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This paper analyses the cultural constraints that are factually imposed on the actors of the Russian legal system by the prevailing social philosophy which is characterized by a significant degree of religious conservatism. This conservatism is predictably opposed to sexual minorities and to those who want to defend or justify them. Examining the 2013 amendments on the protection of traditional values and the case law concerning these amendments, along with the discourses of some judges of the Russian Constitutional Court (RCC) and other actors, the author concludes that religious conceptions have a strong impact on decision-making in Russian courts, and can sometimes overrule the formal provisions of the Russian Constitution and the laws which grant protection and guarantees to the sexual minorities. This situation can be explained with reference to the prevailing social philosophy which promotes conservative values and emphasises collective interests. The reasons for this specific development of Russian intellectual culture in this regard fall outside the scope of the present paper, but it can be asserted that this development, historically oriented at prioritizing morals and religion over the law, still shapes the general conservative attitudes of Russians toward sexual minorities. These attitudes cannot be ignored by judges and other actors of Russian legal system who, to some extent, are subject to the general perception of what is just, acceptable, and reasonable in the society.

JEL Classification: K 10; K 40

Key words: religion, social philosophy, religious feelings, sexual minorities, justice, courts, case law, legal normativity, human rights, constitutional justice

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1. Introduction

This paper analyses how religious freedoms and religious feelings are accommodated within the rights of sexual minorities under Russian law, and how they shape the legal practice in cases concerning these minorities. While religious freedoms are enshrined in the Russian Constitution (the Constitution) and in the 1999 Law "On freedom of conscious", the Constitution guarantees moral and cultural pluralism, the secular character of the Russian state and its laws and prohibits any discrimination, including that based on sexual orientation. After the 2013 Pussy Riot case, the Russian parliament adopted a series of laws that set out to protect religious feelings and traditional values. It means the statutory protection of believers against performances, utterances, or any other actions that may insult their religious creeds and traditional mind-sets. These amendments have sharpened the normative conflict between two groups of values: the traditional values that largely promote the creeds of the historical religious denominations, and the liberal values that prohibit limitations on rights based on discriminatory clauses such as sexual orientation. Due to their basic religious conceptions, the traditional denominations (Russian Orthodox Christianity, Islam, Judaism and Buddhism) are hostile toward sexual minorities, so that there usually are open or latent conflicts between their believers and sexual minorities, especially in such sensitive areas as education, the adoption of children, marriage. The 2013 amendments tipped the scales to favour the traditional denominations, as religious feelings became an object of statutory protection. This added to the complexity of finding a judicial balance between these groups of values, and intensified the question about the justification of the choice between these different values and principles.

Some observers claim that court decisions in Russia are politically predetermined and that judges in fact have no choice but to follow the line of the ruling party. It might be true, at least partly, but we are unaware of any concrete empirical data confirming the overwhelming political bias of all Russian court decisions. Perhaps, such bias can be found in some headline cases, but it does not suffice to make a judgment about the entire court system. Our personal experience is that even if there are some politically motivated cases, they are few, and in the most cases the judge has the discretion to decide the case how she or he chooses. Given the impact of tradition and of religion on culture, it comes as no surprise that many judges are at default opined in favour of the doctrines of the major religious denominations and against the sexual minorities.

This might be the reason why Russian courts usually support the claims against sexual minorities, and it is exactly this aspect that draws our attention.

In the present paper we examine the dichotomy that exists between the formal legal texts (the Constitution, ratified treaties, and other legal acts that fix liberal and anti-discriminatory rules and principles) and the factual regulation where the state owes a large part of its legitimacy to the adherence to so called "traditional values", to the support of the Russian Orthodox Church and other conservative forces. A set of historical reasons means, these "traditional values" in Russia are, for the most part, based on the religious patterns of the major religious denominations, which are, by definition, conservative in sexual matters. Furthermore, in recent years the government has readily utilised the issue of traditional values in its anti-Western and anti-globalist rhetoric, reinforcing its support from the conservatively minded masses. In turn, this predictably leads to conflicts and discrepancies with the supranational European institutions, and in particular with the European Court of Human Rights (the ECtHR).

2. Methodology

Our research is theoretical rather than empirical in that it remains on the theoretical level without becoming an empirical study based on sociological polls or discourse-analysis. With this approach we connect legal texts with the societal environment in which they are active and with their cultural background, and retrace the feedback that is produced in this interaction between the texts and their interpretations.[3] This provides us with ideal-typical representations in that they provide the conceptual apparatus necessary to make a selection and abstraction from the infinite multitude of social realities that pertains to the religious sphere in Russia. As exemplified in one study of the policies and strategies of the ECtHR, Weberian sociology can provide a set of reflexive tools for understanding this court as an evolutionary institution that develops specific legal rationalities, which are reflexive of this court's embedded rationality in its decision-making process.[4] Such perspective can be applied also to other international courts, and surely to domestic courts and—in our situation—to Russian courts. This theoretical approach has its focal

[3] A similar approach is advocated by Justice Scalia: Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997).

[4] Mikael R. Madsen, "The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence", in: Mikael Madsen and Jonas Christoffersen (eds.), *The European Court of Human Rights between Law and Politic*s (Oxford: Oxford University Press, 2011), 43-60; Richard Munch "Constructing an European Society by Jurisdiction", 14 *European Law Journal* (2008), 519-541.

point in the different historically founded rationalities of the courts in question, and how these are reflective of society, and of the general moods dominating this society. It can help reveal not so much individual motivations but societal and institutional developments, which can be made intelligible by exploring the contexts of certain judgments, and their impact on the rationalization of law in the context of contestation over defining the 'legal field'.[5] Decision-making processes in Russian courts can be thus considered not through the prism of a political analysis of respective influences, but in the light of a philosophical analysis (in the sense specified above) allowing us to assess these processes in the more general framework of social development and social control in Russia.

The balance between the societal values rooted in religious traditions and the liberal values that protect minorities against the arbitrary rule of the majority can be a litmus test that permits the evaluation of the extent to which the rule of law is efficient in Russia.[6] The main question will be: can minorities claim the full judicial protection of their rights which are enshrined in the Constitution and international treaties despite these rights contravening the established pattern which is rooted in the prevailing religious paradigms? This problem is present also in other countries with a relatively strong influence of religious traditions on the social life and mind-sets. Adhering to international standards of the protection of minorities, quite a few countries may in reality be unwilling to extend the full scope of such protection to some minorities that are stigmatized in the public opinion of their countries. Accommodating such stigmatised minorities is, therefore, also a practical choice for the government—it may undermine its legitimacy and cause a loss in support from the population. This choice is relevant not only for democratic countries where the outspoken support of minorities can lead to lost elections, but also for authoritarian countries which governments are, to a certain extent, dependent upon various conservative groups (clergy, tribal leaders, etc.). Often, so called "traditional" denominations fiercely oppose any governmental attempts to grant more rights to sexual minorities: this includes, but is not limited to, Islam, Judaism, and such historical branches of Christianity as Catholicism and Orthodoxy. To adequately assess the nuances and

[5] Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Judicial Field", 38 *Hastings Law Journal* (1987), 805-853; Bruno Latour, *La fabrique du droit: Une ethngraphie du Conseil d'Etat* (Paris: La Découverte, 2002).

[6] In a broader perspective, one can consider this issue in the light of different strategies of Russian modernization. In the Russian scholarship see, e.g., Marianna Muravieva, "Traditsionnye tsennosti i sovremennye sem'i: pravovye podkhody k traditsii i modernu v sovremennoi Rossii" (Traditional values and contemporary families: legal approaches to tradition and modernity in the contemporary Russia), 12(4) *Zhurnal issledovanii sotsial'noi politiki* (2014), 625-640.

limits of this balance, the statutory texts are insufficient, as the issue of the accommodation and protection of religious feelings concern the underlying social conventions that have been historically formed and that may hold the sway over mind-sets not only of ordinary people but also of legislators and judges.

We analyse the part of Russian law that regulates the rights of sexual minorities from the standpoint of the prevailing social philosophy in Russia with the ultimate purpose to understand and to explain the axiological background (i.e., the system of societal values) that underpins the legal regulation of sexual minority rights in the Russian Federation. The prevailing philosophy is understood as that which is promoted by the official media and in the discourse of the political leaders[7] and, according to sociological surveys, shared by the majority of the population.[8] (It is a separate question whether it is shared because it is officially promoted or it is promoted officially because it is supported by masses.[9])

After the of Pussy Riot case in 2013 draft bills about the liability of those who insult the feelings of believers and propagate LGBT ideology were adopted in 2013, and this resulted in an indirect limitation of basic constitutional freedoms (first of all, those of conscience and of expression). This gave rise to abundant debates in the Russian scholarly literature devoted to the limits of moral regulation and to the interplay between religion and law, and between the Constitution, the law and judicial freedom. In the following, we will briefly scrutinize these developments, revealing their philosophical and historical background.

3. Traditional values against posited legal rules

Historically, 'tradition' in Russia has been formed (at least, in what concerns such issues as family, sexuality, gender) under the strong influence of the Russian Orthodox Church—if we take the Christian part of the population. The same assertion about the decisive religious influence can be made about the second major denomination—Islam prevailing in the Caucasus and in the Volga region. This influence has been reflected, e.g., in the Russian medieval

[7] A short analysis of the structure of this discourse is aptly provided in: Michael Urban, *Cultures of power in post-Communist Russia: an analysis of elite political discourse* (Cambridge: Cambridge University Press, 2010).

[8] The sociological surveys seem to confirm that the homophobe policy of the authorities goes in line with the popular moods. According to the Levada-centre polls, 77 % of Russians supported the so-called gay propaganda law (this law, as will be shown later, has a wider scope of regulation) in March 2015, as compared with 67 % in February 2013. See: "Nevidimoe bolshinstvo" (The Invisible Majority), at http://www.levada.ru/15-05-2015/nevidimoe-menshinstvo-k-probleme-gomofobii-v-rossii.

[9] An interesting sociological explanation of how xenophobia in Russia is used by different groups to promote the philosophy of solidarity: Vladimir Mukomel, "Ksenofobiia kak osnova solidarnosti" (Xenophobia As the Foundation of Solidarity), 3-4 *Vestnik obzhestvennogo mneniia* (2013), 63-69.

collection of customary guidelines called 'Household' ('Domostroi') where family issues have been dealt with from the religious standpoint (even if this religiosity differed quite a bit from the canonical Russian Orthodox Christianity),[10] and in later texts containing ethical (and at the same time legal, insofar as they were backed by organized coercion) prescriptions of appropriate behaviour. Gender roles and patterns of sexual behaviour have been prescribed in an imperative manner, with zero tolerance towards non-traditional sexual orientations, which has repercussions still now.[11] The Westernization project undertaken by Peter the Great sought, *inter alia*, to change these traditionalist ethics. But if this great Russian reformer succeeded in his plans, it was only for the highest strata of Russian society, while the major part of the population (peasantry, clergy, lower gentry, merchants) maintained their behavioural standards, standing against the official Westernized morality. For many Russian historians and philosophers, the 1917 Revolution is seen as a result of the clash between the Western values propagated by the highest classes and the traditionalist values imbued with religious connotation which were supported by the middle and the lower classes.[12] After the 1917 Revolution not many things substantially changed in what concerned the official attitude towards 'non-traditional' sexuality and gender in the long term.[13] The Bolsheviks similarly pursued homosexuals and banned feminism from the public discourse, maintaining, e.g., criminal liability for homosexual intercourse.

Nowadays, the issue of homosexuality became a political rallying cry for the conservatives in Russia who claim that the country must be saved from the 'decaying West' (a figure of speech widely utilized also in Soviet propaganda and earlier by the Slavophiles in the 19th century) imposing a perverted sexual morality under the guise of human rights.[14] Addressing the philosophical background in which this conservative ideology flourishes, provides clues to a better understanding of the Russian (both official and popular) attitude towards human rights, their formulations and limits of protection, and also the cultural constraints.

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[10] See the careful analysis in English: Carolyn Pouncy, *The Domostroi: Rules for Russian Households in the Time of Ivan the Terrible* (Cornell University Press, 1994).

[11] Peter Barta, *Gender and Sexuality in Russian Civilisation* (London: Routledge, 2001).

[12] The most comprehensive interpretation of the Revolution in this perspective can be found in the work of Nicolas Berdyaev, *The Origin of Russian Communism*, translated by R.M. French (Ann Arbor: Paperback, 1960).

[13] The unfortunate experiments with marriage and family construction in the first years of the Soviet Russia are worth mentioning here (Lynn D. Wardle, "The "Withering Away" of Marriage: Some Lessons from the Bolshevik Family Law Reforms in Russia, 1917-1926", 2 *The Georgetown Journal of Law and Public Policy* (2004), 469-521), but they had been abandoned by the Communist Party as early as in the late 1920s.

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

The 1993 Russian Constitution fixes common human rights such as freedoms of conscience, of expression, of assembly. These rights and freedoms are basically the same as those that are set forth in the European Convention on Human Rights (the Convention) and in the constitutions of other European countries. However, the interpretation and implementation of these rights and freedoms in Russia differs significantly from in the EU, and this fact serves as the ground for attacks against Russia in the Western media. One of the most controversial issues is the status of LGBT. Russia is not prepared to recognize any active rights or freedoms for LGBT, this is reiterated in the official discourse[15] and even in electoral strategies of the opposing liberal parties (none of which dare claim more rights for the LGBT community). Although, these sexual minorities formally have passive rights (in the sense of the right to be tolerated). From the vantage point of 'tradition' (be it Russian Orthodox, Muslim or Soviet) or of 'authentic family values' such rights or freedoms are not admissible and are even intolerable. This explains partly why the legal regulation of the LGBT community's rights in Russia is passive, meaning that no rights are explicitly recognized for the sexual minorities, and at the same time no formal discrimination is imposed on them in the statutory law.

This stratagem allows equilibrating the Western moral and legal standards to which Russia subscribed through numerous international declarations and conventions with the prevailing sense of what is just and normal. It is upon this sense that legal regulation is based everywhere, even if for some this 'normality' would appear anachronistic. Surely, nothing guarantees that the sense of the normal shared by the majority will be considered as adequate and just from other civilizational standpoints (one can remind about the trial of Socrates or about the 'banality of evil'—the leniency of Germans toward Nazism in the 1930s[16]). This is a field for value judgments—assertions of ultimate value truths which are maintained by the Convention and similar legal instruments—which in no way shall be confused with those of normative (legal) judgments. However, it is this confusion which progressively aggravates the relations between Russia and the West. Even without reference to the notorious 'clash of civilizations', it will come as no surprise that this sense among Russians differs from what is taken for just and normal by the peoples of Western democracies. Russians in general turn out to be less tolerant

[15] See analysis of the official and of the LGBT discourses in Russia: Alexander Kondakov, "Same-Sex Marriages Inside the Closet: Deconstruction of Subjects of Gay and Lesbian Discourses in Russia", 1 *Oñati Socio-Legal Series*, (2011). Available at SSRN: http://ssrn.com/abstract=1737357

[16] Hannah Arendt, *Eichmann in Jerusalem. A report on the banality of evil* (Penguin Books, 1992).

towards the LGBT community than residents of other countries belonging to the Christian culture[17] which unsurprisingly also impacts judicial practice.

In spite of the commonly shared prejudice, no Russian federal statute[18] prohibits "homosexual propaganda" or homosexuality (lesbianism and other non-traditional sexual orientations) as such. But no allowance is granted to them either. In this normative ambiguity other mechanisms of social control (primarily, religion and traditional morality) are at work, shaping the attitude both of ordinary people and legal actors towards sexual minorities. With regard to the teachings of the main religious denominations in Russia (Russian Orthodoxy, Islam, Judaism and Buddhism) and to the morality that is historically based on their dogmas, it is not surprising that this attitude is negative. References to 'traditional', 'national', 'authentic' values became a major point in the court argumentation where the statutory provisions are silent and therefore implicitly (because of the generally accepted liberal constitutional principle "everything which is not forbidden is allowed"[19]) allow for those behavioural patterns that are not directly prohibited.

In the absence of the relevant legislative rules, the judiciary has gradually coined an implicit rule which is contrary to that general principle: public performances, demonstrations and mass actions that touch on the issues of gender and sexuality are tolerated insofar as they do not contravene the established value standards. This reduces the equivocality of the Russian legal system, because such court practice is at odds with the Constitution in at least two ways. First, according to the prevalent legal doctrine and to constitutional law (Art. 120 of the Constitution), the task of the judges is to apply and never to create rules. This means that courts have no rule-making power, and if trying to take possession of such power the judiciary would contravene the constitutional principle of separation of powers (Art. 10, 11 of the Constitution). Second, as we

[17] According to the Pew Research Centre survey conducted in June 2013: *The Global Divide on Homosexuality. Greater Acceptance in More Secular and Affluent Countries*. Available at: http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/ Similar findings can be found in the 2014 research outcome conducted by two Russian sociologists. Although, these authors find that ins pite of the traditionalist rhetoric of the government, Russian Orthodox Church and state-controlled media, Russians are progressively becoming more and more tolerant toward LGBT: Margarita Fabrikant, Vladimir Magun, "Semeinye tsennosti rossiian i evropeitsev" (Family values of Russians and Europeans), 613-614 *Demoskop*, 6-19 October, 2014, available at http://demoscope.ru/weekly/2014/0613/demoscope613.pdf.

[18] There are regional laws adopted by legislatures in the sub-federal jurisdictions of the RF. Some of these laws have been challenged in the RF Supreme Court, but with no success. The most illustrative cases were the law of the Arkhangelsk region No. 113-9-OZ (the Ruling of the RF Supreme Court No. 1-APG12-11 from 15 August, 2012); the law of the Kostroma region No. 193-5-ZKO (the Ruling of the RF Supreme Court No. 87-APG12-2 from 7 November, 2012); the law of the Samara region No. 115-GD (the Ruling of the RF Supreme Court No. 46-APG13-2 from 27 February, 2013).

[19] See the traditionalist criticism of this principle: Sergey Taskov, "Razresheno vse, chto ne zapreshcheno zakonom: pravovye i nravstvennye aspekty" (Everything Is Allowed That Is Not Forbidden by the Law: Some Legal and Moral Aspects), 11 *Rossiiskaia iustitsiia* (2014), 50-51.

show below, constitutional law is favourable towards various minorities (be they religious, political, sexual, and so on), and in this respect the Constitution contains the anti-discriminatory principles that are common to Western constitutions.[20]

What is at play here is not so much positive law (in the sense of constitutional and statutory law), but rather the informal constraints and regulations stemming from the societal environment and which are based on social conventions. These conventions in Russia, as in other countries where religion has a significant impact on the social sphere, are essentially conservative, banning from the public sphere any attempts to justify behaviour considered to be deviating from the established sexual and other patterns. Considering the judicial function from a sociological standpoint, one can assert that in their routine work judges tend to maintain and to reinforce these underlying conventions—lest they risk coming under social pressure and suffering from conventional sanctions.[21] Given the religious and traditionalist background of these conventions, such social control results in discrimination against minorities, sometimes contrary to the plain texts of the Constitution and of international law, this latter being formally accepted as an integral part of the Russian legal system and as prevailing over domestic statutory law.

4. The Constitution, legal regulation and balancing traditional values in Russian law

Courts and law-enforcement agencies in various countries use different criteria when deciding to what extent a right or a freedom can be restricted and under what circumstances. Normally, courts elaborate these rules *ad hoc* insofar as such rules cannot be formalized. Neither do the Russian legislative acts contain an exhaustive list of such criteria, and in their absence the strict positivist interpretation of these rights and freedoms leads to the conclusion that they have no limits except those mentioned in para. 3 of Art. 55 of the Constitution. This constitutional provision deserves special attention and, as we show, contains an empty formula that can be filled in with any restrictions whatsoever, including those stemming from 'traditional values' of

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

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

an overtly conservative character.

Properly stated, there are no laws or directives about the status of LGBT persons in Russia; their rights and obligations and therefore their legal regulation has a passive character. The statutes are simply silent on the rights of the LGBT community, which does not mean that there is no legal regulation at all. First, there are some statutory rules, which directly do not restrict sexual minorities, but which in reality negatively shape the limits of LGBT rights. Second, legal regulation everywhere is based not only on statutory texts, but also on a system[22] of implicit standards and patterns of 'normal' behaviour in the society. This is true also for LGBT rights in Russia—their factual limits are formed by the social attitudes towards their sexual behaviour,[23] and this factuality is gradually transforming into normativity giving a kind of "customary law" that is not codified but influences both political and judicial decision-making.[24] In Russian legalese this system of regulation is usually referred to as 'family values' or 'traditional values', and in law-enforcement practice it might be placed even above the constitutional law that may prescribe rules contrary to the 'tradition' or 'customs' of family life.[25] In this aspect, the 'living law' sometimes prevails over the 'law in books', and this with the approval of the political authorities and the popular majority, but with the disapproval of international organizations such as the ECtHR.

Russian law contains two statutory rules that are the most powerful constraint on the rights of sexual minorities to declare their sexual orientation, to provide argumentation for this orientation, and to foster public discussions on this topic. The first statutory rule usually serves as the normative justification for the prohibition of gay-pride parades and other LGBT public actions; the second is applied when LGBT activists are punished when attempting to organize such unauthorized actions. These rules are the following: (1) Art. 5 of Federal Law No. 436 as of

[22] Perhaps, use of the term 'system' in plural is more adequate here, insofar as each social group can have and in reality has its own ethics. In this aspect, a regulatory system in a society is in fact a conglomerate of many ethical systems.

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

[24] Alexander Kondakov, "Heteronormativity of the Russian Legal Discourse: The Silencing, Lack, and Absence of Homosexual Subjects in Law and Policies", 4(1) *Oñati Journal of Emergent Socio-Legal Studies* (2010), 4-23; id., "Injured Narratives and Homosexual Subjectivities in Russia: The Production of Rights Vocabulary in Post-Soviet Context", in: Marianna Muravyeva and Natalia Novikova (eds.), *Women's History in Russia: (Re)Establishing the Field* (Cambridge: Cambridge Scholars Publishing, 2014), 101-117.

[25] See about the official strategy to use homophobia as proxy for traditional values and to apply thereby moral regulation instead of legal one: Cai Wilkinson, "Putting Traditional Values into Practice: Russia's Anti-Gay Laws", 138 Russian Analytical Digest (8 November, 2013), available at http://www.css.ethz.ch/publications/pdfs/RAD-138-5-7.pdf

29.12.2010 "On protection of children from the information that harms their health and development." Para. 2 (point 4) of this Article prohibits the dissemination of information that "negates family values, propagates non-traditional sexual relations and provokes disrespect towards parents and (or) other members of the family". This interdiction is backed by the sanction set forth in Art. 6. 17 of Russian Code of Administrative Offences (the CAO) which punishes such dissemination with fines up to 50,000 RUR. (2) Art. 6.21 of the CAO, which prohibits "the propaganda of non-traditional sexual relations among minors if such propaganda results in the dissemination of information that is aimed at promoting non-traditional sexual patterns with minors, at attracting to non-traditional sexual relations, at perverting the social equivalence between traditional and non-traditional sexual relations, or at imposing information about non-traditional sexual relations that provokes interest to such relations." Depending on whether such actions have been performed with or without utilization of the internet, the punishment is up to 100,000 RUR or up to 5,000 RUR for natural persons, and up to 1,000,000 RUR for legal entities.

We analysed the practice of the Moscow courts in the database "KonsultantPlus" (an analogue to LexisNexis), reviewing cases from the Moscow City Court from 5 February, 2014 until 5 February, 2017.[26] They all concern complaints brought by LGBT activists against municipal authorities reluctant to allow public actions of sexual minorities. And none of them were decided in favour of the presumed violators of rule (1). The courts tend to uphold the refusals on the basis of quite elementary logic—there is always the probability that in every public place where LGBT activists can gather together there will be at least one child passing by. In fact, this signifies an absolute ban on LGBT public manifestations in population areas. Rule (2) is also uniformly applied by courts against LGBT activists. Courts interpret this rule in the sense that anyone who dares publicly assert that he is gay (issues of lesbianism are for a while not in the focus of social discussions and court trials) is to be punished for "gay-propaganda". Analysis of this strange normative situation was undertaken in 2014 by the Russian Constitutional Court (RCC) which considered the constitutionality of Art. 6.21 of the CAO.[27] Even finding this rule to be congruent with the Constitution, the court, taking into account the criticism of the ECtHR, called for a space for "unbiased public discussions about the status of

[26] Altogether, 179 rulings made by the Court acting both as the first instance and as the appeal instance for the lower courts.
[27] Decision of the RF Constitutional Court No. 24-P from 23 September 2014 in the case connected with the complaints of N. A. Alekseev, Ya. N. Evtushenko and D. A. Isakov.

sexual minorities and for an articulation of their position by the representatives of these minorities" and warned the lower courts against a "formalist approach" (para. 4). Nonetheless, our analysis of court practice in the Moscow region allows us to say that nothing has changed in the way the courts apply and interpret this rule after this 2014 decision.

Russian and Western NGOs relentlessly attack the aforementioned provisions of the CAO as unconstitutional, and especially the legislative rules prohibiting propaganda of views that purportedly contradict family values.[28] Such attacks are, however, mostly based only on the literal text of the Constitution and fail to take into account the interpretative environment in which this Constitution and the statutes are applied. Their opponents retort that rights and freedoms, even if they are proclaimed to be fundamental, cannot be limitless and that one constitutional right can restrain another right, a constitutional freedom can be in conflict with another constitutional value or with a principle, and that in reality these limits are established as per each freedom in each concrete case in the view of the circumstances of the case, values and interests that are at stake in it.[29] This is the work of judges in any developed civil-law society, and Russia is not an exception to this rule (some ideological differences notwithstanding).[30] Here the distinction refers to the that made in comparative law between common-law and civil-law systems, on the one hand, and countries with religious or customary law, on the other. It is more or less generally accepted that Russia belongs to the civil-law system because of the structure of its legal order, the hierarchy of the sources of law, the style of legal reasoning and other conventional criteria. A civil-law judge shall, as shown later, subsume a given practical situation under the formulation of an abstract rule, and connect his or her decision, thus obtained, with the rules and principles of the legal order. Nevertheless, this connection can be simulated, and judge's findings can enter directly contradict the literal meaning of law.

Along with these statutory texts, there are several federal and regional programs touching on family values. These programs do not have a direct binding effect on ordinary social relations,

[28] Richard Sakwa, *The crisis of Russian democracy: the dual state, factionalism, and the Medvedev succession* (Cambridge: Cambridge University Press, 2011). See an interesting set of observations by one of the leading Russian sociologists: Igor Kon, "Homophobia as a Litmus Test of Russian Democracy", 48(2) *Sociological Research* (March-April 2009), 43-64.

[29] Anatolii Dyachenko, Evgenii Tsimbal, "Sotsialnaia obuslovlennost' zapreta propagandy gomoseksualisma" (Social Determination of the Ban on Propaganda of Homosexuality), 11 *Lex russica* (2013), 1216-1223. These authors insist that the Russian mentality is different as compared with the mentalities of the peoples living in the Western democracies. For argumentation of this position they refer to numerous sociological polls. See also the polemic of Zorkin, the Chief Justice of the RF Constitutional Court: Valerii Zorkin, *Sovremennyi mir, pravo i Konstitutsiia* (Moscow: Norma, 2010), 441 ff.

[30] As a shortcut, we can refer here to the fortunate formulation by the respected authors about the actual Russian legal system: "the civil law tradition with some special Russian characteristics" (Peter B. Maggs, Olga Schwartz, William Burnham, *Law and Legal System of the Russian Federation* (Huntington, New York: Juris Publishing, 2015), 1-8, esp. at 7).

but as a matter of fact they can be referred to as justifications for judicial decisions which protect these values from violation by those minorities whose activities are considered to be contrary to such values. Further, they serve as guidelines for the judiciary as to what the priorities of state policy are. The following programs indirectly influence judicial reasoning in this category of cases; the courts do not cite directly from these programs when adjudicating cases and justifying their decisions. A 2012 presidential decree[31] states that social welfare is foremost endangered by such phenomena as alcoholism, drugs, and also by what is characterized as "the degradation of family and social values" (chapter 1), and calls for a program to propagate these family values (chapter 5). Another document fixes the priorities of the national policy, and "the revival of family values" is mentioned in point 21 of this decree as one of the main goals.[32] The governmental program of development mentions that in the media the best efforts should be made to promulgate family values and to promote them especially among youth.[33] One can easily imagine that a judge who attempted to deviate from these state policies could be suspected of disloyalty to the ruling regime, which would be fraught with negative professional consequences.

The Constitution contains a number of liberal principles, among which are the principles of ideological diversity ("In the Russian Federation ideological diversity shall be recognized; no ideology may be established as a state or obligatory one" – Art. 13) and of secularity ("The Russian Federation is a secular state; no religion may be established as a state or obligatory one" – Art. 14). These articles are included in Chapter 1 "The Fundamentals of the Constitutional System", which implies that law-creation and law-enforcement in Russia shall be subject to these principles. Their pivotal significance is stressed in Art. 16 (para. 2): "No other provision of the present Constitution may contradict the fundamental principles of the constitutional system of the Russian Federation". Based on these principles, we can logically presume that any other rules, principles or policies of the Russian legal order shall have inferior force and shall cede in the case of discrepancy. But it is not the case.

[31] Decree of the RF President No. 761 (01.06.2012) "About the National Strategy of Actions in the Interests of Children in 2012-2017".
[32] Decree of the RF President No. 1666 (19.12.2012) "On Strategy of State National Policy of the Russian Federation for the period up to 2025".
[33] Edict of the RF Government No. 1662-p (17.11.2008) "About Conception of Long-Term Development of the Russian Federation Until 2020".

These principles are echoed by a set of liberal rights and freedoms established in the following provision of the Constitution: “the rights and freedoms of man and citizen shall be directly operative. They determine the essence, meaning and implementation of laws, the activities of the legislative and executive authorities, local self-government and shall be ensured by the administration of justice” (Art. 18). Among these rights and freedoms are “freedom of conscience, freedom of religion, including the right to profess individually or together with others any religion or to profess no religion at all, to freely choose, possess and disseminate religious and other views and act according to them” (Art. 28); “the freedom of ideas and speech” (Art. 29, para. 1); the interdiction to force anyone to express his views and convictions or to reject them (para. 2); “the right to freely look for, receive, transmit, produce and distribute information” (para. 3); “the right to assemble peacefully, without weapons, hold rallies, meetings and demonstrations, marches and pickets” (Art. 31); “the freedom of literary, artistic, scientific, technical and other types of creative activity, and teaching” (Art. 44).

Art. 55 of the Constitution sets out a mechanism to balance fundamental rights and freedoms with other constitutional principles and values. Para. 2 of this Article warns that “in the Russian Federation no laws shall be adopted cancelling or derogating human rights and freedoms”. On the other hand, the next paragraph states that “the rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State” (para. 3). The following question then arises: if every federal law can limit human rights and freedoms with reference to these values and principles, where then can criteria of their justification be found? The cited paragraph of Art. 55 enumerates only a “necessity for the protection…”, but in fact all laws in a democratic state (pursuant to Art. 1 of the Constitution, Russia is proclaimed to be a democratic state) are intended to provide such protection. A strictly positivist reading of these provisions is incapable of offering any clear answer to this question, and in practice such a “necessity” means “where the Constitutional Court finds it necessary”. However, this is not a solution to the problem, as there should be criteria for RCC itself to decide about the necessity in question. The Constitution is silent on this point.

Being careful about the limits of interpretation, the authors of the Constitution have especially underlined the universality of human rights: “the listing in the Constitution of the

Russian Federation of the fundamental rights and freedoms shall not be interpreted as a rejection or derogation of other universally recognized human rights and freedoms" (Art. 55, para. 1). Para. 4 of Art. 15 states that "The universally-recognized norms of international law and international treaties of the Russian Federation are component parts of its legal system. If an international treaty of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied".[34] Thus, constitutional law is supposed to guarantee against any particularism or exceptionalism in the interpretation and application of these rights and freedoms. The "violation of the principle of equality of citizens before the law" by public officials can be punished with up to five years of imprisonment—this contravention constitutes the *corpus delicti* of Art. 136 of the Russian Criminal Code.

However, the applicability of these principles and rules is largely limited by two major constraints: the authoritarian political system with its traditionalist ideology and the formal training of legal actors who have been and still are taught to see the law as nothing but a set of commands of the sovereign and to consider the subjects of law (human beings) as merely addresses of these commands with no rights independent of or prevailing over these commands.[35] These constraints will be discussed in the following section.

5. The intellectual framework

Traditionalism,[36] which serves as the philosophical base of these constraints, implies that the supreme societal value is ascribed to the collective unity, and the individuals are considered first of all as members of the collective and have thence no independent value taken apart from

[34] This language of the Constitution notwithstanding, under prevailing Russian legal doctrine, a ECtHR decision is not deemed to contain norms or principles of international law. See Decree of the RF Supreme Court Plenum No. 21 (26 July 2013) "O primenenii sudami obshchei iuridiktsii Konventsii o zashchite prav cheloveka ..." (On the Application of the ECHR by Courts of General Jurisdiction). In a mid-2015 judgment (14 July 2015) No.21-P, the RF Constitutional Court has ruled that decisions of the ECtHR are not self-executing and not endowed with supreme force above the 1993 RF Constitution ("Po delu o proverke konstitutsionnosti polozheniia stat'i 1 Federal'nogo Zakona 'O ratifikatsii Konventsii ...'" (In the Matter of Verifying the Constitutionality of the Provisions of Article One of the Federal Law "On Ratification of the Convention ...). Here the Court especially stressed that the ECtHR can deviate from its proper function of protection of human rights, and national constitutional courts shall limit negative impact of such ECtHR judgments on their domestic laws.

[35] Mikhail Antonov, "Theoretical Issues of Sovereignty in Russia", 37 *Review of Central and East European Law* (2012), 95–113.

[36] Here we utilize this term not in the sense of the traditionalist school (Perennialism) asserting that all the world's great religions share the same origin and are based on the same metaphysical principles; by "Traditionalism" we refer here to the set of anti-individualistic ideas in epistemology and ethics developed by the Counter-revolutionists in France in the first decades of the 19th century. Among the most important literature of these French traditionalists can be mentioned: Joseph de Maistre, *St. Petersburg Dialogues: On the Conversation on Temporal Government of Providence*, transl. by Richard Lebrun (McGill University Press, 1993) and Louis G. de Bonald, *The True and Only Wealth of Nations: Essays on Family, Society and Economy*, trans. by Christopher Blum (Ave Maria University Press, 2006). See Frederick Coplestone, *19th and 20th Century French Philosophy* (London: Continuum, 1975), 1-18.

the social unit they belong to. With certain differences, this idea has developed from Antiquity, as formulated by such philosophers as Plato and Aristotle (the whole prevails over its parts, and therefore society prevails over individuals), through the Middle Ages and up to Modernity: Alexis de Tocqueville, Benjamin Constant, Edmund Burke, Joseph de Maistre. Other thinkers of the 19th century include Hegel, Kant and Marx who were considered by Karl Popper to be "enemies of the open society" exactly because of this traditionalist aspiration toward the communitarian ideology.[37]

This traditionalism was very much congruent with the policies of the Russian Empire, so that the slogan "Orthodoxy, Autocracy and Nationality" in fact reflected the three cornerstones upon which this ideology has been based. Russian philosophers, especially the Slavophiles (Khomiakov or Aksakov) and the Monarchists (Pobedonostsev or Tikhomirov), largely contributed to the legitimation of this ideology, condemning Western liberal values as something heterogeneous to the Russian people whose life should be organized not on the rational base of law, but on the precepts of love and forgiveness predicated by Orthodoxy.[38]

We need not go into further details about this intellectual history or its repercussions in contemporary Russian political debates.[39] Here we mention this collectivist (or traditionalist) ideology as a counterpart that is not present formally in the constitutional texts but in reality sets out the constraints limiting the application of constitutional rights and freedoms by courts and law-enforcement agencies.[40] Without perceiving this philosophical background, it is hard to understand adequately the functioning of the machinery of the Russian legal system. This machinery is not as crude as it is sometimes described in the Western media—purportedly manipulated by Vladimir Putin or by his administration, or even lacking a sense of justice and for this reason not being worthy of classifying as a legal system *stricto sensu*. The political powers do sometimes intervene in the judicial field (and not only in Russia); even in Soviet Russia, the Communist Party did not replace judges who worked in their 'semi-autonomous'

[37] Karl Popper, *The Open Society and Its Enemies* (Princeton and Oxford: Princeton University Press, 2013; first published in 1945).
[38] See Nicolas Zernov, *Three Russian Prophets: Khomiakov, Dostoevsky, Soloviev*, 3rd ed. (Gulf Breeze, FL: AIP, 1973).
[39] Mikhail Antonov, "Conservatism in Russia and Sovereignty in Human Rights", 39(1) *Review of Central and East European Law* (2014), 1–40.
[40] The paradigmatic example is the case of Pussy Riot punk singers that have been examined by us elsewhere: Mikhail Antonov, "Beyond formalism: sociological argumentation in the "Pussy Riot" case", 1 *Revista Critica de Derecho Canonico Pluriconfesional* (2014), 15–25.

field, translating political programs into legal discourse (which is basically the function of judiciary everywhere, although with different political agendas).[41]

On the other hand, there is a certain sense of justice in every legal system, even if it can be viewed as perverted or incorrect from particular standpoints—like slavery in the ancient legal systems that nowadays is considered to be unjust and absolutely illegal. The same can be said about the sexual minorities that were prosecuted by courts in Western Europe some decades ago. To explain a historical or a contemporary legal system means to grasp the specific sense of justice which reins in it and prefigures the application of the legal texts and the regulation of human behaviour with the help of these texts. The sense of justice that guides Russian judges is quite particular: it is based on legal formalism and neglects principles in favour of fixed rules; it does not endorse human rights but rather delimits them; it does not respect individual autonomy and subordinates individual choice to collective interests. In this ideological sense the Russian legal system stands apart from Western law, and this is in spite of its official constitutional texts based on Western standards and principles.[42] Nonetheless, there remains a sense of justice that needs to be examined rather than being condemned *ab initio*.[43]

Constitutional provisions in different countries allow a discretional limitation of human rights without providing any comprehensive formula for cases where ordinary laws set no limits for the exercise of constitutional rights and freedoms. As famously asserted by the American legal philosopher Ronald Dworkin,[44] in many modern legal systems there are actually two basic kinds of norms, that is, there are rules and principles which are applied through two different procedures: subsumption and balancing. Rules are applied by means of subsumption by placing a specific situation under an abstract formulation of a norm, and inferring from this norm the legal consequences for this situation; in the case of a discrepancy between several norms, only one, the superior norm, can be applied (so called "all or nothing" algorithm). Balancing is the means of applying principles which are weighted according to certain values that the judge or the law-

[41] Harold J. Berman, *Justice in the U.S.S.R: An Interpretation of the Soviet Law*. 2nd ed. (Cambridge MS: Harvard University Press, 1962).

[42] See the book of Justice of the RF Constitutional Court where he underscores primary importance of the sense of justice in court process and investigates how this sense influences the judicial rule-making in Russia: Vladimir Yaroslavtsev, *Nravstvennoe pravosudie i sudeiskoe pravotvorchestvo* (Moral Judiciary and Law-making in Courts) (Moscow: Justitsinform, 2007). It is demonstrative that calling for wider application of morality in Russian courts, Yaroslavtsev systematically refers to the doctrine of Christianity. His basic thesis is that justice prevails over the law (*zakon*) because "application of the laws are not the ultimate goal of judges—they are there to look for justice and truth" (*Ibid*., 9).

[43] Jeffrey Kahn, "Vladimir Putin and the Rule of Law in Russia", 36 *Georgia Journal of International and Comparative Law* (2007-2008), 511-558.

[44] Ronald Dworkin, *Taking Rights Seriously* (London: Gerald Duckworth, 1977).

enforcement officer seeks to protect in the given case. Following the terminology of the German legal scholar Robert Alexy, the major task of jurisprudence is to coin such a formula that allows the making of a justified decision in the situation where different principles tend to offer different solutions for the same case. Weighting, in the terms of Alexy, implies the evaluation of the quantum of infringement of a principle necessary to satisfy a competing principle.[45]

The prevailing legal theory in Russia is intrinsically positivist and follows the traditions of the first positivism of the 19th century in the spirit of John Austin, Jeremy Bentham or Karl Bergbom, which see the law as a set of sovereign's commands.[46] Consequently, within this positivist paradigm only subsumption can be accepted as the means to apply the law; the procedure of balancing in the light of this positivist theory is the theoretical attempt to justify judicial discretion or even arbitrariness. The Russian legal system is traditionally constructed according to this theory; it functions based on the premise that the main task of judges is to apply laws. Given the hierarchy of legal rules set out in Art. 15 of the Constitution—the Constitution itself; international law (its rules and principles); the constitutional and ordinary statutes—and the special understanding of the mission of judges (to be "the mount that pronounces the words of the law", to follow the celebrated expression of Charles Montesquieu[47]), judges have no authority to apply any principles except those expressly fixed in laws and other posited sources of the law, and, furthermore, they are prohibited to refuse to apply laws because of their presumed contrariety to such principles. This is the reflection of the ideal of *Rechtsstaat* where the law is independent and prevails over other social regulatory mechanisms.[48] However, this theoretical ideal is not warranted by actual court practice, including the practice of RCC.

The reality of the Russian legal order is that Russian judges (as judges in the most other European jurisdictions) in fact consider fundamental rights and freedoms not as "rules" but rather as "principles", and accordingly find an easy detour to introduce, through balancing, limitations of those rights and freedoms which are considered as non-congruent with certain values. This method evidently does not fit the fundamental provisions of the Constitution, but it finds general acceptance with the higher judicial instances in Russia: the Constitutional Court

[45] Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002).
[46] See William E. Butler (ed.), *Russian Legal Theory* (New York, NY: NYUP, 1996).
[47] Charles Louis de Montesquieu, *The Spirit of the Laws*, transl. by Thomas Nugent (Cambridge University Press, Cambridge, 1989), Book 1, chap. 3.
[48] Frances Nethercott, *Russian Legal Culture Before and After Communism: Criminal Justice, Politics and the Public Sphere* (London: Routledge, 2007).

and the Supreme Court. In other words, in spite of the prevailing theoretical dogmas, the legal norms in judicial practice are divided into two categories: those that are applied through subsumption ("hard" rules), and those that are applied through balancing ("flexible" principles). The application of the former is mandatory, and the application of the latter is discretional (in the neutral sense of this word—basing on discretional balancing). Human rights fall within this latter category, and Russian courts feel free to use a "margin of appreciation" when assessing whether legal protection should be given to a certain freedom or a right in cases where there is no statutory law supporting this freedom or right, or even in situations when the statutes indirectly endorse the freedom or right in question. The obvious discrepancy of this approach with the constitutional provisions for a "direct effect" of human rights has been many times criticised from inside and outside of Russia, and even led to the debates between the Russian Constitutional and Supreme Courts in the mid-1990s over the question of the right to alternative civil service.[49]

6. Differences in interpretation of human rights

The criticism from human rights' organizations and from the ECtHR and other European agencies of Russia for violations of human rights can be viewed formally as well founded in many situations, especially given that both the Convention and the Constitution literally grant almost the same range of rights and freedoms. Paradoxically, the Russian courts do claim to protect some human rights while limiting other ones, doing it in the same manner as the ECtHR but with the focus on different values.[50] The question is, then, not about any alleged discrepancies between the texts of these two legal instruments but in reality about the difference in their interpretation. This becomes patent in the polemic of RCC against the ECtHR for perverting the true values of the Convention in particular, and legal values of the Western civilization in general, in cases connected with sexual minorities, and, conversely, criticism from the ECtHR for unjustified discrimination.[51] The theme of values inevitably comes to the fore when discussing differences of interpretation, providing one of the most viable sources for

[49] Mikhail Antonov, "Balancing religious freedoms: some examples from the practice of the Russian Constitutional Court", in: Piotr Szymaniec (ed.), *The principle of proportionality and the protection of the fundamental rights in the European states* (Wroclaw: Wydawnictwo im. Angelusa Silesiusa, 2016), 259-268.
[50] Paul Johnson, "Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the European Court of Human Rights", 11(3) *Human Rights Law Review* (2011), 578-593.
[51] Andrey Makarychev, "Communication and Dislocations: Normative Disagreements between Russia and the EU", in: Reihnard Krumm et al. (eds.) *Constructing Identities in Europe* (Baden Baden: Nomos, 2012), 45-62.

reassessment of the "civilizational" disputes between the European and Russian institutions on human rights.

However, the main question should be, in our opinion, not so much about justifying the European criticism against Russia for violation of human rights through the prism of the Convention and other European humanitarian instruments (one of the most frequent topics in the Western media) but rather about reassessing the differences of principles and policies that stand behind the rules set forth in the Convention, in the Constitution and in other normative instruments, and finally, the differences in values that give divergent grounds for interpretation. This helps reveal the internal logic of legal regulation which outweighs the fundamental rights of sexual minorities with the help of moral argumentation. In order to keep the coherence of the legal order, judges and other legal actors have to balance the statutory interdictions and restrictions (like those against gay-pride parades or religious sects) with basic constitutional freedoms. Such balancing is the main argumentation point in court cases connected with "non-traditional" minorities, and is implicitly present also in the above-cited federal legislation, and in the discourse of the chief judges. This argumentation provides some clues to the philosophy that underpins the Russian exceptionalism in the matters of the rights of minorities.[52] A closer look at this philosophy discloses its anti-universalist stances—the proponents of this conservative approach stress that Russia has religious, cultural and other civilizational particularities, which make the legal regulation of human rights in this country to be irreducible to the universalist humanitarian standards of the West.[53]

Following this track can help to explain why religion, morality and law work together in Russia quite specifically—with no prevalence on the part of law (which is conceptually expected from a rule-of-law state), and with law's regulatory role being subject to the concerns of sovereignty. Formally, Russia is a secular, rule-of-law and democratic state, which promotes value pluralism (Art. 1 of the Constitution), but in fact the moral and religious principles often prevail over the legal ones not only in politics, but also in court proceedings. That is why the courts, scholars and politicians in Russia sometimes admit that the "liberal" constitutional human rights are binding only insofar as they do not contravene the "public" morality, "social

[52] Mikhail Antonov, "Judicial protection of the religious freedoms: the landmark cases of the Supreme Court of Russia", in: Cole Durham (ed.), *Religion in the context of globalization and the legislative protection of its freedom* (Baden Baden: Nomos, 2015).
[53] See about the influence of political, historical, and social forces on the autonomy of judiciary in Russia in cases involving minorities: James Richardson, Galina Krylova, Marat Shterin, "Legal Regulation of Religion in Russia. New Developments", in: James Richardson (ed.), *Regulating Religion: case studies from around the globe* (Kluwer, 2004), 246 ff.

dynamics"[54] or, in some opinions, also religious values.[55] Such opinions are legitimated with reference to para. 3 of Art. 55 of the Constitution that allows the limiting of human rights for the sake of national security and some other collective interests. This conservative logic is quite primitive: the law can exist only insofar as there is a state, the latter is a political form of national integration, and this integration is possible only if there are common basic values that bring the nation together. Consequently, legal rules and principles (human rights included) have inferior significance as compared with collective values, and shall cede in the case of a conflict.[56]

Conceptually, limiting human rights implies balancing individual values (autonomy, self-determination, personal choice, etc.) against the collective ones (security, justice, order, etc.). Actually, and in the foreseeable future, this balancing is one of the most important stumbling blocks in relations between Russian and European institutions, as culturally individuality has a higher value in Western cultures than in Russia. Evidently, the value difference cannot be overridden or at least smoothed over without engaging in a value dialogue, for which neither of the parties is fully prepared. This dialogue is actually obstructed, along with the Ukrainian conflict, both by the Western humanitarian universalism (see below) and the exceptionalist argumentation of the Russian authorities and of those intellectuals who support this argumentation.

Some Russian legal scholars, among whom are constitutional judges, search for a solution in the Preamble to the Constitution, which solemnly proclaims "respect to the ancestors". Thus, Professor Valerii Lazarev insists that the Preamble justifies the traditionalist interpretation of human rights in the sense that they are valid within the "moral framework" of Russian statehood.[57] RCC Justice, Nikolai Bondar, finds that the Preamble fixes certain implicit moral values of supreme importance that are "necessary regulators of practical life" and

[54] Nikolai Bondar, "Sotsioistoritcheskii dinamism Konstitutsiii bez perepisyvannia konstitutionnogo teksta" (Social-Historical Dynamism of the Constitution Without Rewriting the Constitutional Text), 2 *Zhurnal konstitutsionnogo pravosudiia* (2014), 22-34.

[55] Boris Kurkin, "Ideologema prav cheloveka i ee interpretatsiia v sovremennoi otechestevennoi pravovoi teorii" (The Ideology of Human Rights and Its Interpretation in the Contemporary Russian Legal Theory), 2 *Pravo: Zhurnal VSE* (2008); Mikhail Krasnov, "Khristianskoe mirovozzrenie i prava cheloveka" (The Christian Weltanschauung and Human Rights), 5 *Rex russica* (2013), 465-477.

[56] Compare with the solidarist conceptions that are promoted by some prominent specialists in constitutional law: Vladimir Kruss, "Doktrinalnye innovatsii v kontekste konstitutsionalizatsii rossiiskoi pravovoi sistemy" (Doctrinal Innovations in the Context of Constitutionalizing of Russian Legal System), 4 *Konstitutsionnoe i munitsipalnoe pravo* (2013), 2-11; Boris Ebzeev (ex-Justice of the RF Constitutional Court), "Konstitutsiia, gosudarstvo i lichnost' v Rossii: filosofiia rossiiskogo konstitutsionalisma" (Constitution, State and Individuality: Philosophy of Russian Constitutionalism), 11 *Konstitutsionalnoe i munitsipalnoe pravo* (2013), 14-23.

[57] Valerii Lazarev, "Konstitutsionnye ogranicheniia konstitutsionnykh tsennostei" (Constitutional Limitation of the Constitutional Values), in: V. Golubtsov, O. Kuznetsova (eds.), *20 let rossiiskoi Konstitutsii* (Moscow: Statut, 2014).

therefore justify bans on the "propaganda of homosexuality." Such values, as Bondar assures, save us from "the attempts to impose and to lead up to the constitutional level so called values of sexual freedoms and of equal rights of gays".[58] Another RCC Justice, Konstantin Aranovskii, pursues the same line, although more discreetly: "no legal protection can be granted to sexual perversions or same-sex marriages in the situation when the moral order of the society considers homosexualism as an oddity or unpleasantly exotic and if this society has not yet fully protected the really fundamental rights".[59] In the same vein RCC Chairman, Valerii Zorkin, reiterates that positive law is intertwined with the web of social regulation and calls for "a good deal of the sound conservatism in understanding the internal connection between law, morality and religious values […] when assessing the requirements for tolerance towards any sexual and gender permissiveness whatsoever".[60] Other RCC justices have made similar assertions in their publications,[61] and no wonder that such opinions are systematically implemented in the texts of judicial acts. These statements have provoked a predictable negative reaction from the West.

Seemingly, the discrepancies between Russian and European authorities are not so much about rules, but rather about the values that underpin these rules and the practice of their implementation. The case of gay-pride parades being systematically prohibited by Russian authorities and courts can serve here as an illustrative example. On the one hand, the ECtHR reiterates that such bans are discriminatory, and on the other hand, RCC stresses that Russian laws do not prohibit gay parades as such and therefore systematic banning of these parades by the local authorities is due to some extra-statutory principles pursued by ordinary officials within their legitimate administrative discretion. It would be incorrect to explain this use of discretion as an abuse of power, as officials (or judges) generally gain nothing or very little (and rather in the negative sense—suffer no informal sanctions that could be imposed in the society on those who

[58] Nikolai Bondar, "Bukva i dukh rossiiskoi Konstitutsii: 20-letnii opyt garmonizatsii v svete konstitutsionnogo pravosudiia" (The Letter and the Spirit of Russian Constitution: Twenty Years of Experience of Harmonization in the Light of Constitutional Justice), 11 *Zhurnal rossiiskogo prava* (2013), 5-17, at 9.

[59] Konstantin Aranovskii, "Usloviia soglasovaniia praktiki mezhdunarodnogo i konstitutsionnogo pravosudiia" (Conditions of Harmonization of the Practice of International and Constitutional Justice), 3 *Zhurnal konstitutsionnogo pravosudiia* (2013), 1-10, at 6.

[60] Valerii Zorkin, "Tsivilizatsiia prava: sovremennyi kontekst" (Civilization of Law: the Contemporary Context), 5 *Zhurnal konstitutsionnogo pravosudiia* (2014), 1-15, at 10.

[61] At a round table that has been recently organized by the Institute of Philosophy of the Russian Academy of Sciences, justices of the Constitutional Court Gadis Gadzhiev and Nikolai Bondar' stressed the creative role of their Court in shaping a specific conservative Russian attitude toward religious and sexual deviations. See: "Law and National Traditions. The Materials of the 'Round Table'. Participants: A.A. Guseynov, V.S. Stepin, A.V. Smirnov, G.A. Gadzhiev, N.S. Bondar, E.Yu. Solovyev, V.M. Mezhuev, P.D. Barenboim, V.V. Lapaeva, S.L. Chizhkov", 12 *Voprosy Filosofii* (2016), available at http://vphil.ru/index.php?option=com_content&task=view&id=1541&Itemid=52 .

disagree with the established social patterns or challenge them) from pursuing discriminatory policies towards the LGBT population. Entwined with the broader machinery of social regulation—as to which they are at the same time active agents and passive addressees—the judges administer not only their proper legal function (that of the application of laws) but also the societal function of maintaining the existing order. This order for many of them is synonymous with the traditional order based on rather homophobic convictions.

This role of Russian judges is ambiguous and controversial. On the one hand, their factual policies violate not only Russian constitutional law but also international humanitarian law, which is manifestly based on the non-discrimination principle.[62] On the other hand, their policies are congruent with the convictions of the overwhelming majority of the population and of the ruling elites, and one would hardly expect judges to go against this. Unlike the Anglo-Saxon judiciary, judges in common law countries are less activist due to various institutional constraints, and very seldom do they act as promoters of moral or legal changes. However, they have tools for slackening legislative innovations, and they readily use them via a conservative reinterpretations of constitutional principles. What is actually happening with the liberal principles of the Constitution is that they are interpreted in the style of the Soviet attitude towards human rights. Why it does not work the other way round (a liberal reading of conservatively formulated rules), is a question that requires separate study, combining the political, cultural, and institutional aspects of the issue. Here it suffices to state this conservative strategy of the Russian judiciary and that it stumbles before the liberal principles defended by the ECtHR, which often results in open or veiled conflicts.

The indeterminacy of the decision-making process cannot be fully eliminated even if the power to decide lies not in the hands of the judges but of the political actors. Although, in this latter case a great deal more public debates would be required to justify the margins of appreciation in generic cases. Bringing these debates from the secretness of judges' chambers to the public sphere would lessen the feeling of disproportionality on the part of peripheral countries because of the constant bickering over whether this or that consideration should apply to this or to that country. The lack of cogency of judicial discretion in determining values and standards would (and in reality already does) also affect their effectiveness, given that '*le*

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

gouvernement des juges' is seen by many political actors as incongruent with the conservatively viewed ideals of democracy. Whether these ideals are 'correct' or not is a question to be decided through public debates with the participation of all citizens or, at least, their representatives.

Evidently, the ECtHR is also engaged in a more complicated game than the modest interpretation and application of the Convention—the text of which is silent on most of the topics discussed before this court. Whether a crucifix can be displayed in a public school or whether medical personnel can wear crucifixes around their necks: these and many other issues require going far beyond the text of the Convention, and imply discerning and balancing basic values. If we accept moral pluralism in the sense that there is no universal moral system (be it Western, Christian, "civilized" or some other), but many moral systems, each of which has its *raison d'être*, then courts engaged in these penumbra cases (to use the term of H.L.A. Hart[63]) are always responsible for their value choice and shall justify it with reference not to one single system (e.g., that of liberal values implicitly present in the notorious "necessity for a democratic society") but to various systems. In other words, it means that the agency (be it a court or a parliament) that assumes responsibility for making a value choice which is valid for different countries shall become a platform for intercultural dialogue and not so much an ambo for moralizing. The question whether the ECtHR is apt for this task, goes beyond the limits of this paper.

In fact, the role the ECtHR is playing in this regard seems to be different from the role of the Russian judiciary; their respective attitudes towards value innovations in society, also differ significantly. This problematizes the role of the ECtHR for the Russian legal system and, more generally, for all national legal systems with which this court cooperates. This creates an arena for discrepancies with national courts because of the different normative frameworks which frame the working of European and national institutions. Along with the potential conflict between international law and domestic laws, conflicts of the regulatory backgrounds also occur. The national cultural environment protected and promoted by the member-states is not always in perfect harmony with a "common European (legal) culture" which the ECtHR and other European institutions are trying to forge. With all necessary reservations made, one can state that the level of tensions between the supranational jurisprudence of the ECtHR and the national legal orders is directly proportional to the difference between the "common European culture" *in statu nascendi* and national legal cultures. The situation of Turkey, Russia and other "peripheral" (in

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

the sense of the dominating legal, and presumably not only legal cultures) countries can serve here as an illustration. It is not unexpected that the greater the distance between such countries and the allegedly "pan-European" cultural core, the more they resist cultural uniformization by claiming that the ECtHR is not competent to articulate the prevalence of any values.

The stance consequently repeated both by the Russian authorities and by the Russian Orthodox Church is that, in the final analysis, nothing justifies the validity of the moral precepts sermonized by the ECtHR, and their pretention to universality (at least, within the European area). On the contrary, they maintain that a wider margin of appreciation is reasonably needed provided that there are significant differences between countries and cultures.[64] From this perspective, the question is not about the complete uniformity of the interpretation and implementation of human rights but about the practical reasonableness of the restraints that national legal orders may impose on the exercise of human rights in a given country.[65] This reasonableness can have two dimensions. One of them is universal, setting out to discover some rules valid for any nation or state, and another is relative, searching for contingent rules depending on circumstances of each country. The debates between the ECtHR and national governments about legality can be described in the logic of these two dimensions of reasonableness.

7. Religious feelings as a legal defence for social conservatism

Legal systems can be distinguished from each other in many ways: not only in the textual differences of statutes but also the difference of legal styles which underpin different the normative dimensions. The legal mentality may largely influence the practices of the interpretation and application of statutes, so that very similar texts and laws can have different effects in different cultural environments. Applying these generally accepted comparative ideas to Russian law, we can obtain a better understanding of the fact that, being mostly copied from the Western samples, Russian statutes establish quite dissimilar frameworks for the exercise of

[64] It is emblematic that the RF Constitutional Court in its recent ruling (No.21-P as of 14 July 2015) translated "margin of appreciation" into Russian as "freedom of discretion" (*svoboda usmotreniia*).

[65] Chaim Perelman, *The Idea of Justice and the Problem of Argumentation* (New York: Humanities Press, 1963); Jürgen Habermas, *Between facts and norms: contributions to a discourse theory of law and democracy* (Cambridge, MIT Press: 1996). A recent attempt to apply this methodology to the Russian constitutional law and to justify its autonomy as to the international courts see: Sergey Belov, "Predely universalnosti konstitutsionalisma: vliianie natsionalnykh tsennostei na praktiku priniiatiia reshenii konstitutsionnymi sudami" (Limits of Universality of Constitutionalism: Influence of National Values on Practice of Decision-makings by Constitutional Courts), 4 *Sravnitelnoe konstitutsionnoe obozreniie* (2014), 37-56.

religious rights and freedoms. The 1997 Russian law on freedom of conscience in many aspects mirrors European legislation, pursuing the goal of transferring the best regulatory practices from the West. But the reality was different and the interpretation that Russian courts gave to this law made it largely inoperative for the purposes of the protection of religious freedoms and for the anti-discriminatory practices. Much criticism has been expressed about the Russian political system and against the trends in Russian politics after Putin returned to (presidential) power in 2000. Along with this important aspect, not everything can be explained through real or presumed political influences. In many cases judges and other actors of Russian legal system freely choose to reinterpret statutory and case law in a sense that is hostile to religious freedoms, without being anyhow controlled or surveyed by political authorities. As a matter of fact, Russian lawyers are not trained in and, therefore, are unable to apply such techniques as the balancing and weighing of conflicting principles, proportionality tests for the limitation of rights, or finding "the best fit" (Dworkin's term) for rights in a social system.

Russian law schools and academia translate and reproduce the state-centred perspective of the law understood as a set of commands of the sovereign, the sovereign having absolute power to create and enforce any legal enactments whatsoever. The state possesses sovereign powers allegedly delegated to the state by the people, and in this light the state is immune to any criticism of its laws and regulations. This image of the almighty Leviathan is very appropriate to illustrate the relationship between the state, its law, human rights and religious freedoms. It is true that the state can restrict itself by adopting certain constitutional acts or by ratifying international treaties and conventions, nonetheless, it retains the power to rescind these restrictions and to make its will triumph over any legal or moral limitations. Such logic repeatedly came to surface in the years-long polemics between RCC and the ECtHR about the admissibility and the criteria for limiting religious freedoms in Russia. These polemics consistently revolve around several central topics such as the limits of sovereignty, the sources of binding force of legal rules, and the nature of rights.[66]

These topics regularly refer to a set of arguments (which includes such elements as claimed cultural uniqueness, the specificity of religious morality, the constitutive function of religious beliefs for the Russian political and social systems), which are framed as a system of

[66] See Mikhail Antonov and Ekaterina Samokhina, "The Realist and Rhetorical Dimensions of the Protection of Religious Feelings in Russia", 40(3-4) *Review of Central and East European Law* (2015), 229–284.

traditionalist rhetoric about Russian legal, political and religious culture. For example, President Putin or RCC President Zorkin cite such conservative Russian legal philosophers as Ivan Il'in, Nicholas Berdyaev or Boris Chicherin; their narratives also translate Slavophil ideas about Russian uniqueness and some earlier ideas about the prevalence of religious morality over religious rights and freedoms. These ideas have underpinned political and legal narratives since the Middle Ages, so that Ilarion's idea about the prevalence of morality and religion over human rights (the 11th century) or Filofei's understanding of Russia's missionary role in the logic of the Third Rome (the 16th century) might be interpreted as still holding sway over Russian legal thinking. The same is true for ordinary judges who interpret the statutes in light of certain accepted truths about the prevalence of some "traditional" confessions over others, and about the pernicious effect of "non-traditional" religious denominations for social solidarity and legal security. Needless to say that this approach may be dangerous for promoting the rule of law, as limitations imposed by courts may be viewed as subjective and therefore arbitrary, being also contested on international and supranational forums.

This value difference and Russian exceptionalism has been subject to many debates and controversies, the most notorious of which is that between the Westernizers and the Slavophiles in the 19th century. These controversies continue and considerably influence public policies, especially concerning human rights. This traditionalism was very much congruent with the policies of the Russian Empire. After the 1917 Revolution this ideology changed the form but not the substance—the collective values still primed over the individual ones, even if this time in the name of communism. Therefore, both before and after the Revolution the political environment was not favourable to encouragement of individual liberties, so that the Constitutional Acts of 1905 and the Soviet Constitutions of 1924 and 1936 with their liberal provisions about human rights remained rather paper law. Human-rights observers frequently make the same conclusions about the 1993 Constitution. In their interpretations of religious freedoms in particular, and of human rights in general, RCC and other courts in Russia do not give the details justifying their decisions. Their argumentation is usually based on referring to metaphysical concepts and constructions such as social consciousness. This term aptly combines the Marxist philosophy studied by senior judges in their youth and certain ecclesiastic ideas about the supra-individual psychological reality that stands over human beings and their minds and unites them into mystical communions (churches, etc.). With reference to such constructions

judges justify, although without any persuasive effect, the limitations they might want to impose on religious freedoms in the view of maintaining traditional values. This issue has recently been contested, after a set of repressive laws was adopted in 2013 protecting some traditional religious values.

This logic of interpretation is defended by RCC President Zorkin, who is one of the most influential conservative legal scholars in Russia today. He insists that human beings are limited by chains of social solidarity which impede them from making an arbitrary choice of religious beliefs, and courts have to promote and impose this solidarity on individuals. This logic repeats, to certain extent, Rousseau's idea of "compelling to be free", or at least Zorkin comes to the same conclusions as the French philosopher. Without addressing Rousseau, Marx or other Western thinkers, Zorkin finds in the Russian legal philosophy a rich source of ideas for his argumentation. Referring to such conceptions as Boris Chicherin's "liberal conservatism", Zorkin legitimizes restrictions on religious freedoms with reference to the political, cultural or historical context of the "transitory period" (meaning the post-Soviet era in Russia). Zorkin's ideas are widely echoed by Patriarch Kirill, other ecclesiastical and secular intellectuals.

Fundamentally, these debates fall within the province of value discourse based on a pre-established cognitive and axiological choice. Rational arguments are employed too, but they come not at the point of choice but at the point of the justification of this choice. One of the appropriate measurements of this reasonableness would be to describe the intentions and meanings that legal actors invest into the legal texts created and interpreted by them. This practical reasonableness which underpins the judicial function in different countries can become a *tertium comparationis* yielding a criterion for a charitable comparison of various regulative systems in Europe, even if finding and formulating such reasonableness would be a much more difficult enterprise than a simple commentary on statutory law or a political assessment of legal systems. Here, reassessing this problem from the vantage point of various philosophical conceptions can provide clues for a better understanding of the legal fabric at work in courts.

Such a thick description can be obtained from an historical perspective, providing the comparative background for drawing parallels in the development of human rights and religious freedoms in Russia and in the West. In most Western countries the secularization of the state was a painful and lengthy process connected with the struggle for individual liberties, which led to the conviction that religious pluralism is a prerequisite for the protection of human rights. The

Russian experience was somewhat different. The Soviet state was secular from the very beginning, and nothing fundamentally changed with *perestroika*. This historical experience does not allow the univocal linking of positive or negative values: secularity is conceptually associated with Bolshevik ideas rather than with the works of Enlightenment philosophers and with the first human rights pamphlets, as in the West. For this reason, in Russia the principle of secularity in public discussions is often critically reassessed with reference to the anti-religious and atheist campaigns conducted by the Bolsheviks under the flag of secularity. The encroachment on religious freedoms seems to Western observers as an indisputable and impermissible violation of human rights, however this is not so for many Russians.

One may state that the protection of religious freedoms under Russian law is dependent not only on statutory laws or their interpretations, but also on the historical context, on certain peculiarities of the legal thinking maintained and reproduced in Russia by the prevailing system of legal education, and on the interpretative communities that create some factual constraints influencing judicial argumentation. From this viewpoint, struggling for better protection of religious freedoms in Russia implies addressing the intricate combination of the underpinning conventions and shared values that shape Russian's attitudes to the limits of individual choice in the religious field.

8. Conclusion

This paper has analysed the cultural constraints that are factually imposed on the actors of the Russian legal system by the prevailing social philosophy which is characterized by a significant degree of religious conservatism. This conservatism is predictably opposed to sexual minorities and to those who want to defend or justify them. Examining the 2013 amendments about traditional values and the case law of the application of these amendments, along with the discourses of some judges of RCC, the author concludes that religious credos have a strong impact on decision making in Russian courts, and can sometimes overrule the formal provisions of the Constitution and laws that grant protection and guarantees to the sexual minorities. This situation can be explained with the reference to the prevailing social philosophy which promotes conservative values and emphasises collective interests. The reasons for this specific development of Russian intellectual culture in this regard are beyond the scope of the paper, but it can be asserted that this development, historically rooted in religious ideas, still shapes the

general conservative attitudes of Russians toward sexual minorities. These attitudes cannot be ignored by judges and other actors of Russian legal system who, to some extent, are subject to the general perception of what is just, acceptable, and reasonable in the society.

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