Archiv für Rechts- und Sozialphilosophie – Band 170

Franz Steiner Verlag | Auszug aus:

FRIEDRICH MÜLLER'S THEORY OF LAW

ZUR RECHTSTHEORIE FRIEDRICH MÜLLERS

Proceedings of the Special Workshop held at the 29th World Congress of the International Association for Philosophy of Law and Social Philosophy in Lucerne, Switzerland, 2019

Edited by Natalina Stamile, Nestor Castilho Gomes and Dennis José Almanza Torres

Franz Steiner Verlag, Stuttgart 2021

Table of Contents

Law, State, and Human Rights in Russian Legal Lexicon

MIKHAIL ANTONOV (Saint Petersburg, Russia)

Abstract: This paper examines how the perception of the concepts "state" and "law" in Russian legal culture impacts the interpretation and application of human rights in Russian legal system. This analysis is carried out from the perspective of Friedrich Müller's structural theory of law. The author argues that the legitimation of legal norms through the political power is considered in Russian law as a conceptual condition of binding force of these norms. This perception of "law" indirectly confers on political leaders the limitless and unchecked power of exception and is incompatible with the idea of "human rights" as rights independent from state will. This conceptual framework in Russian law implicitly subordinates human rights to collective interests and to the state will which represent these interests.

1. Introduction

This paper attempts to consider the relevance of two key concepts (state and law) for interpretation and application of human rights in Russian legal system from the perspective of Friedrich Müller's structural theory of law (*Strukturiende Rechtslehre*).[1] This relevance becomes apparent if one assumes that judges do not interpret the law in a context purified from the linguistic and axiological conventions in the given legal community. On the contrary, interpretative acts of lawyers are always embedded in the existing conceptual frameworks (*Wissenrahmen*). It is through these frameworks that lawyers get implicit ideas about human rights, their binding force and the limits of their application, then translating these ideas in the law-application by filling out the constitutional texts with concrete meanings.

1 Friedrich Müller, *Strukturierende Rechtslehre*. Berlin: Duncker&Humblot, 2nd ed., 1994.

There are constitutional provisions in Russian law about formal priority of human rights over statutory law,[2] but in practice this priority is not respected. Russian courts solemnly pay lip service to these rights, but in fact do not recognize that these rights can work against the will of the state, enshrined in the statutory law or in the official ideology.[3] This fact can be explained in various perspectives, such as political influence, legal culture or institutional frameworks. And, in fact, there is a good many theories that explain Russian law in terms of politicized justice, legal nihilism or institutional backwardness. Without denying these theories, this paper suggests that one of the possible facets for explanation is to examine the possible impact of the *Wissenrahmen* of Russian legal community on interpretation of the human-rights provisions.

This paper will argue that lawyers employ these provisions (which are only abstract texts of law, *Rechtsformularen*) through adapting them to their vocabulary, to their *Lebenswelt*, and thereby connecting them with social facts (*Sachbereich*) in concrete cases. A similar analysis on the link between facticity and normativity in Russian law has already been undertaken by us from the perspective of Eugen Ehrlich's and Georges Gurvitch's legal sociologies.[4] The present paper is a continuation of that research, adding thereto insights taken from the structural theory of law.[5]

A couple of caveats shall be added here. To keep the paper within manageable limits, we will not go into a comparative analysis of Russian and Western interpretations of the examined concepts: a task that would require a much longer monographic study. Here, it will be assumed that the modern Western conception of state means institutional autonomy of the state from social groups and officials (including political leaders),[6]

---

2 It is a controversial issue whether the international human-rights law stands over the constitutional law in Russia (see the recent debate between Jeffrey Kahn and Alexander Blankenagel: Jeffrey Kahn The Relationship between the European Court of Human Rights and the Constitutional Court of the Russian Federation: Conflicting Conceptions of Sovereignty in Strasbourg and St Petersburg. *European Journal of International Law* 30, 3 (2019), 933–959; Alexander Blankenagel, The Relationship between the European Court of Human Rights and the Constitutional Court of the Russian Federation: A Reply to Jeffrey Kahn. *European Journal of International Law* 30, 3 (2019), 961–969), but we will not provide detailed account on this issue in the present paper.

3 Pamela A. Jordan, *Defending Rights in Russia: Lawyers, the State, And Legal Reform in the Post-Soviet Era.* Vancouver: University of British Columbia Press, 2006.

4 Mikhail Antonov, Normativity and Facticity of Law in the Legal Sociology of Eugen Ehrlich. *Law of Ukraine* 4 (2013), 263–272; Id. La théorie du droit de Georges Gurvitch et ses origines philosophiques russes. *Droit et société*, 94, 3 (2016), 503–512. There are especially interesting intersections between the structural theory and Gurvitch's legal sociology which widely employed such constructions as "legal experience" or "frameworks of social knowledge" for analysis of law.

5 Surely, there is a large variety of socio-legal theories which underscore the importance of the social context for interpretation and application of law. However, an analysis of common points and dissimilarities between the structural theory (in this aspect) and other theories is not the subject matter of this paper. There will be as well points of intersections with the methodology of *Begriffsgeschichte* as developed by Reinhart Kosellek and Quentin Skinner.

6 E. g., Francis H. Hinsley, *Sovereignty*. Cambridge and New York: Cambridge University Press, 2nd ed, 1986.

while human rights will be taken in the sense of international normative constraints on the exercise of state power.[7] We are aware of other interpretations,[8] but will not go into their discussing here. Undeniably, similar readings of the respective concepts can be found in other legal cultures impregned by legal formalism, but this comparative analysis also goes beyond the limits of this paper.

Another caveat is that we ground our analysis on our previous research and will not repeat the arguments that have already been provided in our previous publications.[9] These publications provide examples from Russian case law that illustrate the connection between the legal theory inculcated at Russian (Soviet) law schools (legal formalism mixed up with decisionism[10]) and how this theory shapes judicial reasoning in particular hard cases. The present paper will only outline the methodological pattern for examining the link between the key legal concepts and the application of human-rights law, employing for this some methodological ideas of the structural theory of law.

After a general methodological discussion in Section 1, Section 2 will analyze the main conceptual meanings of the term "law" in the epistemic community of Russian lawyers. It will be argued that there has been almost no room for discussions about natural law, divine law, social contract, and other abstract sources of binding force of law in Russian conceptual history. The Soviet era did not change these *Wissenrahmen*, only adding a drop of criticism against human rights as one of the bourgeois ideological inventions. This background apparently shaped the reception of the idea of human rights in the post-Soviet Russia. Adopting the 1993 Constitution which established that human rights have direct effect and priority over the legislation, Russia attempted to change this intellectual context, but, so far, the protection of human rights is carried out rather in the old statist perspective, as exemplified in the case law of the RF Constitutional Court and its ongoing controversies with the ECtHR.[11] Historically, Russia follows the patterns of legal formalism which imputes the state will as the content of legal norms. This fact is was and still is one of the main factors that determine interpre-

---

7 Samuel Moyn, *The Last Utopia: Human rights in History*. London and Cambridge MA: Harvard University Press, 2010.

8 Patrick Macklem, *The Sovereignty of Human Rights*. Oxford: Oxford University Press, 2015.

9 E. g., Mikhail Antonov, Theoretical Issues of Sovereignty in Russia and Russian Law. *Review of Central and East European Law* 37, 1 (2012), 95–113; Id. Conservatism in Russia and Sovereignty in Human Rights. *Review of Central and East European Law* 39, 1 (2014), 1–40; Id. Conservative Philosophy and Doctrine of Sovereignty: A Necessary Connection? *Archiv für Rechts- und Sozialphilosophie,* 153 (2017), 45–59; Id. The Russian Constitutional Court as a Mediating Link Between Russian and European Law? *European Yearbook on Human Rights* (2019), 547–566.

10 Mikhail Antonov, Legal Realism in Soviet and Russian Jurisprudence. *Review of Central and East European Law* 43, 4, (2018) 483–518.

11 E. g., Regina Heller, *Normensozialisation in Russland. Chancen und Grenzeneuropäischer Menschenrechtspolitik gegenüber der Russländischen Föderation.* Verlag für Sozialwissenschaft: Wiesbaden, 2008.

tative work (*Textarbeit*) of Russian lawyers who are engaged in human-rights cases at Russian law.[12]

Section 3 will provide a look at the concept of state and its implications for the epistemic community. The concept of state (*gosudarstvo*) in Russian language implies a reference to the person of sovereign lord (*gosudar'*), whose power was often understood as the ultimate source of validity of legal norms. Possession of state power therefore implied the unlimited power of political leaders to act in the common interest on behalf of the society. Their actions are by default considered to be for the common good and therefore binding, while human rights are, as a rule, taken to mean a mere collection of rights octroyed by the state to its citizens (essentially similar to rights provided by the statutory law). This conceptual state of affairs explains the difficulty to draw a distinction between the abstract state will and the factual will of political leaders expressed in their discourses and in the prevailing ideology.[13] Despite efforts of some Russian legal philosophers and scholars, this perspective still prevails in Russian law.

This analysis will prepare the ground for discussing the concept of human rights and its application in Russian law. Section 4 will start from the hypothesis[14] that this concept has always been and still remains a foreign body in Russian legal culture. As distinguished from such well-established concepts as fundamental, constitutional or civil rights, human rights were utilized by Soviet international lawyers rather as an ideological tool and mostly for the "international ideological market" (for propaganda purposes in other countries), and in fact did not play any substantial role in creation or application of legal norms in Soviet law.[15] Continuing this interpretative tradition, in the contemporary Russian law human rights also are frequently considered as a merely ideological façade for economic and other interests, with no real legal effect capable to bridle the almighty state will.

This perspective suggests to evaluate in Conclusion how these concepts influence discussions about legal validity in the epistemic community of Russian lawyers. The conceptual background examined in the first three sections suggests there being a confusion between legal validity and the political will which is in fact merged in the will of political rulers. Such legitimation of legal norms through the political power is

---

12 Anton Burkov, The Use of European Human Rights Law in Russian Courts, in: *Russia and the European Court of Human Rights: The Strasbourg Effect*, eds. L. Mälksoo and W. Benedek, Cambridge: Cambridge University Press, 2017, 59–92.

13 This can, among other factors, explain enormous popularity of Carl Schmitt's ideas among Russian lawyers and politicians (Stefan Auer, Carl Schmitt in the Kremlin: The Ukraine Crisis and the Return of Geopolitics. *International Affairs*, 91, 5 (2015), 953–968).

14 This hypothesis is a generalized ideal-type introduced for the purposes of the analysis in the present paper, and does not exclude that there are also other interpretations of Russian legal culture.

15 Evidently, that in Imperial Russia there have been no discussions on human rights: the problem of suprastatutory law was examined in terms of natural rights. Albeit, in terms of humanitarian rights Russian lawyers (such as Friedrich Martens) contributed significantly already in the 19th century.

regarded in the prevailing Russian legal scholarship as a conceptual condition of binding force of these norms and indirectly confers on political leaders the limitless and unchecked power of exception.[16] This understanding of validity defines the normative sphere (*Normbereich*) within constitutional texts on human rights will be in fact interpreted and transformed by Russian courts in particular norms of decision (*Entscheidungsnormen*), according to which concrete cases are decided. Not rarely, against the letter of the Constitution.[17]

2. Methodological Outlines

Russian law officers, as lawyers everywhere, interpret and apply the law in the limits oftheir conceptual frameworks (*juristischen Wissensrahmen*), so that particularities of interpretation of legal texts and the narratives embedded in them (rule-of-law, human rights, law-and-order, etc.) can be – at least, partly, – explained against the backdrop of these frameworks and of the vocabulary employed in the legal community. In this line of thinking, Harold Berman wrote in 1963 in his seminal book on Soviet justice: "Law is more than rules; it is the legal profession, the law schools, the technique and tradition of judging, administrating and legislating. Law is also the sense of law, the law-consciousness of the people".[18]

Analyzing such frameworks and what they mean for legal and institutional activities (*rechtlich-institutionelle Handel*) of lawyers can shed more light on why very similar legal texts (such as the UDHR or the ECHR) produce quite different effects and get divergent interpretations in Russian and in Western law. It comes as no surprise insomuch as meanings of legal norms are largely shaped by the established linguistic contexts and conventions, this shaping being one of the landmarks in the process of their interpretation and application (*Normkonkretisierung*).

In every legal system, one can distinguish between norms and normative texts from which these norms are reconstructed, and respectively, between the meaning of norms (*Normbedeutung*) and their formal sources (*Textformular*). This is especially true for constitutional law, where formal sources (such as constitutional texts) are relatively

---

16 This statement is not a declaration of resignation, neither does it not rule out that other approaches were discussed among Russian legal thinkers (e. g., Andrzej Walicki, *Legal Philosophies of Russian Liberalism*. Notre Dame: University of Notre Dame Press, 1992). What is analyzed here is the prevailing legal dogmatic perpetuated in practices of creation and application of the law.

17 Mikhail Antonov, Religious Beliefs and the Limits of Their Accommodation in Russia: Some Landmark Cases of the Russia Supreme Court. *Religion and Society in Central and Eastern Europe,* 11, 1 (2018), 3–19; Id. Religion, Sexual Minorities, and the Rule of Law in Russia. *Journal of Law, Religion and State,* 7, 2 (2019), 152–183.

18 Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law*. Cambridge MA: Harvard University Press, 1963, 188.

short and abstract. The constitutional "law in action" is mainly created by case law and doctrine also in the civil law countries. But it does not necessarily lead to the realist credo that "the Constitution is what the judges say it is". The structural theory helps to demonstrate it, showing that, in their turn, case law and doctrine do not exist as detached from the social reality and, to a considerable extent, are informed by the established epistemic conventions. These conventions provide meaningful linguistic frameworks (*sprachliche Verwendungsweisen*) for interpretative activities of courts, so that the relevant legal texts are integrated into the frameworks of legal knowledge and experience.[19]

In Russia, these frameworks are evidently impregned by the statist conception of law, unchecked power of exception reserved for the political leaders, and strong statehood as the political ideal. This institutional framework is reflected also in the legal vocabulary which, in its turn, outlines the way lawyers look at the law and its machinery. Below, we will argue that this background had been formed historically in the tsarist Russia, its contours have been ideologically reshaped but not substantially changed in the Soviet era.

These patterns not only constantly reappear but also are not unfrequently represented as genuine elements of Russian legal culture. This nativist argument is not rarely employed to differentiate Russia from the West as different legal traditions or, in terms of the structural theory, as different textual forums for the application of law (*Textort der Rechtsprechung*): not only by Russian romanticized thinkers who write about Russia's *Sonderweg*, but also by a panoply of Western authors who contend that Russian law is not "law" (in the Western sense).

The perspective of the structural theory, outlined above in this Section, can try to explain the gap between the real law-application practice (*Rechtsarbeit*) and the solemn declaration of human rights as the supreme constitutional value in Art. 18 of the RF Constitution. On the one hand, this provision formally requires that human rights shall determine lawmaking and law-application. On the other hand, human rights are often considered not only as empty signifiers when evoked by parties at the court, but in official narratives they are also from time to time portraited as a Trojan horse for the West to meddle with Russian sovereign affairs.[20]

Another thesis of this paper is that Russian perception of law is intrinsically linked to the presupposition that legal validity is derived from will of political rulers: this is one of the key messages of Russian legal theory. This presupposition leads to the sug-

---

19 Friedrich Müller, Ralph Christensen, *Juristische Methodik. Bd. I: Grundlegung für die Arbeitsmethoden der Rechtspraxis*. Berlin: Duncker&Humblot, 11 ed., 2013.

20 Anton Burkov, *The Impact of the European Convention on Human Rights on Russian Law: Legislation and Application in 1996–2006*. Stuttgart und Hannover: Ibidem-Verlag, 2007.

gestion that state power is legally unaccountable before its citizens and civil society, because it is the state will that defines what is legal and what is not.[21]

Such perception cannot but affect the law-application at courts and other law-enforcement agencies. In fact, Russian courts very often interpret legal propositions contrary to their literal meaning but favoring interpretative acts of other state agencies. By way of example: the general rule for burden of proof in Russian public law (criminal, tax, administrative, custom and other branches of the law) is that it shall lie with the state agencies (including the presumption of innocence in criminal law). Literally, this formal rule as enshrined in the corresponding legislation cannot be interpreted otherwise. But, as a matter of fact, in the overwhelming majority of cases courts by default accept what state agencies deliver as proofs or arguments as if it were truth. Thus, the burden of proof really lies with the adverse party (e. g., defense in criminal cases). The unbelievably low acquittal rate (0,25 %)[22] in criminal cases and the similar statistics in administrative and other public-law cases confirms this tendency which can become an object for structural analysis "due to its coherence, practicability and reality".[23] This divergence between texts and their interpretation is the established fact also in human-rights cases.

3. The Concept of Law

It is often argued that that all major legal reforms in Russia were introduced not because of social pressure on the state in the way of Jhering's *Kampf ums Recht* as it frequently was the case in the West, but by the state itself: and this in spite of the social inertia and against the prevailing conservative morality.[24] To take some examples: the Westernization of Russian law propelled by Peter the Great and his successors, the abolishment of the serfdom in 1861, the codifications and the court reforms of the mid-19th century, Stolypin's land reforms in the early 20th century, and other major legal transformations were imposed "from above", by the state. It is largely by the way of Westernization from above that individual rights obtained the protection in the pre-revolutionary Russian law. The same conclusion can be made about the liberally worded Soviet Constitutions, about Gorbachev's *Perestroika* or Yeltsin's constitutional reforms which were not

---

21 Eugene Huskey, A Framework for the Analysis of Soviet Law. *The Russian Review* 50, 1 (1991), 53–70; Chris Osakwe, Four Images of Soviet Law: A Philosophical Analysis of the Soviet Legal System. *Texas International Law Journal,* 21, 1 (1985), 1–37.

22 https://www.independent.co.uk/news/world/europe/russia-justice-system-low-acquittal-rate-uk-crown-court-a8935016.html

23 Friedrich Müller, *Syntagma. Verfasstes Recht, verfasste Gesellschaft, verfasste Sprache im Horizont von Zeit*. Berlin: Duncker&Humblot, 2012, 386.

24 According to Konstantin Kavelin, Alexander Gradovsky, Sergey Soloviev and other influential Russian historians of the so-called state school (*gosudarstvennaia shkola*) of the 19th century.

directly necessitated by changes in the legal culture or the legal mentality. Only the 1906 Basic Laws, adoption of which was prompted by the first Russian revolution of 1905, can be cited as exclusion from this rule, but their real value and impact on Russian political and legal systems is still questionable.[25]

In the first approximation, the Russian language use suggests the telling linguistic difference between *zakon* (statutory law, *Gesetz*) and *pravo* (suprastatutory law, *Recht*) that seemingly catches the difference between normative and ideal dimensions of the legal. This difference is surely common also to the Western legal vocabulary. However, the specificity of the Russian legal language use is that *pravo*, due to the historical convolutions, is not associated with doctrines of social contract and other normative constraints on state power. These doctrines usually were seen as a part of the legal ideology (*pravovaia ideologiia*); this ideology constitutes the social environment in which law exists but it is not law itself.[26] It might reveals some ideal dimensions of law, can serve as an inspiration for pragmatic changes but with no normative power unless accepted by the state.[27] As a result, these "ideal dimensions" have no binding force and are unable to overrule the statutory provisions contradicting these doctrines.

Historically, as opposed to the official law, *pravo* in Russian legalese referred rather to customary law, and initially had rather a retrograde connotation.[28] *Pravo* is not necessarily better than *zakon* in what concerns, e. g., the protection of individual rights. On the contrary, the retrograde customary law in Imperial Russia, backed by the prevailing Orthodox communitarian dogma, tended to underplay individual rights and to perpetuate the factual legal regulation, blocking liberal reforms. Consequently, *pravo* is often perceived by Russians as something pertaining rather to morality or custom than to the legal order.[29] From this point of view, if Russian judges depart from the statutory

---

25 Alexander Blankenagel, Legal Reforms in Russia: Visible Steps, Obvious Gaps, and an Invisible Hand? *Journal of Institutional and Theoretical Economics,* 156, 1 (2000), 99–119.

26 See: Susan Stewart, *Grundeinstellungen der russischen politischen Elite: Recht, Wahrheit, Gemeinwohl und Gewalt*. Berlin: SWP, 2017, 10–17.

27 George C. Guins, *Soviet law and Soviet society*. The Hague: M. Nijhoff, 2012, 24–46.

28 As shown by Professor Zolotukhina, after the acceptance of Christianity by Russia in 988, the term "zakon" received sacred meaning: the laws of God, the laws of the Old and New Testaments. The word "zakon" was not taken out of its former connotation, but it received characteristics relating directly to God: verity, justice, eternity, and infinity. Meanwhile, the term "pravo" was not included in the vocabulary of the entire Russian Middle Ages, its appearance is associated with the spread of the theory of "natural law" in Russia (N. M. Zolotukhina, Srednevekovye mysliteli Rossii o pravde, zakone, spravedlivosti, istine i blagodati. *Trudy IGPAN* 13, 2 (2018), 102–142). As narratives about Russia's golden past frequently refers to the premodern (prior to the reforms by Peter the Great), this semi-religious connotation of the term "zakon" secured its practical prevalence over "pravo".

29 The ideas of Ivan Ilyin are very representative for this rupture. Symptomatically, Ilyin draws a distinction between a "correct" legal consciousness based on conservatism, morality and religion (this consciousness leads to the contemplation of pravo) and a "formalist" legal consciousness that considers only the posited, rationalized law (zakon) and therefore gives no clues to understanding what law is. This idea was developed by other influential legal philosophers such as Vladimir Soloviev or Nicholas Berdyaev. In the Soviet jurisprudence, Stuchka proposed to differentiate between the "general" legal consciousness (it

law reasoning about suprastatutory justice (*pravo*), it does not mean that rights will be better protected. Not rarely, in such situations this reasoning turns rather to conservative values to impose additional limitations on individual rights of minorities, against the letter of the law.

One can interpret this dialectic in the sense that the statutory law (*zakon*) turns out to be what is commanded by the sovereign lord, while *pravo* justifies the discretionary power of the sovereign (because a norm is considered to be a part of *pravo* only if it approved by the sovereign) to make exceptions from the statutory law. From this perspective, the use of the term *pravo* can sometimes rather blur the distinction between the legal and the political. From this vantage point, this distinction seems to have different connotations and consequences than similar linguistic distinctions in the Western legal lexicon, like that between *Gesetz* and *Recht* in Art. 20 of the German Basic Law. This creates a tension between the normative force of the law (*zakonnost'*) and the factual power of exception (*tselesoobraznost'*) belonging to political rulers. In this light, human rights cannot be conceived as "rights against the state", enabling the civil society and citizens to counter and to rein political will of rulers.[30]

Harmonization of *pravo* and *zakon*, finding their ideal synthesis has never been the first issue on the agenda of Russian legal philosophers, as deplored Bogdan Kistiakovsky in his famous contribution "In Defense of Law: the Intelligentsia and Legal Consciousness" to *"Landmarks"* (*Vekhi*), the 1909 Manifesto of Russian intelligentsia. For the Slavophiles, Dostoevsky, Tolstoy or Solzhenitsyn the concern was the contrary: how to protect moral and religious convictions of Russians against the decaying effect of the rationalized law, the latter being seen as the product of the godless West. The famous idea of Nikolay Danilevsky to "freeze" Russia and its communitarian life-style (*obshchina*) in order to save it from the putrefying liberalism can serve here as an example. On the scale between Tönnies' *Gemeinschaft* and *Gesellschaft*, most of Russian legal philosophers tended to choose the former. Vladimir Soloviev's sophisticated attempt of a synthesis of law and morality was rather an abstract construction which provided no schemes of reconciliation of law and ethics. Pavel Novgorodtzev and other disciples

---

reflects the social structure and is therefore correct) and the "concrete" legal consciousness that people, basing on the statutory law, can have about their rights and obligations. This latter consciousness is not "objective" and therefore can be wrong. This style of legal thinking is still persistent among the Russian political elite: Anton Barbashin, Hannah Thoburn, Putin's Philosopher: Ivan Ilyin and the Ideology of Moscow's Rule. *Foreign Affairs* (15.09.2015), available at https://www.foreignaffairs.com/articles/russian-federation/2015-09-20/putins-philosopher.

30 In a sociological poll conducted by Levada Center in 2017, 37 percent of Russian agreed that human rights can be violated for the sake of the state interest, while only 13 percent asserted that human rights shall always stand beyond the state interest (Interesy gosudarstva i prava cheloveka [State Interests and Human Rights]. *Levada Center* (03.04.2017), available at https://www.levada.ru/2017/04/03/interesy-gosudarstva-i-prava-cheloveka/).

of Soloviev tried to develop practical aspects of this synthesis but did not succeed to do it before the 1917 Revolution.[31]

This short sketch from the conceptual history can partly explain why the term "*pravo*" did not acquire a visibly positive meaning in Russian legal tradition,[32] and why it is not reprehensible in the Russian legal culture to evade from observance of statutory laws if they are inconvenient, opaque or ineffective.[33] This skepticism to law explains why Radbruch's or Arendt's concerns about dangers of the formalist servility to legality (the positivist credo of "Gesetz ist Gesetz") have rarely been in the focus of Soviet and Russian legal theory. Priority of the principle of legality gave no place for discussing the problem of "unjust" or "immoral" law in the Soviet era.[34] Only in the 1980s, Professor Vladik Nersesiants attempted to problematize practical consequences of legal formalism and to assert supreme value of law (*pravo*) in legal system. His 1983 book on the distinction between statutory law (*zakon*) and *pravo* (the law as it ought to be) has been the first theoretical attempt to tackle this matter,[35] and the ensuing popularity of this theory among Russian lawyers demonstrates that this problem is still actual.[36]

On the other side, this tension between *pravo* and *zakon* underlies the ambiguity between prerogative and normative sides of Russian law, and formerly – Soviet law.[37] Once it is supposed that the law is derived from the state will, and that this will coincide with the will of a sovereign lord (*gosudar'*), legal rights would be valid insofar as they rely on the political will and are supported by it.[38] As Lenin put it in a short but telling formula: "Law is nothing without an apparatus capable of enforcing the obser-

---

31 Evert Van der Zweerde, *Vzgliad so storony na istoriiu russkoii sovetskoi filosofii* [View from aside on the history of Russian and Soviet philosophy]. Saint Petersburg: Aleteiia, 2017.

32 One can consider that this term has the Polish origin and came to Russian language only in the 16th century (before *zakon* had included into its scope both *Gesezt* and *Recht*), without acquiring a well-established semantic meaning so far.

33 According to the famous diction by Alexander Herzen: "Complete inequality before the law has killed any trace of respect for legality in the Russian people. The Russian, whatever his station, breaks the law wherever he can do so with impunity; the government acts in the same way" (Alexander Herzen, "Du développement des idées révolutionnaires en Russie", cited by Bogdan Kistiakovsky in his contribution to the 1909 *Vekhi: Landmarks* (Armonk, NY: M. E. Sharpe,1994), 130).

34 Harold Berman, The Challenge of Soviet Law. *Harvard Law Review,* 62, 2 (1948), 220–265; George L. Kline, Socialist Legality and Communist Ethics. *The American Journal of Jurisprudence,* 8, 1 (1963), 21–34.

35 Vladik S. Nersesiants, *Pravo i zakon: iz istorii politicheskikh uchenii* [Law and Statutory Law: From the History of Political Ideas] Moscow: Mysl', 1983.

36 Olga I. Vlasova, Libertarno-iuridicheskaia kontseptsiia V. S. Nersesiantsa v kontekste nashego vremeni [The Libertarian-Juridical Conception of V. S. Nersesiants in the Context of Our Time]. *Sotsialno-ekonomicheskie iavleniia i protsessy* 3/4 (2011), 362–368; Valentina V. Lapaeva, Sootnoshenie prava i spravedlivosti v libertarno-iuridicheskoi kontseptsii V. S. Nersesiantsa [The Correlation between Law and Justice in the Libertarian-Juridical Conception of VS Nersesiants]. *Trudy IGPAN* 13:4 (2018), 9–36.

37 Christopher Osakwe, Theories and Realities of Modern Soviet Constitutional Law: An Analysis of the 1977 USSR Constitution. *University of Pennsylvania Law Review* 127 (1979), 1350–1437.

38 Nataliia V. Varlamova (2009) Rossiiskaia teoriia prava v poiskakh paradigmy [The Russian Legal Theory in the Search of a Paradigm]. *Zhurnal rossiiskogo prava* 156, 12 (2009), 68–84.

vance of legal norms". In the early 1920s, Peteris Stuchka developed this formula: "Law is a system (or an order) of social relations which corresponds to interests of dominating class and protected by its organized force (i. e. by the class state)".[39] This concept of law remained basically unchanged throughout the history of Soviet law and still, with a number of technical decorations and adjustments, serves as the paradigmatic definition of law in most of actual Russian textbooks on "Theory of state and law".[40]

4. The Concept of State

The 2019 controversial paper by the one of the Kremlin ideologists, Vladislav Surkov (President Putin's aide), argued that there is a specific Russian conception of state, according to which the state is based on popular trust to political leaders, as opposed to the Western political forms which "cultivate distrust and critics".[41] Underscoring Russia's non-Western track of political development, Surkov alluded that "Multilevel political institutions borrowed from the West are considered in Russia as ritual ones, created in order that Russia has them as 'all others have them', so that our neighbors are not astonished, irritated or frightened by special features of our political culture. These institutions are for us as a town suit worn we pay visits, but we wear other clothes when we are at home. As a matter of fact, our society trusts only supreme political leader".[42] Surkov concludes that Russian mentality does not accept legal constraints on state power, and this conclusion, albeit in different terms, has been recently repeated

---

39 Peteris I. Stuchka (ed.) *Entsiklopediia gosudarstvai prava* [Encyclopedia of State and Law]. Kommunisticheskaia akademiia, Moscow. Vol. 3 (1925–1927), 426. A longer official definition of law was provided by Vyshinsky in 1938: "The sum of rules of behavior that express the will of dominating class, posited in legislative manner, as well as of customs and rules of common life which are approved by the state power and which are guaranteed by coercive force of the state for protection, maintenance and development of social relations and orders that are profitable and favorable to dominating class" (Andrei Ya. Vyshinsky, *Voprosy teorii gosudarstva i prava* [Questions of the Theory of State and Law]. Gosiurizdat, Moscow, 1949, 83).

40 E. g., Vladislav V. Denisenko, Andrei Yu. Sukhinin, Sovetskii normativism kak teoretiko-pravovaia paradigma [The Soviet Normativism as a Paradigm of Legal Theory]. *Vestnik RUDN: Yuridicheskie nauki* 21:3, (2017) 380–395. This continuity between Soviet and Russian law in this intellectual dimension is described by one of the contemporary Russian authors the in the following words: "In accordance with Soviet conception the state is given the leading role in every sense: meaningful and chronicle. Thus, the state appearing as a result of the abstract of the private property and the division of the society to classes, had to produce a special mechanism to protect its rights. This exact role is given to the law. It is understood to be the result of the state's activities and the instrument of its protection. The purpose of law is to guarantee the state's interests. Such approach, described in plain form, forms the bases of Theory of the state and the law. This understanding was and still is traditional for Russia, what is in no small measure explained by its support by the state"(Svetlana Boshno, The Subject and the Method of the Theory of Law and State (Jurisprudence). *Law and Modern States* 6 (2015), 69–82, at 71).

41 Vladislav Surkov (2019), Dolgoe gosudarstvo Putina, *Nezavisimaia gazeta* (11.02.2019), available at http://www.ng.ru/ideas/2019-02-11/5_7503_surkov.html

42 Ibid.

by the President Putin.[43] Earlier, in his de facto inaugural speech in 1999, two days before the resignation of Yeltsin, Putin asserted that: "For Russians a strong state is not an anomaly which should be got rid of. Quite the contrary, they see it as a source and guarantor of order".[44]

In Russian history of political ideas, Surkov and Putin could find a plenty of arguments for their Slavophile musings. There is a long philosophical tradition of commitment to the theory and practice of autocracy in Russian political thought,[45] and this commitment logically implies uncontrolled exercise of political power. This style of thinking goes through centuries, from Ivan the Terrible's letters to Andrey Kurbsky, through the 19th century Slavophiles and monarchists to the 21st century apologists of Russian authoritarianism or to numerous protagonists of Carl Schmitt among Russian politicians. Surkov could also have referred to the notorious Russian faith in "good tsar" or to the century-old wishful thinking about a triadic symphony between people, tsar and Church. Ivan Ilyin, one of the prominent Russian legal philosophers in the 20th century whose name repeatedly reemerges in the narratives of Putin and other political actors,[46] conceptualized this Russian attitude to the state power as the "monarchic legal consciousness", opposed to the "republican legal consciousness". This latter seeks to limit the state power by democratic institutions and by the rules they create, and is therefore inappropriate to Russians.

This philosophical perspective, among other questions, raises the concern about its congruity with the Russian constitutional order. One can easily notice the apparent tension with the liberal wording of the 1993 RF Constitution. Individual rights and freedoms are proclaimed in Art. 2 of the Constitution as the supreme political and legal values and at the same time as the mechanism which restrains the state power (Art. 18). Nonetheless, these lofty ideals have not to any significant degree become parts of the real political and legal machinery of the Russian state.

Because of prevalence of the statist theory of law (see Section 2 above), the reflections of Soviet legal scholars about the nature and the machinery of law were closely linked to their conceptualization of the state. Apparently, in many cases this conceptualization did not stem from Marx's philosophy which did not admit active role of

---

43 Vladimir Putin says liberalism has become obsolete. Financial Times (27.07.2019), https://www.ft.com/content/670039ec-98f3–11e9–9573-ee5cbb98ed36.

44 Vladimir Putin (1999) Russia at the Turn of Millennium. Nezavisimaia gazeta (30.12.1999), available in English translation at: https://pages.uoregon.edu/kimball/Putin.htm

45 Richard Pipes, *Russian Conservatism and Its Critics: A Study in Political Culture*. New Haven: Yale University Press, 2005.

46 Timothy Snyder, *The Road to Unfreedom: Russia, Europe, America*. New York: Tim Duggan Books, 2018; Id., Ivan Ilyin, Putin's Philosopher of Russian Fascism. Available at https://www.nybooks.com/daily/2018/03/16/ivan-ilyin-putins-philosopher-of-russian-fascism/

the state in social regulation. Neither "State and Revolution" by Lenin[47] gave any clear indications how to explain expansion of state machinery in the society which declared to have built socialism in a particular country.[48] After several years of debates about a stateless and lawless socialist society (in the sense of being governed only by the communist morality), Soviet legal scholars in the late 1930s, under the guidance of Vyshinsky, reaffirmed that the law is unavoidable for social regulation also in socialist society, and that state's commands are the supreme source of law.[49] The success of this theory was quite explicable as it fitted to the cult of Stalin who personified the state and its will, so that the law could be associated with a tool for conveyance of this will and therefore be highly venerated in legal ideology.

The classical Marx's conception of state as a tool of exploitation is well known and does not need to be explained here.[50] Theoretical efforts of Soviet lawyers to combine this conception with the factual growth of Soviet state's administrative machinery woke substantial interest among Soviet lawyers to the theory of state. The result was that the return to the pre-revolutionary state structure and to the positivist state-and-law theory,[51] adding ideological modifications to it, when necessary – in the historical movement that is known as the "Great Retreat" of the 1930s.[52]

In his 2001 seminal work, Professor Khakhordin compared historical and etymological reasons for different conceptualization of the state in the Russian and Western

---

47 E. g., Lenin characterized the state as "a product and a manifestation of their reconcilability of the class antagonisms …", formed by "… special bodies of armed men placed above society and alienating themselves from it for the purposes of exploitation" (Vladimir I. Lenin, The State and Revolution, in *The Lenin Anthology,* ed. Michael Tucker, New York: Norton&Company, 1975/1918, 314 and 316). Putting an end to class exploitation through breaking down capitalist states and inciting the world revolution could not be conceptually compatible with sovereignty understood as the inviolable supreme political power of state. In this sense, Lenin plainly asserted that "We are not for the state, we defend neither sovereignty … nor national interest, we maintain that the interests of socialism is above the interests of the state (cited according to: George G. Guins, *Soviet Law and Soviet Society.* Netherlands: Springer, 2012, 374).

48 Stalin's statement endorsed at the XVII Meeting of the Bolshevik Party in 1934 and implemented in the 1936 USSR Constitution.

49 The ideas that Vyshinsky had proclaimed in 1938, became a kind of Vulgate for Soviet legal scholarship for years to come: Andrei Ya. Vyshinsky, Doklad na zasedanii Otdeleniia obshchestvennykh nauk AN SSSR 27.04.1938 [The Presentation Made at the Meeting of the Department of Social Sciences of the USSR Academy of Sciences on 27 April 1938], in: Id., *Voprosy teorii gosudarstva i prava.* Moscow: Gosiurizdat, 1938, 24–28.

50 E. g., Graeme Duncan, The Marxist Theory of the State. *Royal Institute of Philosophy Lecture Series* 14 (1982), 129–143.

51 Professor Syrykh justly evaluates that the Soviet conceptions of state and law were copied from the pre-revolutionary positivist textbooks, with insignificant ideological adjustments (Vladimir M. Syrykh, *Logicheskie osnovaniia obshchei teorii prava* [Logical Foundations of General Theory of Law]. Iustitsinform, Moscow, 2004, Vol. 1, 38).

52 Nicholas S. Timasheff, *The Great Retreat: The Growth and Decline of Communism in Russia*. New York: Dutton Amp Company, 1946.

legal traditions.[53] In his opinion, this difference resulted from the fact that the Russian medieval political thought did not follow the basic distinction between two aspects of the state: the one that refers to apparatus of government, and the other that described the person of the sovereign and his power.

Professor Khakhordin finds the first theoretical attempts to draw such a distinction in Russia only in the mid-18th century. These attempts were based on the conception of common good and, in his opinion, were unsuccessful because of the absence of long-established republican traditions of political thought.[54] Russia was faced with the necessity to regulate and control people more thoroughly than ever before and to arrive to such a form of control faster and in a very limited period of time as compared with the Western legal development. Because of such a necessity, "the czars had to rely on autocratic means to hammer this idea of the common good into the heads of their subjects".[55] This difference in the development explains the fact that the principle of common good was imposed from above, by political rulers: Professor Khakhordin cites Peter the Great and Catherine the Second as examples of such reformers.

However, one can hardly agree with Professor Khakhordin who alleges that "it was only the Bolsheviks who brought the state into the everyday life of each citizen of post-revolutionary Russia, who made the modern meaning of the term obvious to everybody".[56] The Soviet system of governance implied that the political power was divided between the state and the CPSU, and it was the latter who retained the right to decide as a last resort, in its capacity of "leading and guiding force of the Soviet society and the nucleus of its political system, of all state and public organizations" (Art. 6 of the 1977 USSR Constitution). The CPSU's control over the state institutions flagrantly contradicted the modern idea of state: the Soviet structure of governance rather reminded the pre-Westphalian multi-level political order, while the concept of "interest of dominating class'" was not by far tantamount to the idea of "common good".

Post-Soviet authors do not introduce any cardinal changes in their understanding of state which is still identified with the power of political rulers to govern the society (*upravliat' obshchestvom*) pursuing the common good, as this good is defined by rulers.[57] For example, one of the main contemporary authorities in Russian public law, Professor Veniamin Chirkin characterized the political power as "the state in the

---

53 Oleg Khakhordin, What Is the State? The Russian Concept of Gosudarstvo in the European Context. *History and Theory* 40, 2 (2001), 206–240.

54 Ibid., 218.

55 Ibid., 227. It meant that the principle of common good was taken simply as one more command of the sovereign and therefore did not contribute to differentiation between the person of political ruler and the abstract idea of state.

56 Khakhordin (note 53), 226.

57 E. g., Mikhail I. Baitin, O poniatii gosudarstva [About the Concept of State]. *Pravovedenie* 3 (2002), 4–16.

person of an official".[58] It implies that the state power is nothing else as a will to power [*vlastnaia volia*] carried out by high officials and unthinkable without being personified by these officials.[59]

One can argue that in the contemporary Russia there is still no clear distinction between the historical pattern of "good tsar" (president or whoever be the supreme political ruler[60]), on the one hand, and the abstract idea of the state (understood as a political institution which can be detached from the person of sovereign, on the other. In a 2007 PhD dissertation, its libertarian author divided between two types of concept of state: authoritarian and liberal ones. According to the former, the state is tantamount to the power of political rulers, while the latter supposes that state power is distinguished from the power of political rulers. He concluded that the latter type of conceptualization of state is omnipresent in the Russian (Soviet) legal scholarship until now.[61] Furthermore, he contends that the Russian term "gosudarstvo" suggest that, unlike in the Western legal tradition, there is no clear demarcating line between "state" as a system of institutions and "state" as a bearer of supreme political will. In this reading, the legal is unavoidably subordinated to the political.

This linguistic perspective unveils one of the structural regularities (or problems) of Russian political system which has never attempted to secure institutional autonomy of the state. This situation has a strong impact on different sides of social life, including the law-application. In this Russian context, the positivist dogmatic expression "will of the state" gets a verbatim representation, being personified by the will of political rules. Here, the "state will" is not simply a figure of speech (a point of imputation, in Kelsen's formulation) as in German or French jurisprudence. Russian (and previously, Soviet) judges are trained to execute the will of the state understood as the will of those who possess the state power or control its exercise. The 'telephone law' in the Soviet Union functioned as a tool to fill this gap between normativity and facticity: a *partkom* official informing the judge what the "state will" would mean in a particular case, no matter what is commanded by the letter of the law.[62] These mechanisms justified switching from the normative mechanism in mundane cases to "manual control" (*ruchnoe up-*

---

58 Veniamin E. Chirkin, *Publichnaia vlast'* [Public Authority]. Iurist, Moscow (2005), 16.

59 Veniamin E. Chirkin, *Elementy sravnitelnogo pravovedeniia* [Elements of Comparative Law]. IGiP RAN, Moscow, 2005.

60 Sociological polls invariably show that Russians still tend to identify the "strong state" with strong political leader. E. g., Aleksei Levinson (2018), *Prezident kak universalnaia tochka otscheta* [The President as the Universal Reference Point] https://www.levada.ru/2018/02/09/prezident-kak-universalnaya-tochka-otscheta/

61 Ilya M. Sokolshchik, *Poniatie gosudarstva v teoreticheskoi positivistkoi iurisprudentsii v Rossii (konets 19th – nachalo 20th veka)* [The Concept of State in the Russian Theoretical Positivist Jurisprudence in the End of the 19th and in the Beginning of the 20th centuries]. IGP RAN, Moscow, 2007.

62 Alena Ledeneva, Telephone Justice in Russia. *Post-Soviet Affairs,* 24, 4 (2008), 324–350; Kathryn Hendley, Telephone Law and the 'Rule of Law': The Russian Case. *Hague Journal on the Rule of Law* 1, 2 (2009), 241–264.

ravlenie, as opposed to general norms) in high-profile cases. It implied that unless the judge is informed otherwise by state officials, she has to decide the case as if the letter of the law coincided with the political will and constituted "the state will".[63]

5. The Concept of Human Rights

Despite human rights are proclaimed to lie in the foundation of Russian constitutional order (Arts. 2, 18 Constitution), a significant number of Russian authors are skeptical about real binding force of human rights and consider them as irreconcilable with the Russian mentality where allegedly prevail conservatism and communitarianism.[64] One of the leading Russian legal philosophers, Professor Valentina Lapaeva, concludes that the idea of human rights is not based on Russia's historical experience, but represents an artificial intellectual construct with no concrete bearing for legal regulation.[65] Another contemporary Russian scholar insists that "Russian mentality inadequately perceives the values of the legal culture, alienates itself from this culture and from universal values and principles such as inalienable human rights, legal autonomy of individuals within legal community, prevalence of law over the state".[66]

The concept of human rights has been rarely mentioned by Soviet legal scholars. For the most part, such mentions were intended for criticism of Western democracies for their "legal hypocrisy" in blaming the USSR for the lack of civil liberties.[67] Illustratively, in 1977 the CPSU circulated among Soviet ambassadors an instruction how to downplay narratives about human rights – diplomats were instructed to utilize other notions such as "rights of toilers" or "rights of citizens" and to argue that Soviet

---

63 Another question might come – whether this system can still be qualified as "legal". But this question would inevitably lead to value judgments (or to a priori constructions about what is "true nature" of law) and will not be discussed here.

64 E. g., Boris S. Ebzeev, *Lishnost' igosudarstvo v Rossii: vzaimnai aotvetstvennost' i konstitutsionnye obiazannosti* [Individuality and State in Russia: Mutual Responsibility and Constitutional Duties]. Norma, Moscow, 2007; Yurii A. Chernavin, Razvitie institutapra v cheloveka v Rossii: filosofsko-pravovoi vzgliadna na problemu [Development of the Institution of Human Rights in Russia: A Philosophical and Legal Estimation of at the Problem]. *Lex Russica*: 6 (2011), 7–15; Anton A. Vasiliev, Kontseptsiia pravo obiazannosti v rossiiskom konservatisme [The Conception of Law-Obligation in Russian Conservatism]. *Vestnik Moskovskogo universiteta. Pravo*: 5 (2013), 38–47.

65 Valentina V. Lapaeva, Tipy pravoponimaniia: pravovaia teoriia i praktika [Types of Understanding of Law: Legal Theory and Practice]. RAP, Moscow, 2012 p 316. See also: Valentina V. Lapaeva, Formirovanie doktriny zashchity prav lichnosti kak aktualnaia zadacha teorii prava [Formation of a Doctrine of Protection of Individual Rights as the Actual Task of Legal Theory]. *Rossiiskoe pravosudiie*: 4 (2006), 14–30.

66 Rustam S. Bainiiazov, Pravosoznanie i rossiiskii pravovoi mentalitet [Legal Consciousness and Russian Legal Mentality]. *Pravovedenie* 2 (2000), 31–40, at 39.

67 Vagram R. Davtian, *Ideia prav cheloveka v sovetskoi iuridicheskoi nauke (1946–1991)* [The Idea of Human Rights in the Soviet Legal Science], *PhD dissertation*. RANKHIGS, Moscow, 2011.

law cannot be evaluated against the backdrop of the Western understanding of human rights.[68]

Practically, human rights were mostly employed by Soviet legal theory for propaganda purposes abroad, while in the "local market" Soviet lawyers utilized other terms such as fundamental, constitutional, or civil rights.[69] As a matter of fact, Soviet legal theory was not prepared (neither ideologically nor methodologically) to accept the priority of human rights.[70] Only in the years of *Perestroika*, the first book appeared in which several Soviet legal scholars attempted to formulate a "socialist conception of human rights".[71]

On the one hand, Soviet theory definitely prioritized collective rights and asserted that there can be no real contradiction between individual and collective rights. Speaking before the UN General Assembly in 1951, Andrei Vyshinsky, – Stalin's general attorney and the leader of Soviet legal theory, – insisted on this point claiming that the socialist society can be compared to one collective man.[72] His message was that Soviet citizens by default cannot have any interests contradicting those of the state: individuals may take use of their rights only insofar as their exercise does not deviate from collective interests. No matter if these liberties are established in constitutional and statutory law, they are valid only under condition that there is no contradiction to the public (collective, social) interest, formulated by the state. In line with this *Weltanschauung*, Soviet lawyers underplayed the value of individual (civil, political) rights

---

68 Protokol No.56 (19.05.1977) of the Politburo of the CPSU "O bukazanii sovetskim poslam v sviazi s shumikhoi na Zapade po voprosu o pravakh cheloveka" [About Instructing Soviet Ambassadors in Connection with the Ado in the West Concerning the Question of Human Rights], available at http://www.bukovsky-archives.net/pdfs/dis70/pb77–2.pdf

69 E. g., Anatoly P. Movchan, *Mezhdunarodnaia zashchita prav cheloveka* [International Protection of Human Rights]. Gosiurizdat, Moscow, 1958; Vladimir A. Kartashkin, *Mezhdunarodnaia zashchita prav cheloveka (osnovnye problemy mezhgosudarstvennogo sotrudnichestva)* [International Protection of Human Rights (The Main Problems of Cooperation between States)]. Mezhdunarodnye otnosheniia, Moscow, 1976; Viktor M. Chikvadze, Mezhdunarodnye aspekty problem zashchity prav cheloveka [International Aspects of the Problems Concerning Protection of Human Rights]. In: *Prava cheloveka: problemy i perspektivy*. IGiP RAN, Moscow, 1990.

70 Elena A. Lukasheva, Krizisnaia situatsiia v sovremennom obshchestve i prava cheloveka [The Situation of Crisis in the Contemporary Society, and Human Rights]. In: *Prava cheloveka: vremia rudnykh reshenii*. IGiP RAN, Moscow, 1991, at 51.

71 Viktor M. Chikvadze, Elena A. Lukasheva, *Sotsialisticheskaia kontseptsiia prav cheloveka* [A Socialist Conception of Human Rights]. Nauka, Moscow, 1986. Nonetheless, this was a particular "conception of human rights" which underscored its distinction from bourgeois conceptions along the following lines: class interpretation of human rights, their changeability depending on class formations, reciprocity of rights and obligations, legal effect of human rights posited by the state only, and dependence of extent of protection of human rights on reasons of internal and external policy (Ibid., 6–11). That is why legal effect of the 1948 UDHR was called into question – this Declaration was written mainly under the influence of Western countries and therefore reflects "the class nature of their legal orders" which is not directly applicable to the USSR (Ibid., 208).

72 Andrei Ya. Vyshinsky, *Voprosy mezhdunarodnogo prava i mezhdunarodnoi politiki* [Questions of International Law and International Politics]. Gosiurizdat, Moscow, 1951, at 383.

stressing that legal effect of these rights is derived from the normative force of collective interest. Surely, only in the way as this interest was defined by the CPSU.

On the other hand, the USSR resisted the "bourgeois conception of rights" by putting social and economic rights on its agenda and considering them as "the most fundamental human rights that have priority in the system of rights".[73] The logic of this approach implied that "freedom from oppression, exploitation and poverty is the foundation for other basic rights and freedoms. These rights and freedoms have incomparably higher relevance for the people than any formally legal equality which, in case of continued exploitation of man by man, gives to minority the freedom to enslave the majority and makes senseless all bourgeois declarations about human rights, freedoms and equality".[74] This mythologization of collective rights[75] still holds sway in Russian law, and in practical terms suggests that individual rights shall be surrendered if they conflict with the collective ones (e. g., if a gay parade endangers moral well being of the community).

This collectivist perception of rights is normatively protection in Russian law in two main aspects. The first one gives the priority to the state commands over individual rights. In case of a conflict between individual rights and state interests, these latter shall triumph, because they embody the collective interest. The image of the almighty Leviathan is appropriate to illustrate the relationship between the state, its law, and individual rights: as this Russian context was illustrated in the 2014 film of Andrey Zvyagintsev, "Leviathan".[76] The second aspect justifies exceptions when the formalist reading of constitutional or statutory laws is suspected to go against collective interest formulated by the state will.

At the first glance, this logic repeats the sociological theory of law asserting that the posited law is only a reflection, more or less successful, of factual social conventions, so that this posited law is valid only so far as it does not contradict the spontaneous law which factually governs the social life. This logic fitted well Marx's philosophical doctrine and encouraged such anti-positivist theories as those by Evgeni Pashukanis or Mikhail Reisner, which thrived in the Soviet legal scholarship in the 1920s. However, as shown in Section 2 above, in the course of the further development of Soviet law, the anti-formalism has been gradually squeezed out of the Soviet legal theory, and Marx's

---

73 *Sostialnye prava i garantii trudiashchikhsia pri sotsialisme* [Social Rights and Guarantees for Workers under Socialism]. Moscow: Profizdat, 1983, 55.

74 Nikolai M. Minasian, Yurii M. Prusakov, Eduard A. Pushmin, *Sovetskoe gosudarstvo i mezhdunarodnoe pravo* [Soviet State and International Law]. Mezhdunarodnye otnosheniia, Moscow, 1967, at 289.

75 Elena A. Lukasheva, *Mifologizatsiia politicheskoi i pravovoi zhizni* [Mythologization of Political and Legal Life]. Norma, Moscow, 2015.

76 The action of this film narrates about a man whose house and land plot were illegally seized by the mayor of his town to build a church there. When this citizen tries to oppose this illegal appropriation, he is confronted to the corrupt local civil and judicial authorities which, blessed by the clergy, destroy him morally, legally, and financially.

dialectic of basis and superstructure has been carefully reconsidered according to the statist paradigm of law.

With this, human rights were pragmatically accepted by Soviet legal theory to criticize capitalist and other "wrong" states in which liberal ideals do not correspond to the reality of segregation and other reprehensible practices. But there was no room for these rights in the socialist state: the state will, informed by the correct ideology, faultlessly uncovered and implemented these realities in Soviet law. Extrapolating this line of reasoning on the contemporary Russian law, one can similarly argue that there is no practical or normative need for citizens to revendicate their human rights, if the state – in the view of the collective interest and national traditions – resists to recognition and protection of these rights. In this aspect, revindication of human rights can be easily seen as a challenge to the law-and-order (*pravoporiadok*) which is secured by the state will and which can stand only if this will be unavoidably obeyed.

6. Conclusion

The perspective intimated in this paper, can confirm the performative contradiction between the normatively unlimited power of political leaders, and their formal obligations to abide by the law (*zakonnost'*) and to be guided by human rights. In fact, "state will" serves as a counterweight to normative force of human rights and legitimizes prerogative powers of political leaders who may decide above both the law and human rights. Conventional meanings of "state" and "law" in Russian law create for Russian law officers the conceptual ground for resisting normative constraints of the human-rights law. If human rights considered from this perspective, there is little room, if any at all, for them as supranational or suprastatutory restraints on state authorities. *Ius resistendi* and other ideas about the right to contest the binding force of unjust state commands or resist them cannot be coherently framed into this logic.[77] Furthermore, no rights can be conceived as "rights against the state" – otherwise, they would lose their qualifier of "legal".

At the same time, the concept of law (*pravo*) has an ambiguous place in Russian legal vocabulary and unclear normative implications. In the legal doctrine, *zakon* as a command of the state is often prioritized to *pravo*, so that the supreme principle for judges and other law-officers is that of legality (***zakon****nost'*) and not that of lawfulness (***pravo****mernost'*). This conceptual framework cannot but have a significant impact on

77 It is not a coincidence that the *ius resistendi* is continuedly condemned by Russian legal scholars as incompatible with the basic principles of legal theory and as a pretext to "color revolutions" sponsored by the West. E. g., Georgii B. Romanovskyi, Pravo na vosstanie i 'tsvetnye revoliutsii' v sovremennom mire [The Right to Resistance and 'Color Revolutions' in the Contemporary World]. *Rossiiskii zhurnal pravovykh issledovanii* 1:6 (2016), 65–72.

how lawyers interpret abstract codified legal texts and connect them with factual social situations.

The literal meaning of Art. 18 of the RF Constitution apparently contradicts this framework, according to which no rights can exist against the sovereign's will. In this context, human rights hardly can work as "rights against the state". This theoretical scheme can help to insulate the political power from criticism from the inside and the outside, to protect the national law and courts from normative concurrence with international law and supranational courts. However, it does not mean that the realist account of Russian constitutional law must be unreservedly accepted.

The conventional scheme for explanation of the jurisprudence of the RF Constitutional Court in the Western political science is that of politicized justice: constitutional judges subserviently implement the political will of the rulers. But it is not only the political justice which once characterized Soviet law and nowadays crept in post-Soviet Russian law that can serve for understanding the difference. There are certain conceptual frameworks that prefigure interpretation of human rights in Russian legal community, these frameworks being created in the course of development of legal culture, institutions and legal vocabulary.

Professor Angelika Nußberger notices that in Russia "human rights violations are caused by a behavior that is based on the idea of the uncontrollability of the State and the complete submission of the individual".[78] This vicious circle (conservative mentality stirs skepticism about human rights and justifies the limitless power of the state, while this unlimited power strengthens human-rights skepticism in the mind-sets of the population) seems to one of the major challenges to Russia's democratization.[79]

As a matter of fact, "normativity is not a natural product of language, which can be extracted like mineral resources. Language is a phenomenon of market, and its legitimacy cannot be obtained without additional efforts".[80] First of all, these efforts imply clarifying the legal lexicon and its intellectual background, as proposed in the structural theory of law. Such analysis can reveal important dimensions of the conceptual background which informs judges and other law officers about the real and linguistic data (*Realdaten, Sprachdaten*) for adjusting constitutional texts to the linguistic and epistemic frameworks of the legal community and of the society in general. The present paper is a modest attempt to outline some methodological ideas for analysis of this background.

---

78 Angelika Nußberger, The Reception Process in Russia and Ukraine, in: *A Europe of Rights: the Impact of the ECHR On National Legal Systems,* eds. Helen Keller and Alec Stone Sweet. Oxford: Oxford University Press, 2008, 450.

79 Jonathan Weiler, *Human Rights in Russia: A Darker Side of Reform*. Boulder, Colo: Lynne Rienner Publishers, 2004.

80 Ralph Christensen&Hans Kudlich, Die Auslegungslehre als implizite Sprachtheorie der Juristen. *Archiv für Rechts- und Sozialphilosophie* 88 (2002), 230–246, at 237.

This analysis does not intend to propose any practical methods for resolving the normative contradiction between the Russian "law in books" which proclaim human rights to have the supreme value, and the Russian "law in action" which subordinates human rights to collective interests and to the state will which represent these interests. Employing here the perspective of the structural theory of law is not aimed at criticizing Russian law or its conceptual background, but rather intends to better understand the interplay between judicial decision-making and the concepts which structure the conceptual frameworks of Russian law.

Mikhail Antonov
National Research University Higher School of Economics (Saint Petersburg, Russia). Law Faculty. Department of Theory and History of Law and State. Professor. The article has been prepared during a fellowship at the Institute of Eastern European and Comparative Law of University of Cologne with the financial support of the Alexander von Humboldt Foundation.

Address: mantonov@hse.ru