whether there are any universalities in the multicultural postmodern world, but such a question would redirect us to the vast philosophical debates which are beyond the scope of this work. In the context of the present article it suffices to point out the main philosophical implication of this position: the collective interest takes precedent over individual interests.[69]

Sovereign democracy was discussed for several months, and after about a year of discussions it fell into desuetude.[70] The most important discussion took place at the Faculty of Philosophy of Saint Petersburg State University on September 11, 2007 where the philosophers ruthlessly derided the

[66] This ideology underpins recent Federal Law No. 121 of 20 July, 2012 imposing restrictions on activities of Russian NGOs funded from abroad and for this reason considered to be "foreign agents". The opinion of the ECtHR in the case Assotsiatsiya NGO Golos and Others v. Russia (Application No. 41055/12) and the reaction of the Russian authorities remain to be seen. In the same vein is Putin's rhetoric in favor of "deoffshorization", i.e. the compulsory repatriation of the capital deposited by Russian businessmen in foreign banks – a survey of private transactions is still proposed under the pretext of the protection of sovereignty (The Address of the President of the RF to the Federal Assembly of the RF, December 12, 2012, available at http://eng.kremlin.ru/transcripts/4739). The list of basic values for the development of Russia that Putin outlines in this Address, is demonstrative of the ideas we discuss in this paper ("The ruling parties, governments and presidents may change but the core of the state and society, the continuity of national development, sovereignty and the freedoms of the people must remain intact"). The sequence is emblematic: 1) state, 2) nation, 3) sovereignty, 4) freedoms of people. This list does not leave room for individual liberties and human rights, let alone democracy. On the ideological connection between the concept of sovereign democracy and the interventionalist economical policy of the Russian state see Julia Svetlichnaja, James Heartfield, "Sovereign democracy: Dictatorship over capitalism in contemporary Russia", 159 *Radical Philosophy* (2010), 38-43.

[67] From the general line of this rhetoric it follows that this task is entrusted only to the federal government (not regional or municipal), so that "sovereign democracy is nothing more than democracy under the authorities' supervision." (Vladimir Ryzhkov, "Sovereignty vs. Democracy?", 4 *Russia in Global Affairs* (2005), 101-112, at 104).

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

[69] This is in no way a new idea. This implication was common for many thinkers, from Plato and Aristotle to Hegel and Marx, who were labeled by Karl Popper as "enemies of the open society". See Karl Popper, *The Open Society and Its Enemies*, in 2 vol. (Princeton University Press, Princeton, 1971). A successful parallel between "sovereign democracy" and the conservative ideas of Francois Guizot and Karl Schmitt is drawn in Ivan Krastev, "Russia as the 'Other Europe'", 4 (5) *Russia in Global Affairs* (2007), 66-78.

[70] The remnants of this theory can be found at the site of the "Center for the Investigation of the Problems of Sovereign Democracy" created at that time (the site was last updated in 2009): http://www.sd.csu.ru/.

discrepancies and paradoxes of sovereign democracy.[71] This philosophical critique (almost all the philosophers were united by a deep skepticism toward this concept) was echoed by political leaders. The (then) President Medvedev claimed that "if you take the word 'democracy' and start attaching qualifiers to it, that would seem a little odd" and Zor'kin suggested this idea was a confused form of constitutionalism. At the same time, Vladimir Putin did not expressly take a stance on Surkov's concept, but indirectly supported the ideological and philosophical basis on which his assistant built the idea of sovereign democracy.[72] This basis was formed in 2005 when, in his Address to the Russian parliament, Putin emphasized that Russia had to find its own path to build a "democratic, free and just society and state."[73] And in February 2012 Putin referred again to this idea "to reanimate the state, [and] restore popular sovereignty which is the basis of true democracy."[74]

Is this paternalist attitude to democracy preprogrammed by the Russian intellectual tradition, as assert some Western authors?[75] We do not think so, as there always were and still are different trends in this tradition. Many controversies can attest this fact, and taking one of the paradigmatical examples, we will address the Slavophile-Westernizer debates of the 19th century.[76] The Westernizers (liberals and revolutionary democrats) insisted on modernization through 'Westernization' believing that Russian and Western civilizations have common tasks to accomplish. The universal standards of political and legal organization of society are similar (though not identical) for the both. The landmark Westernizers include Pyotr Chaadaev, Aleskander Herzen, Andrei Sakharov, and many others who believed that Western civilization reveals universal values of cultural (political, legal, etc.) development in relation to which Russia has just fallen behind and needs to catch up the West.[77] For contemporary Russian legal thought, this means that Russia need not painfully fight for the

[71] "About the Discussion On the Concept of Sovereign Democracy", available at http://www.politex.info/content/view/365/

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

[73] In this Address Putin set out the new program as follows: "Russia will decide itself how it can implement the principles of freedom and democracy, taking into account its historical, geopolitical and other specificities. As a sovereign state, Russia can and will independently establish for itself the timeframe and conditions for moving along this path… And this is why we will keep moving forward, taking into account our own internal circumstances and certainly relying on the law, on constitutional guarantees." (The translation is cited according: Vladimir Ryzhkov, Sovereignty vs. Democracy? (note 62), 102).

[74] Vladimir Putin, "Demokratija i katchestvo gosudarstva" [Democracy and Quality of State], *Kommersant* (6 February 2012), No. 20/П (4805), available at http://www.kommersant.ru/doc/1866753 [In Russian]

[75] For an example of such rhetoric see Timothy J. Colton and Michael McFaul, *Are Russians undemocratic*? Carnegie Endowment working papers. No. 20 (June, 2001). http://carnegieendowment.org/files/20ColtonMcFaul.pdf. One could also construct a banal syllogism from the assertion that every people merits its government, to the fact of autocracy of the most Russian governments which allegedly attests the proclivity of Russians for authoritarianism, with the premature conclusion that Russians do not merit the true democracy (Richard Sakwa, *Putin: Russia's Choice* (London: Routledge, 2007), 2nd ed.). It is paradoxical but quite explicable that the neoconservatives from two opposite sides (Western and Russian) arrive at the same point. See above (note 32) on the opinion of Surkov about the unripeness of the Russians for democracy.

[76] Cf. an attempt to construct the consequent development of Russian history throughout this divide: Esther Kingston-Mann, *In Search of the True West: Culture, Economics and Problems of Russian Development* (Princeton University Press, Princeton, 1999). We limit our analysis here to the main conflicting principles of these two schools which are reproduced in the debates about sovereign democracy. It does not amount to asserting that Russian political thought did not reveal other aspects of the understanding of human rights and democracy (see Anastasia Tumanova, Roman Kiselev, *Prava tseloveka v pravovoj mysli i zakonotvortsestve Rossijskoj imperii vtoroj poloviny XIX – nachala XX veka* [Human rights in the political thought and lawmaking of the Russian Empire from the second half of the 19th to the beginning of the 20th century] (Vysshaja schkola ekonomiki, Moscow, 2011) [In Russian].

[77] Andrzej Walicki, *The Slavophile Controversy: History of a Conservative Utopia in Nineteenth-Century Russia* (Clarendon Press, Oxford, 1975); Isaiah Berlin, *Russian Thinkers* (Penguin Books Ltd, London, 1978), 117 ff.

particularity of its development and can adhere to the Western intellectual tradition, in particular, accepting common standards of human rights.[78]

Slavophiles espoused the theory wherein modernization is not necessarily connected to Westernization. Such Slavophiles as Khomyakov or Solzhenitsyn were attempting to embrace a new Russian identity. Russia is a unique civilization and shall not stick to ideas which are alien to the traditional mentality and culture of its people.[79] They were persuaded that European civilization is permeated by the struggle between egoistic individuals. On the contrary, Russian society was founded on the collectivist principle of the commune (*obszhina*) united by the common interests of its members. The similarity with the ideals the Bolsheviks sought to realize in Soviet Russia is striking and has been noticed by many Russian and Western intellectuals.[80] The social communitarist credo of Slavophiles was formulated by the prominent Slavophile author of the 19th century, Ivan Kireevski in distinction to Western political ideals: "In the West we find a dichotomy of the state, a dichotomy of estates, a dichotomy of society, a dichotomy of familial rights and duties, a dichotomy of morals and emotions… We find in Russia, in contrast, a predominant striving for wholeness of being, both external and inner, social and individual... There one finds the precariousness of individual autonomy, here the strength of family and social ties."[81]

The Slavophile ideal was that of the integrity of society and of individuality, whereas European civilization and its political forms were perceived as fragmented and individualistic. Slavophiles did not deny the value of democracy as such (finding its ideal type in medieval Russia: e.g., Veche in Novgorod); they just challenged the individualist concept of liberal democracy developed in the West. The image of a commune (*obszhina*) suggested by Konstantin Aksakov, one of the leaders of the Slavophiles, could be seen as a conceptual presentiment of "sovereign democracy" described one and a half centuries later by Surkov: "A commune is a union of the people, who have renounced their egoism, their individuality, and who express their common accord…, in the commune the individual is not lost, but renounces his exclusiveness in favor of the general accord – and there arises the noble phenomenon of harmonious, joint existence of rational beings; there arises a brotherhood, a commune – a triumph of human spirit."[82] Building such a brotherhood requires suppression of egoistic

[78] Joachim Zweynert, "Conflicting Patterns of Thought in the Russian Debate on Transition: 1992-2002" (15 March, 2006). HWWA Discussion Paper No. 345, available at http://ssrn.com/abstract=90882. For an interesting sociological survey which demonstrates this Slavophile-Westernizer divide in the mentality of the Russian politicians see William Zimmerman, "Slavophiles and Westernizers Redux: Contemporary Russian Elite Perspectives", 21(3) *Post-Soviet affairs* (2005), 183-209. Similar sociological data are also stated in research by the Russian authors: Leonid Blekher, Georgij Ljubarskij, *Glavnyj russkij spor: ot zapadnikov i slavjanofilov do globalizma i Novogo Srednevekovja* [The principal Russian controversy: from Westernizers and Slavophiles to globalization and the New Middle Ages], (Akademitcheskij project, Moscow, 2003) [In Russian].

[79] See Vasily Zenkovsky, *A History of Russian Philosophy* (Routledge & Kegan Paul Ltd., New York, 1953), 185 ff.

[80] E.g., George Guins "East and West in Soviet Ideology", 8(4) *Russian Review* (1949), 271-283.

[81] Ivan Kireevsky "On the Nature of European Culture and on Its Relationship to Russian Culture" (1852), *On Spiritual Unity: A Slavophile Reader* by Aleksei Khomiakov and Ivan Kireevsky (Lindisfarne Books, Hudson, New York, 1998), 229.

[82] Cited in Nicholas Riasanovsky, *Russia and the West in the Teaching of the Slavophiles: A Study of Romantic Ideology* (Harvard University Press, 1952), 135. On the interrelation between the ideas of Slavophiles and of the modern Russian conservators see Judith Devlin, *Slavophiles and commissars: enemies of democracy in modern Russia* (St. Martin's Press, New York, 1999).

individualism inherent to members of the commune, and their mobilization into the "common accord." Evidently, neither liberal democracy's protection of the minority against the majority, nor human rights' defending the individual from the collective correspond to this project, so that new political forms are wanted instead of those developed by the "decayed West."

Surely, we do not insist that the new rhetoric of sovereign democracy entirely repeats the old conservative schemes of the Slavophiles – this proposal would mean an evident oversimplification of the problem. *Nil sub sole novum*, and this is true also for political ideologies. But these ideologies never grow in an empty space, and are almost always loosely rooted in the previous debates. In our opinion, this is the case of sovereign democracy which is deeply rooted in the Russian traditionalist philosophy (both religious and secular) of the end of the 19th century, and which at the same time transmits the old intellectual tradition into contemporary political debates. An analysis of the philosophical quality of the concept of sovereign democracy was not our task here (a very good philosophical assessment is given in the discussion mentioned in footnote 71 above), neither was our concern to criticize isolationist/traditionalist ideologies. Our objective was rather to show that a careful examination of the political rhetoric in Russia requires transcending (though not a complete abandoning) the usual explanatory schemes formulated in terms of interplay of political (economical, corporate, etc.) interests and the transition of the Soviet ideological legacy. An investigation into the philosophical dimension of this rhetoric can help reveal a larger hidden cultural framework into which this rhetoric can be inscribed, no matter whether the concerned political actors were aware of this framework or not. Today Surkov's concept can already be regarded as obsolete, and its author has lost almost all of his influence – not only intellectual, but also political (after resigning from the government in May, 2013). But his "sovereign democracy" shows the inheritance of the philosophical ideas in the Russian political discourse, and can be regarded as one of the intermediaries which changed the old ideas into the new realities.

Conclusion

This short analysis draws several parallel lines between the reasoning of the Slavophiles and of modern Russian conservatives on the issues of democracy and human rights. Both condemn Western democracy and liberalism for their lack of spirituality and for their accentuated individualism, and stress the priority of the collective over the individual. Human rights in this perspective cannot gain the upper hand over the state laws. These laws take their origin in popular national sovereignty and convey the will of the people; at the same time, the pedigree of international law is obscure and is suspected to be influenced by the alien powers. This way of thinking stands in contrast to the constitutional provisions about the priority of human rights and of international law over domestic laws (Articles 15, 17 of the Constitution); however the imperfect formulation of the Russian constitution allows the

judiciary to circumvent these formulations using them and the principles of international law as redundant arguments. The concept of sovereign democracy by Surkov is not widely discussed nowadays, the author himself has abandoned it, and the Kremlin ideologists seem to be reluctant to restate this concept.[83] Nevertheless, one can suggest that the emergence of this concept was not an accidental fact and can be considered as a recurrence of Russian conservatism. During the last two centuries similar concepts have often been used in propaganda. In imperial Russia it was the case of the celebrated formula of Count Uvarov "*Pravoslavie, Samoderzhavie, Narodnost'"* (Orthodoxy, Autocracy and Popular Democracy[84]) which became one of the cornerstones of the official ideology legitimizing autocracy through references to Russian communitarian traditions. It was also the case of the "soviet (also socialist or council) democracy" which legitimized the dictatorship of the proletariat, or in fact – the authoritarian (sometimes even totalitarian) rule of the Communist Party in Soviet Russia. "Sovereign democracy" therefore can be seen not as an "invention" but as a "reinvention" of one of the models of official political discourse.

Reiterating this idea of a "democracy *à la russe*" by political leaders and senior judges (with or without reference to sovereign democracy) conveys to Russians several ideological messages about the correlation between individual and collective rights. We can discern three principal messages among them. The first says that the sources of sovereignty are found in state power itself, not in society or in the international community. This message is translated by a simple syllogism: given that the Russian people are the only bearer of sovereignty (Article 3 of the Constitution), and given that the people do not realize their will directly (except during elections and referendums) and delegate its realization to the government, it follows that the government is entitled (on behalf of the people) to take any measures to protect the popular and national (these aspects are hardly differentiated in Russian political science) sovereignty indispensable for survival of the people. Therefore, no international courts or agencies can interfere with the activities of the government or criticize even based on humanitarian or other standards.

Second, the 'correct' way of thinking about sovereignty allows the Russian state and society to survive in the international community which is friendly only in appearance but in reality is a conglomerate of envious states and corporations which search to take hold of the national resources

[83] An interesting ideological demarche has been undertaken by the conservative political scientist Leonid Polyakov who accused the Americans of introducing the false idea of sovereign democracy (See: Leonid Polyakov (ed.), *PRO suverennuju demokratiju* [Anti Missile System "Sovereign democracy"], Moscow, 2007).

[84] The usual translation of "*Narodnost'*" as "*Nationality*" (cf.: Nikolay Riasanovsky, *Russian identities: a historical survey* (Oxford University Press, Oxford, 2005), 132) is not successful as it conveys a connotation which in the European political literature refers to a substantially different set of ideas. For its founding fathers, the Russian romantic writers, the term of *Narodnost'* referred to the traditions of the self-government of the Russian peasantry (*obszhina*). These traditions are in natural unison with the Russian autocratic regime, and this unison is legitimized by the Orthodox religiosity. It was the main message of *Narodnost'* in Uvarov's formula. To note additionally that in Russian the term "nationality" is literally transferred by the word "*natsional'nost*'."

belonging to the Russian people, thus depriving it of its sovereignty.[85] The main function of the state is therefore to detect the ideological dangers coming from the West in the guise of the liberal rhetoric for "idealization of pseudo-objective values", and to avert these dangers through dismissing the malevolent criticism of the West. Human rights and democracy are merely a pretext for the West to interfere with Russian internal affairs and to take control over its sovereignty.

Fear of social and political unpredictability, and traditional communitarism create an atmosphere favorable to the isolationism predicated by the officials as 'a separate way of development' of Russia. In this light the protection of sovereignty at any cost can easily be justified as *conditio sine qua non* for the survival of the Russian people. In the opinion of some authors, such historical experience contributed to the formation of a "spirit of misadventure in the public sphere" in the Russian culture[86] which results in the passive abstention and mistrust in any kind of political discourse including that about democracy or human rights. Given this traditional inertia of Russians in political issues, the government may act independently of public opinion as long as Russians are not "ripe" enough to be widely engaged in political deliberation. Even if such conclusions are highly questionable, they can at least, partly explain the objectives of the "mobilization strategy" employed by the authorities to urge intellectuals to be vigilant towards the Western values. If there is *some* mistrust in the great narratives about human rights among *some of* the Russians, the rhetoric about sovereignty can increase this distrust and reinforce the legitimacy of the authorities, otherwise challenged by the Western critic.

Thirdly, the West goes in the wrong direction admitting the paradigm of globalization where sovereignty allegedly loses its importance. Abandoning sovereignty in favor of softer international regulation would lead to the rule of transnational corporations and oligarchs. Russia shall not follow this new paradigm as it does not conform to the Constitution and the laws of Russia (they are evidently based on the Westphalian model of sovereignty), and is destructive for society. This old idea of the "decaying West" offered by the Slavophiles and appreciated by the Soviet regime ("decaying capitalism"), plays its role also in dismissing the globalization arguments ("it can be true for the decayed West but not for Russia which keeps faithful to its statist traditions"). The globalization dangers could come true if Russia engaged itself in cosmopolitan culture and would admit the universality of democratic or humanitarian standards, destroying thereby its national uniqueness. These arguments, reiterated by Putin and other conservative politicians nowadays, had already been widely expanded on in the 19th century. Therefore, such engagement can be dangerous and Russia

[85] Ivan Krastev notes that "For the Kremlin, sovereignty means capacity. It implies economic independence, military strength and cultural identity" (Ivan Krastev, Op. cit. (note 69), p. 72).

[86] Meaning the tendency of Russians to explain all their misadventures by referring to the unjust political regimes (Alain Besançon, *Ubiennyy carevich: Russkaya kul'tura i nacional'noe soznanie: zakon i ego narushenie* [The killed/murdered/dead Prince: the Russian culture and the national consciousness, the law and its transgression] (MIK, Moscow 1999), 208 [In Russian]

should keep a safe distance from the legal ideology promoted by international courts and organizations.[87]

In these three messages sovereignty is mostly understood as external independence, that is, the integrity and autonomy of the state as regards other states and the international community. In these discussions about "untouchable sovereignty" there is a lack of distinction among the sovereignty of a people, of a nation, of a state; sovereignty is uncritically used in all meanings for the same ideological purpose. Many ideologists of this concept are at a loss to understand whether "sovereign democracy" is different from sovereignty or is an integral part of sovereignty.[88] The 'sovereignty debates' are not separated from the question about a monist/dualist foundation of the legal order; ideas about the priority of international law can easily (but erroneously) be considered as a threat to sovereignty. A distinction is also missing between the concept of sovereignty and that of the binding force of human rights (do they depend on a state's endorsement, on international legal standards, or on natural laws of reasonableness and sociability?).

Analyzing the official discourse, one can notice that these formal questions become more and more important for high-ranking Russian lawyers. Several examples symbolize this trend. Among them the demise of the idea of sovereign democracy, which is no longer supported by politicians with a legal background, the evolution of Zor'kin's ideas on sovereignty,[89] from apology of the Westphalian system to the search for the new contemporary models, and other examples, including the accentuated interest in contemporary Western legal philosophy.[90] From this standpoint, one cannot predict the future development of human rights and democracy in Russia, nor can one undeniably qualify the position of the Russian authorities as anti-humanitarian and contravening to the standards of democracy.[91] As Vladimir Bibikhin, the contemporary Russian philosopher of law, insisted the Russian legal consciousness continually tends to create a modern democratic society of the European type and, at the same time, pushes it away.[92] This is confirmed also in the debates about sovereignty, democracy, and human rights in Russia.

[87] For an analysis of this rhetoric see Dmitrii Orlov, "The New Russian Age and Sovereign Democracy", 46(5) *Russian Politics and Law* (2008), 72-76.
[88] Andrei Kokoshin, "Real Sovereignty and Sovereign Democracy", 4(4) *Russia in Global Affairs (2006*), 105-118.
[89] On the development of these debates see Bill Bowring, "The Resurgence of Radical Conservatism in Russia" (23 November, 2010), available at SSRN: http://ssrn.com/abstract=1845424.
[90] E.g., the book by the Justice of the Constitutional Court (Gadis Gadzhiev, *Ontologia prava* [Onthology of Law] (INFRA-M, Moscow, 2012) [In Russian] where the author attempts to examine the problems of Russian constitutional law from the perspective of ideas of Michel Troper, Otto Pfersmann, Robert Alexy, Pierre Schlag, and other contemporary Western legal philosophers.
[91] Some observers notice that "the strong Russian stating imperatives should not obscure the democratic potential that continued into the Putin-Medvedev period" (Patrick McGovern, John P. Willerton, Op. cit. (note 5), 5).
[92] Cf.: Vladimir Bibikhin, *Filosofia prava* [Philosophy of Law] (MGU, Moscow, 2001) [In Russian]

Dr. Mikhail Antonov
National Research University Higher School of Economics (St. Petersburg, Russia).
Associate Professor of Law.
E-mail: mantonov@hse.ru, Tel. +7 (812) 7852540

Any opinions or claims contained in this Working Paper do not necessarily reflect the views of HSE.