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CONSERVATIVE PHILOSOPHY AND THE DOCTRINE OF SOVEREIGNTY: A NECESSARY CONNECTION?

This article explains the philosophical sources of contemporary Russian conservative philosophy, which is blended with exceptionalism, the Westphalian conception of sovereignty, the negation of the universality of human rights, and which is based on the positivist precepts of the prevailing legal thinking in Russia. This conservative ideology is not new, as similar conceptions have been developed in Russian intellectual history in the past.

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Introduction

Under the presidency of Medvedev, the word “modernization” became one of the hobbyhorses of Russian politicians who insisted that Russian society, polity and economics have to be modernized if Russia wants to stand competition with the West.¹ At the same time there were no illusions among the Russian leadership that Russia would ever become a part of the European Union, enter the NATO, or in any way accede to the political or military structures of Western civilization. This logically led to a sense of vulnerability; to the fear that the militarily and economically more powerful West would strip Russia of its territories and/or resources. This challenge was similarly perceived during the years of Peter the Great at the turn of the 17th–18th centuries, and in the aftermath of the Communist rule at the end of the 20th century. To accept the challenge “to change or to decay”,² Russia nevertheless could not follow the adaptation scenario of other Eastern-European countries—to endorse the Western standards and values and to transplant the Western institutions.³ To avoid “decaying”, the country had to change not only its political institutions, but also the philosophy underpinning them—the complicated combination of ideas, values, and conceptions which had been developed throughout its long history and which were, and still are, largely incompatible with the liberal philosophy on which Western political institutions are based.⁴

Will this lead to a loss of national identity? One conviction that is frequently repeated by many thinkers (both in Russia and abroad) is the idea that the biggest country of the world cannot survive without strong statehood and strict centralization⁵ (we will return to this point). From this standpoint even a slight decentralization might mean the loss of national identity and consequently the demise of Russian civilization that traditionally, since the Great Schism of the 11th century, constructed itself in contradistinction to the West.⁶ By this logic, the modernization of Russia, if understood as Westernization or Globalization, would be a lethal threat to the national identity which is often understood exactly as a religious or mental identity, and as a continuation of the spiritual opposition to the West.⁷ For many this spiritual opposition also implies the incompatibility of social and political structures.

This style of exceptionalism unsurprisingly was, and is, combined with criticism of Western political institutes. As early as the 16th century Ivan the Terrible famously reproached Elisabeth I, saying that her rule was distorted because of the English parliament and insisted that absolute autocracy—the only correct political form—survived only in Russia.⁸ This logic has been repeated many times since then, and the Russian proponents of liberal democracy (usually considered as mediums of cosmopolitan or multiculturalism—ideas incompatible with the prevailing discourse about national identity⁹) have to struggle against this entrenched exceptionalist tradition. This tradition has resulted in a more or less coherent ideological

strategy, which can be referred to as “Russian political neo-conservatism.”¹⁰ In the present article we consider the connection between this political trend and the prevailing legal thinking, showing the implications of such an intellectual symbiosis for the development of Russian law. The cornerstone of this thinking is, as we demonstrate, the concept of sovereignty which traditionally serves in Russian legal education as the ideological, conceptual and philosophical background for understanding law, its substance and machinery. On the other hand, this concept has a certain affinity with the concept of autocracy which is sometimes described as inherent to Russian political thinking¹¹, and both have common roots in the philosophy of conservatism.

1. Russian legal order and the logic of human rights

After the overwhelming fascination with the Western style of life in the years of perestroika, there were clear signs of changing attitudes of the Russian leadership towards Western liberal ideals and values, and even some harbingers of a new ideological curtain.¹² This happened long before the Ukrainian crisis, which only revealed the real extent to which Russian political elites¹³ oppose the West; the construction of their political identities involves this antagonism.¹⁴ At the same time, to compete with the West, Russia has to constantly modernize its military, economic, political and other technologies, which is impossible without the corresponding intellectual and cultural shifts. To cause such shifts the authorities ordered beards to be shaved off in the years of Peter the Great; but could they endeavour to go further, to transform the traditional political mentality which cherishes absolute autocracy? Such experiments undertaken in the first decades of the 20th century led to catastrophic consequences in 1917, and this reminiscence hung in the air in the years of perestroika when statehood was on the brink of extinction.

Dealing with the challenge “to change or to decay”, political rulers in Russia therefore did not need to undertake the relevant political changes because of a fear of political unpredictability, this fear being shared both by the government and the masses. To reinforce and to legitimate its rule, the government needed to show that it has the country under control, that it can implement modernization and at the same time keep political forms intact. The task was substantially the same as in the imperial or the Soviet epochs, but it required a fundamentally renewed rhetoric.¹⁵ The basic assertion of this new official rhetoric, explored below, resides in the negation of the universality of whatever humanitarian or political standards which claim to take precedence over positive rules of national law. Pretensions to universality are repudiated because they are considered to be irreconcilable with the nature of state organization as a sovereign entity and with the nature of law which is described as a product of the sovereign will (of the people or of their representatives). Surely, we are aware of similar trends in the West

where the German PEGIDA, the French Front National or English UKIP represent marking examples of this fear of the Other, but we will leave aside comparative analysis in this paper.

We designate this style of rhetoric on human rights as conservative not only because of its affinity with other postulates of the conservative philosophy (which is the natural enemy of cosmopolitanism), but also because it promotes the values of tradition and ritual at the expense of the values of autonomy and personal choice, and thereby makes collectivity triumph over individuality. Utilizing the term “conservatism”, we admit that it can have different meanings and connotations depending on the philosophical or political context. Here, we use it in its focal meaning—as a set of ideas which are aimed at retaining traditional social institutions and at their legitimization. The combination of cultural and philosophical conservatism with exceptionalism in human rights issues already provides an intellectual stronghold against any criticism of the existing regime from inside or outside the country. The third element which reinforces this construction is the idea of sovereignty understood as absolute supremacy (*puissance absolue*, according to Jean Bodin) in policymaking and in lawmaking (so called the Westphalian model).

From a legal perspective this isolationist rhetoric implies the dethronement of human rights which, in contemporary Western legal philosophy, are supposed to be universally valid and to concern every human being regardless of nationality or culture. In the words of the Universal Declaration of Human Rights 1948: “All human beings are born free and equal in dignity and rights”. In this and in other declarations human beings are seen as autonomous individuals “endowed with reason and conscience”, living free and pursuing their happiness independent of any state recognition or empowerment. The state has the responsibility to recognize and to protect these rights, and it has no choice. From this perspective individuality prevails over the collectivity—this basic point of liberal political philosophy has been attacked relentlessly many times by conservative thinkers from Plato to Hegel,¹⁶ and also by a large number of influential Russian conservative legal or social philosophers of the first decades of the 20th century—Ivan Il’in, Nikolai Berdyaev, Lev Tikhomirov and many others who today are enthusiastically cited by Vladimir Putin and his government.

However, liberal philosophy doubtlessly inspired the 1993 Russian Constitution. The Constitution explicitly considers human rights and freedoms supreme values (Art. 2) which “determine the meaning, content and application of the laws, and the activities of the authorities” (Art. 18). Unfortunately, these liberal philosophical stances mostly remain “law in books” never becoming “law in action” insofar as this wording stumbled at the unpreparedness of most lawyers to accept that human rights may have a different source of validity than their creation or, at least, recognition by the state.¹⁷ The acceptance of this liberal stance would mean that in the final reckoning it is not the state and its laws but some supra-state (transnational, international or

other) rules or principles which must be observed and implemented by judges and other legal actors. This assertion is hardly compatible with the legal positivism (naturally, here we mean the “classical” positivism of John Austin or Karl Bergbohm—the positivism that is generally taught in Russian law schools) which considers the will of the sovereign (be it state, people, or nation) to be the supreme source of the validity of legal rules, and which rules out the idea of supremacy of the international law.¹⁸

This problem of the gap between the formal and the “living” Constitution¹⁹ touches on a very contentious point—the relation between domestic and international law, and consequently, the place of *ius cogens* in the Russian legal order (first of all, of human rights). This issue has provoked and is still provoking many virulent discussions between Russian lawyers.²⁰ Without going into details, the difference between the textual wording of the Russian Constitution (Art. 15, par. 4) which is based on the monist conception (i.e. it puts international rules and principles above state law) and the real law-enforcement practices, which in fact, tend to the dualist model (international rules and principles acquire validity for the state only after they have been explicitly incorporated into domestic law). This divergence was clearly demonstrated in the polemic of the Russian Constitutional Court against the ECtHR which several times tried to impose on Russia the obligation to change its laws or to provide a new interpretation which, in opinion of the Strasbourg Court, would better match the ECtHR.²¹

This discrepancy was present in the relations between the ECtHR and the Russian Constitutional Court long before the mentioned Markin-2 case.²² About ten years ago the Chief Justice of latter court, Valerij Zor’kin, rejecting the ECtHR criticism, reiterated that there are certain “limits of concession”, certain “red lines” which may not be crossed—these lines demarcate the stronghold of Russian sovereignty.²³ Any discussion which does not take into consideration these lines contradicts the rules of “practical discourse” which are accepted in the Russian legal order and which are constitutive for its survival. In fact, this exceptionalism (which naturally can be found not only in Russia but also in other European countries) leads to deep a mistrust of cosmopolitan liberal conceptions, such as the universality of human rights, and their absolute binding force.²⁴ On the other hand, the presupposition of the supremacy of human rights necessarily brings about the reconsideration of the absolute character of sovereignty which analytically cannot be thought of as absolute and has to give the way to human rights. This approach introduces ideas about shared or multilevel sovereignty and questions the possibility of overriding state sovereignty when necessary to protect human rights (“the responsibility to protect” can be cited here as a telling example).²⁵ Reconsidering the limits of their sovereign rights (with the consequent shrinking of these limits) is not easy even for developed Western

democratic states,²⁶ let alone post-Soviet Russia with its institutional inclination to autocracy—a country for which this challenge seems to be one of the most central and existential.

There is one more aspect to be examined in connection with the place of the conception of sovereignty in Russian legal education—that of the prevailing legal dogma. Basically, Russian legal science and legal education are rooted in the positivist conceptions of the 19th century. In these conceptions the syllogistic model of legal reasoning dominates, which sees the judge as the interpreter of sovereign will encoded in the texts of statutes. This perspective did not considerably change after 1917 and the new regime kept applying the legal theory of the previous regime with almost no modifications. This was quite understandable—law and state were conceived by Bolsheviks as tools for class oppression, so that in a classless socialist society they were expected to wither away²⁷ and there were no sound reasons to change them on the way to this bright future. As a result, Soviet jurisprudence had only the task of the exegesis of legal constructions and schemes in the light of Marxist-Leninist philosophy. There were no substantial contradictions with the pre-revolutionary legal dogma, as formal constructions of *Rechtswissenschaft* could be filled with any content at the will of sovereign; and the leaders of Soviet jurisprudence chose to keep these schemes intact.²⁸ It comes as no surprise that the Austinian conception of law as the set of the sovereign's commands remained as the foundation of these schemes. The idea that lawyers are here only to interpret the will of sovereign perfectly matched the authoritarian regime which had no incentive to change it, except in the reinterpretation of its philosophical underpinning in the Marxist terms. Before perestroika began, there had been almost no diversity in Soviet legal theory and lawyers shared almost the same set of premises about law, diverging however in less significant details.²⁹ After the 1970s Marxist lawyers discussed the “narrow” and “wide” approaches to law. Even if this had been the most impressive theoretical discussion in the Soviet jurisprudence, it did not go beyond the philosophical premises of Marxism and of first legal positivism³⁰.

In the early 1990s Russia faced a period of anarchy when state law was one of centripetal forces holding society together and opposing the centrifugal forces, which had the same conceptual basis as the ideas of soft or transnational law. The idea of legality in this context mostly designated fidelity to statutory law and had no connotations typical of the discussions about “statutory lawlessness and supra-statutory law” which followed the break-down of the Nazi-regime in Germany. The worst legal order is better than no legal order whatsoever—this Hobbesian axiom was the general conviction shared by most of the Russian population in general, and the legal profession in particular, during and after the troublesome years of Yeltsin's presidency. State law and the idea of sovereignty as its normative background were thereby

legitimized, and at the same time ideas of legal pluralism or transnational law were discredited for years to come.³¹

One of the intersections of the centrifugal and centripetal forces was the issue of federalism: the strong centralized model had been imposed since the first presidency of Putin and provoked malcontent from the partisans of the decentralized model. Both models were based on the idea of sovereignty, but in different interpretations: the former extolled Westphalian sovereignty, and the latter praised shared or multilevel sovereignty. For several years the Russian Constitutional Court has been engaged with these controversial debates, maintaining the integrity of the country with the reference to national and popular sovereignty and finally confirming the legitimacy of the Westphalian model and the necessity of protecting national identity³². According to this reasoning, the people as the supreme bearer of sovereignty entrust to that sovereignty to the legislators to create laws, and any attempt to override national laws or to impose any supra-statutory criteria of validity for domestic laws would be an encroachment on popular sovereignty³³ which would be intolerable.

Popular sovereignty has, in Kelsenian terminology, the importance of a basic norm of the Russian legal order, especially as—according to the official constitutional doctrine—the validity of the 1993 Russian Constitution is derived not from the previous Soviet constitutions (or the Basic Laws of the Russian Empire), but from the direct mandate of the people which was expressed in the referendum of 12 December, 1993. Therefore, any criticism of Russian legislation can potentially be interpreted as undermining the authority and the binding force of the Russian legal order.³⁴ If we extrapolate this logic to the field of human rights, they, as any other legal rules, principles, or values, derive their binding force from the sovereign will of the people (even if this will theoretically is doomed to remain a fiction in the Kelsenian sense). Human rights cannot legally bind this will, unless the very scheme of legal thinking is changed and the validity of legal rules should be derived from international law and its basic norm. Or, referring back to Kelsen, we have to postulate two basic norms, one for domestic and one for international law, and plead for a monistic conception³⁵ which is not acceptable for most Russian lawyers (see above).

In the logic of the dualist scheme largely adhered to by Russian officials, if human beings have some rights inherent from the moment their lives begin, it implies that, first, these rights are incorporated into the state legal order and only due to this fact are the rights legitimated and validated as *legal* rights. This conception of human rights matches both the Westphalian conception of sovereignty (as the state ultimately decides which rights its citizens have) and the philosophy of conservatism (the idea that each state endorses only the rights it finds admissible, for its legal order repudiates the universalism of human rights and refutes the cosmopolitan idea

of natural rights identical for all human beings).³⁶ If each country, each culture, and each civilization have their own standards of legality and legitimacy, they are endowed with the unlimited scope to decide to what extent they would or would not incorporate into their legal orders (i.e. validate) certain values and norms which pretend to be universally recognized. These conclusions, in their turn, seem to be rooted in a particular social philosophy which relies on a Hobbesian picture of society in *bellum omnium contra omnes*, where dispersed individuals can be tamed and peace can be secured only by an almighty Leviathan.³⁷ If the state falls apart, it will lead to destruction of the society.³⁸

According to the classical doctrine of legal positivism which is largely shared by top Russian judges and politicians (the same can be said also about the majority of ordinary lawyers as the entire system of legal education is still based on simple positivism *à la* John Austin), there is nothing above the will of the sovereign. The cornerstone of this philosophy is the idea of sovereignty understood in accordance with the classical Westphalian model. According to the doctrine of the Russian Constitutional Court, sovereignty resides in popular will which therefore is a residuum of national values and the basis of statehood, so that abandoning sovereignty wholly or partly will lead to the degradation and destruction of the nation. This doctrine, bearing a strong resemblance to the Hegelian deification of statehood, is widely supported by key politicians, legislators and senior judges in Russia and, in turn, serves as an essential part of the emerging ideology described above.

2. Philosophical background

There are three main intellectual blocks which underpin this ideology, among them the concept of Westphalian sovereignty, the idea of the messianic role of the Russian people, and strong positivism in understanding what law is (strong in the sense of discarding any necessary connection between the validity of law and its justification). Here “messianic” does not have a solely religious connotation and designates also exceptionalism, cultural or historical exclusivity of national development.³⁹

Historically, these elements were also assimilated and mixed into philosophical conceptions in other cultures and nations, so the Russian case is not unique from the comparativist point of view. But historically each context gives rise to different forms and facts, so that each historical phenomenon is inimitable and cannot be equated to any other phenomenon. That is why we will not try to draw any parallels between the contemporary Russia and Germany of the 1920s, even if one can find certain similarities in the respective situations.⁴⁰ Also we are aware that Western political philosophy was and still is abundant with various conservative conceptions (de Maistre, Burke, or Fukuyama) which have an affinity with Russian

neo-conservatism and sometimes explicitly serve as a source of inspiration for Russian neo-conservatives.⁴¹ Here an interesting comparative analysis can be made, but this is not goal of the present paper which is limited to the general characteristic of this ideological construction and its intrinsic connection with the prevailing legal mentality.

The rhetoric of Russian politicians and the court argumentation in some landmark cases (especially in those which provoked a sharp criticism of Russia in the West) gives us ground to suppose that there are some important philosophical discrepancies between how law and its machinery are understood respectively in Russian and in the Western legal culture.⁴² Here we cannot go into the question of whether Russia is a part of this legal culture or is a separate culture—anyway, if Russia belongs to the Western culture, it does not wholly and entirely.⁴³ If generalisations in this regard are admissible, they are never able to encompass fully the multifaceted reality. But this does not exclude insights into certain concrete spheres where court practice can be interpreted with reference to some key aspects of the legal mentality. Particularly, we have analysed this rhetoric in several dimensions, including the court argumentation in cases connected with protection of religious feelings and with the execution of foreign legal decisions in Russia.⁴⁴

It is no coincidence that the government (which is to be understood not only as the bearers of power competences but also those who elaborate the ideological background for them⁴⁵) on different occasions referred to and still are referring to a clearly defined set of ideas: sovereignty, national identity, traditions, law-and-order.⁴⁶ These ideas are conceptually interconnected in the sense that starting from any of them would easily lead to postulating all other. For example, if the people do not want to lose their identity, they must maintain their statehood, and for this, protect their traditions, otherwise the state will lose its sovereignty and the people will sink into anarchy. This logic in many parameters is congruent with the anti-globalist stances reiterated by some groups in Russia and in other countries; it is quite understandable why the both find their last intellectual foundation in the philosophy of conservatism. Generally, this philosophy maintains tradition, rejects universalism and does not believe that people can secure law-and-order without a strong state.⁴⁷

For lawyers, this conceptual framework implies several important conclusions: there are no universal humanitarian or political standards which can serve as the basis for the evaluation and possible criticism of national legal orders; attempts to reassess domestic laws in the prism of any supranational criteria must be dismissed as devoid of legal effect (these attempts can be perceived of only as moral criticism without legal consequences). So, when Russian authorities are criticised by NGOs or by EU organisations for not observing proper purposes f human rights, for not “balancing rights and values” or for ignoring “universally accepted humanitarian

standards”, this criticism is simply dismissed as irrelevant, as dealing with morality or ethics but not with law which is foremost understood as “the command of the sovereign”. The both sides persist in the validity of their basic premises and their reasoning and unfortunately do not perceive or do not want to perceive this fundamental difference between the starting hypotheses. The official Russian position can be described as a consequence of first positivism⁴⁸ which is based on the separation thesis—there is no universal morality and validity (binding force) of law which does not depend on its congruence with any moral standards or statements.

Such logic matches very well the positivist style of legal thinking according to which the state stands at the centre of the legal universe and decides which legal rules will exist and which will not. This positivism does not acknowledge any supra-statutory law (to refer to the famous Radbruch’s article of 1946⁴⁹) capable of superseding the will of the state. The combination of these elements allows the Russian authorities to keep argumentative coherence when dismissing Western moralising about democracy and human rights. This logic can be reduced to the following statement: We recognize only the formal rules we have created or approved, and we do not consider ourselves to be bound by any extra-legal (non-positive) values to which we have not conceded our sovereign will. Seemingly, there are debates between Russian and Western politicians and lawyers, but in reality there is only misunderstanding, as they think about the humanitarian law (human rights) in different modalities. This “conceptual” dimension of Russian conservatism turns out to be completely congruent with other dimensions: “cultural” conservatism seeking to protect long-established values against new practices; “religious” conservatism fostering traditional beliefs and denominations and banning new cults and creeds; “political” conservatism which dismisses idealist policies and favours *Realpolitik*. All this serves to create a particular image of Russia in opposition to the West and its liberal values.⁵⁰

The Russian political elite do not see themselves as continuators of Brezhnev or Stalin; they do not revert to the concepts of communist ideology or to the methods of the planned economy, and at the same time they want to act in the style of *Realpolitik*. Their pathos is about the Russia’s people and its history, its traditions, religion and values (attacked by the decaying Western culture), and on the other hand about the true (international) law which is trampled on by double standards and flexible policies of the West. This pathos substantially is close to the traditional philosophy of Slavophiles.⁵¹

The notorious “Russian national idea” often referred to by Putin and his circle (to be noted *en passant* that this circle is not homogeneous and includes several competing ideological groups) and similar ideologems do not necessarily have the objective of establishing a world empire (nor was it the case for Vladimir Soloviev, Nikolai Berdyaev and other prominent Russian philosophers who wrote on this issue) but stand rather for pluralistic world order with

several centres of gravity (political, economical, ideological, etc.) which exclude the very idea of an empire. This aspect of the emerging ideology of the Russian leadership (to wit, the reference to a “national idea” to justify national unity) has been thoroughly examined in various publications in Russia and abroad.⁵² Another aspect has so far attracted considerably less attention, although it is a peculiar trait of this ideology which makes it stand out against the background of other ideologies which appeal to similar metaphysical entities. Along with these references, the ideology in question represents an attempt to formulate a new legal philosophy which is based on classical positivist legal science and which is opposed to “post-positivist” or “non-positivist” legal philosophies—roughly, those which claim that there is a supreme law having primacy over the positive law, that some human rights stand above the command of the sovereign and thereby restrain the sovereign (as compared to the national-socialist ideology, this latter was based on sociological or natural-law doctrines and negated the positivist doctrine as imbued with the spirit of liberalism).

One important aspect here is what can be characterized as the “ambiguity” of Russian cultural attitudes. By “ambiguity” we mean the constant tension between domestic and European values, on one hand, and between messianism and universalism, on the other. This tension systematically re-emerges in Russian intellectual history. On the one hand, the Russian intelligentsia from the time of Peter the Great (or even earlier) wanted their country to be treated as an equal by Western countries, but at the same time they did not want Russia to subscribe to Western cultural, religious, legal or political values. The idea of the protection of Orthodoxy, or the excellence of the tsarist autocracy, or the superiority of Russian culture (the Slavophiles cherishing various forms of communitarianism: *Obzhina, Mir, Vseedinstvo*), which clearly appeared in the famous triad “Orthodoxy, Autocracy, National Spirit” in the 19th century, had no chance of finding its place in the framework of Western liberalism. On the other hand, the intelligentsia glorified the Russian people whose historical mission was on a worldwide scale (e.g. to protect the true Orthodox Christianity or true family values), but nonetheless they rejected cultural universalism or religious ecumenism, praising national specificity and parochialism.

Intellectuals of the grandeur of Vladimir Soloviev—who called for a union of the Russian tsar and the Pope of Rome—usually were not properly understood by their contemporaries. Typically, one of the main Russian Westernizers, the philosopher of the first half of the 19th century, Piotr Chaadaev, was held to be insane because his lack of patriotism, and his great admiration for the West. He regained the favour of the authorities only after publishing “An Apology of a Madman” (1837) where recognized his “grave errors” and explained that Russian autocracy and Orthodox Christianity are of superior value to the Western political structures and religious denominations. In Russian intellectual history no claims to world (political or other)

supremacy have ever been formulated (although not properly Russian, Soviet Marxist-Leninism might be considered an exception here). However, is it possible for Russia to be on a par with the West without sharing the Western values? This question remains one of the basic paradoxes and has incited numerous discussions among Russian intellectuals. It served as a dividing line in debates between the Slavophiles and Westernizers in the 19th century, and today in Russia this question is still a stumbling block in deliberations about the national identity of Russians.

This ambiguity is reinforced through references to sovereignty. Because of this connection, national specificity does not remain a solely philosophical construct with a religious connotation but gains political legitimacy. Any universalism from this perspective thereby becomes an illegal pretension which not only contradicts reality (where there are only particular states, peoples and cultures), but also encroaches on the sovereign rights of the people. Such a conceptual link can serve as a mighty counterweight to liberal ideology and it is no great surprise that partisans of conservatism in Russia reiterate it. This link can be expressed by the following syllogism: Russia shall uphold its traditions and beware of universal values because the state exists insofar as it does not fall under dominance of other states. As a nation cannot exist without a state (conceptually, a nation is understood as a people grown to statehood), the acceptance of universal values implies the end of sovereignty and the perishing of a nation. This philosophical scheme is only one of many possible ways to use the sovereignty argument. We cannot rule out the logic of power relations, the individual pragmatic strategies of political actors, or even the specificity of the cultural mindset of Russians. Nonetheless, this scheme is more apt for an explanation of the Russia-West conflict which today centred around Ukraine. One may persist in explaining this conflict by the malicious intent of the Russian leadership, or by the cultural backwardness of Russians,⁵³ or by other similar reasons—this might be true to a certain extent but such explanations would grow in evident exaggerations. Even accepting these reasons, a philosophical background can be needed to comprehend how they can be entwined into a coherent conception.

Conclusion

We have endeavoured to explain the philosophical sources of contemporary Russian conservative philosophy which is blended with exceptionalism, the Westphalian conception of sovereignty, and which is based on the positivist precepts of the prevailing legal thinking in Russia. Inevitably, it is not a purely analytical question, but also a value question which displays a practical (in the Kantian sense, ethical) dimension. Some twenty years ago Russia reopened itself to the West showing good promise for cooperation or, at least, for peaceful coexistence. Today the country has fallen back to the logic of the iron curtain and pushes the Western

civilization to dangerous confrontation. This is happening not for the first time in Russian history. Along with the communist experiment of the 20th century in Russia, there was the Slavophile philosophy of national messianism in the 19th century and even the medieval conception “Moscow as the Third Rome” (“Two Romes have fallen. The Third stands. And there will be no Fourth”) which asserted that Russia was the only true continuator of Christianity. Surely, some other European nations also have had similar messianic discourses (for example the German idea of *Reich*), but these discourses for them are mostly in the past (even if some would suggest that the EU is a realization of the fourth *Reich*). But for Russia this discourse is still real. Given its long history, it is unlikely to quickly disappear.

Pretending to protect Russian national identity in eastern Ukraine and elsewhere, the Russian leadership is just continuing a conservative trend which has already become manifest in recent years in their maintaining statehood and sovereignty against transnational and supranational standards, in debates with the ECtHR about the “limits of concession” in regard to human rights issues, in protecting national courts from “unfair competition” with Western jurisdictions, in defending traditional religious denominations from the ‘rootless paganism’ of liberal religious freedoms. This conservative ideology is only relatively new, as similar conceptions were developed in Russian intellectual history long ago. The fact that the messianic ideology of Marxism found fertile ground in the Russian mentality was not a coincidence but the result of the close similarity with the ideological postulates sown in the Russian mentality from the Middle Ages. In this sense, Marxist legal philosophy in 20th century Russia can be characterized as a smooth transition from the religious philosophies of imperial Russia. The same transition can putatively also be found in today’s polemic of Russian authorities against Western *mission civilisatrice*.

The image of the decaying West picturesquely portrayed by Soviet propaganda was not in the final analysis its invention—it has already been widely used by the Slavophiles, and similar images of the West have been pictured by Russian intellectuals even since the Great Schism. When Putin and his team invoke Russia’s mission to protect international law and traditional values, they rehash the same old discourse and find an audience ready to support it and to legitimise the authorities. It comes as no surprise that the authorities use this rhetoric to reinforce their legitimacy. According to the Weberian classification of legitimacy types, it can be qualified as traditional legitimacy. But an important point is that this traditionalism adjoins rational legitimacy which promotes respect toward law and rationality, which are conceived of differently than in the West.

¹ Joseph L. Black, *The Russian presidency of Dmitry Medvedev, 2008-12: the next step forward or merely a time-out?* New York, 2014, 98-107.

² This metaphor was suggested in 2012 by Shevtsova and Wood: Lilia Shevtsova and Andrew Wood, *Change or Decay: Russia's Dilemma and the West's Response*, Washington, 2012.

³ The modal verb “can/cannot” indicates here at orientation to legitimate political discourse, following the Habermasian idea that all communicative action (political one inclusively) is an orientation toward rational legitimization: “Inasmuch as communicative agents reciprocally raise validity claims with their speech acts, they are relying on the potential of assailable grounds (Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures* (Frederick Lawrence tr.), Cambridge, 1990, 322). The question of whether there had been historical opportunities for Russia at that time or another to make another choice refers to a set of utterly controversial questions and does not enter in the scope of our research here.

⁴ Surely, there have been and still are other trends and tendencies in Russian thought. See, e.g.: Mikhail Epstein, *The Phoenix of Philosophy: On the Meaning and Significance of Contemporary Russian Thought*, *Symposium. A Journal of Russian Thought* 1 (1996), 35-74. Here we cannot give an overview of all these tendencies, but instead would benchmark what Epstein consider as “the overall tendency, characteristic of the Russian mentality in general but aggravated in the early 1990s by increasing political instability” (*Ibid.*, 65). This tendency characterized by Epstein as “metaphysical radicalism”, implies an intellectual attempt “to build a new ideocratic regime on a more [than in the Soviet ideology] firm, nationalistic, technological and/or religious foundation” (*Ibid.*). On the intellectual traditions underpinning the Soviet ideology see: Isaiah Berlin, *The Soviet Mind: Russian Culture under Communism*, Washington, 2004.

⁵ Vladimir Gelman, Leviathan's Return: The Policy of Recentralization in Contemporary Russia, in: *Federalism and Local Politics in Russia*, hg. von Cameron Ross / Adrian Campbell, Abingdon, 2009, 1-24. Also Shevtsova writes that “In Russia, the interests of the state traditionally took priority over those of the individual and centralization of power was always bolstered by territorial expansionism... This tradition of a centralized and arbitrarily governed state, quite alien to European principles, holds sway over the political thinking of Russia's ruling class” (Lilia Shevtsova, *Russia: Lost in Transition: The Yeltsin and Putin Legacies*, 2007, 8).

⁶ It has been many times remarked that even many enemies came to Russia from the East, it traditionally sought in the East balances that could protect it from the Western expansion, treating the West as its principal potential rival. Many Russian philosophers, from the Slavophiles to the Eurasionists, saw the Russian identity to be a bridge between the East and the West, without becoming either the former, or the latter. See interesting remarks on this issue: Vladimir Weidle, *Russia absent and present* (Gordon Smith tr.), London, 1952; Angelika Nußberger, Rechtsgeschichte und Rechtskultur in Russland, in: *Einführung in das russische Recht* (hg. von Angelika Nußberger), 2010, 1-12.

⁷ Ilya Prizel, Nationalism in Postcommunist Russia: From Resignation to Anger, in *Between Past and Future: The Revolutions of 1989 and Their Aftermath* (hg. von Sorin Antohi and Vladimir Tismaneanu), Budapest; New York, 2000, 332-356.

⁸ Ivan the Terrible wrote in 1570: “We had hoped that you were ruler in your Kingdom and that you yourself ruled, and that you yourself looked after your Kingdom's honour and your Kingdom's advantages and that is why we wanted to deal such matters with you. But it appears that other people rule for you. They are not just people, they are trading peasants and they do not care about our Ruler's heads and our honours and the advantages of our lands, instead seeking just their own trade advantages. And you are in your virginal state like some old unmarried female...”

⁹ For the general discussion see: Eamonn Callan, *Creating Citizens: Political Education and Liberal Democracy*, Oxford, 1997. Some interesting sociological figures about attitude of Russian towards liberalism and conservatism are mentioned: Samuel A. Green, Graeme B. Robertson, *Identity, Nationalism, and the Limits of Liberalism in Russian Popular Politics*, July 2014, at: http://www.ponarseurasia.org/sites/default/files/policy-memos-pdf/Pepm323_GreeneRobertson_June2014.pdf. The prevailing political discourses in Russia and their implications for societal interaction are masterly described in: Michael E. Urban, *Cultures of power in post-Communist Russia: an analysis of elite political discourse*, Cambridge, 2010.

¹⁰ We use this term to label this set of ideas without targeting similar but conceptually different political philosophies of neo-conservatism in the US and other countries. The prefix “neo” indicates only the distance between the conservative social-philosophical conceptions in Russia at the turn of the 19-20th centuries (such as those elaborated by Nicolai Danilevsky or Konstantin Pobedonostsev).

¹¹ Luke March endeavors to reconstruct an official ideological formula of the ruling regime in the nowadays Russia in the parallel with the famous formula of Count Uvarov, putting it in triadic form: “Autocracy, Sovereignty, Nationality” (Luke March, Nationalism for Export? The Domestic and Foreign-Policy Implications of the New ‘Russian Idea’, *Europe-Asia Studies* 3 (2012), 401-425). Endorsing this interesting analysis, we do not share the sharp conclusions of the author who finds that this synthesis is “schizophrenic” (*Ibid.*, 410) or that “official nationality is at times prone to Russocentrism” (*Ibid.*, 412).

¹² Jutta Scherrer, The ‘cultural/civilizational turn’ in post-Soviet identity building, in: *Power and legitimacy: challenges from Russia*, hg. von Per-Arne Bodin / Stefan Nedlund / Elena Namli), Abingdon, 2013, 152-168; Edwin Bacon, Conceptualizing contemporary Russia, *Slavonic and East European Review* 2 (2003), 291-301.

¹³ In the following we will confine ourselves only to analysis of discourses of so called Russian political elites, to wit the leadership which defines state policies and governs public administration. We will leave the question of public opinion and popular attitudes aside, as this would necessitate special sociological research and would therefore exceed the methodological and thematic limits of this paper.

¹⁴ Angelika Nussberger, Der "Russische Weg"—Widerstand gegen die Globalisierung des Rechts?, *Osteuropa Recht* 2007, 371-385

¹⁵ Caroline von Gall, Auf der Suche nach einer neuen "Ideologie"—Ein Beitrag zur russischen Verfassungstheorie, *Osteuropa-Recht* 3 (2010), 272-282

¹⁶ Colin Bird, *The Myth of Liberal Individualism*, Cambridge, 1999. About a possible reconciliation of these opposing trends see: Christian List and Kai Spiekermann, Methodological Individualism and Holism in Political Science: A Reconciliation, *American Political Science Review* 107 (2013), 629-642.

¹⁷ Robert Ahdieh, *Russia's Constitutional Revolution: Legal Consciousness and the Transition to Democracy, 1985-1996*, Pennsylvania, 1997. Many interesting remarks are made by the authors who compared to which extent the text of the RF Constitution differs from the reality of its implementation: *Russland. Verfassung, Recht und Realität. Festschrift für Prof. Dr. Otto Luchterhandt aus Anlass seines 70. Geburtstags*, hg. von Hans Janus, Berlin, 2014.

¹⁸ Angelika Nußberger, Verfassungsgerichtsbarkeit als Krönung des Rechtsstaats oder als Feigenblatt autoritärer Regime?, in: *Rechtskultur in Russland: Tradition und Wandel*, hg. von Otto Luchterhandt, Berlin, 2011, 203-230; Bill Bowring, Positivism versus self-determination: the contradictions of Soviet international law, in: *International Law on the Left: Re-examining Marxist Legacies*, hg. von Susan Marks, Cambridge, 2008, 133-168; Anton Burkov, Das Russische Verfassungsgericht und das Völkerrecht: 1992 bis heute, *Osteuropa-Recht* 3 (2011), 248-252

¹⁹ Referring to the term coined in the American constitutional doctrine (Howard Lee McBain, *Living Constitution*, New York, 1927). This term quite is often used by Russian politicians and constitutional judges, although the legal Russian doctrine does not recognize this notion.

²⁰ The most comprehensive, even if a bit outdated, research remains: Boris Zimnenko, *International Law and the Russian legal system*, Utrecht, 2007.

²¹ The case of Konstantin Markin is symptomatic in this regard (so called “Markin-2 case”). After winning in 2010 his first case against Russia in the ECtHR, in 2013 he asked the Russian courts not to apply in his (reconsidered) case the domestic norms that had been held as contravening the ECHR. In its Ruling as of 6 December, 2013 the RF Constitutional Court reasoned that a judgment of the ECtHR cannot invalidate rules of domestic law and to be a legal ground liberating the domestic courts from the obligation to obey the law. See a short analysis of this case: Ilya Levin and Michael Schwarz, At a crossroads: Russia and the ECHR in the aftermath of Markin, *VerfBlog*, 2015/1/30, <http://www.verfassungsblog.de/crossroads-russia-echr-aftermath-markin/>

²² Caroline von Gall, Russland und der Europäische Gerichtshof für Menschenrechte—Wer hat das letzte Wort?, *Osteuropa-Recht* 1 (2012), 40-54

²³ For this discussion cf.: Valerii Zor'kin, Apologiia Vestfal'skoi sistemy (Apology of the Westphalian system), *Rossiiskaia gazeta*, 22 August 2006; id., Predel ustupchivosti (The limit of compromise), *Rossiiskaia gazeta*, 29 October 2010.

²⁴ See a short but very thoughtful paper of Michael Dusche: Human Rights, Autonomy and National Sovereignty, *Ethical Perspectives* 7 (2000), 24-36.

²⁵ More in details: Mikhail Antonov, Conservatism in Russia and Sovereignty in Human Rights, *Review of Central and East European Law* 39 (2014), 1-40.

²⁶ E.g., Lisbon Case, BverfG, 2 BvE 2/08, from 30 June 2009.

²⁷ In 1917 in his “State and Revolution” Lenin stressed that the diction of Marx that law will wither away after the socialist revolution must be taken in its literal wording—one needs to wait until law withers away and therefore Bolsheviks shall not eliminate or cancel law intentionally.

²⁸ To mention that before the First congress of the Soviet lawyers in 1937 which put the end to any diversity in thinking about law (and led to mass purges among the theoreticians), there were various competing conceptions (Stuchka, Pashukanis, Reisner, et alt.) which differently interpreted legal theory from the Marxist standpoint. However, these different conceptions have had almost no effect on the subsequent development of the Soviet jurisprudence given the heavy ideological pressure of Vyshinski and his team who coined quasi-official “understanding of law” and averted Soviet lawyers from diverging from it, severely chastising those who like Pashukanis did not want to abandon their theoretical views.

²⁹ See about this historical development in more details: Mikhail Antonov, Russian Legal Philosophy in the 20th Century, in: *A Treatise of Legal Philosophy and General Jurisprudence: Legal Philosophy in the Twentieth Century: The Civil Law World*, hg. von Enrico Pattaro / Corrado Roversi, Berlin, 2015.

³⁰ By the “first positivism” we mean the legal doctrines based on the ideas and schemes of the 19th century (J. Bentham or J. Austin), prior to the great positivist conceptions of the 20th century (H. Kelsen or H.L.A. Hart). This term underscores the temporal relation and does not have any pejorative connotation.

³¹ Mikhail Antonov, Unser schwerer Weg zum Recht: Grundprobleme der modernen theoretischen Rechtswissenschaft in Russland, *Rechtstheorie* 1 (2007), 1-12. Even if the idea of legal pluralism is not fallacious to the extent it removes the state out of the legal universe (see: Mikhail Antonov, In the Quest of Global Legal Pluralism, in: *Positivität, Normativität und Institutionalität des Rechts. Festschrift für Werner Krawietz zum 80. Geburtstag*, hg. von Aulis Aarnio et alt., Berlin, 2013, 15-30).

³² Discourses about popular and national sovereignty usually serve as one of the most powerful sources to strengthen nationalism, and not only in Russia. See Bernard Yack, *Nationalism and the moral psychology of community*, Chicago, 2012, 136-160. This author argues: “For wherever popular sovereignty leads, from the French Revolution in 1789 to the collapse of the Soviet Empire in 1989, nationalism seems quickly to follow” (*Ibid.*, 136).

³³ Anja Honnefelder, *Staatliche Souveränität vs. Völkerrechtsoffenheit in der Russischen Föderation*, Frankfurt am Main, 2012; Michael Geistlinger, Die verfassungsrechtliche Konsolidierung der territorialen Integrität und Souveränität Russlands, in: *Russland: Verfassung, Recht und Realität—Festschrift für Prof. Dr. Otto Luchterhandt aus Anlass seines 70. Geburtstages*, hg. von Hans Janus, 2014, 19-34; Mikhail Antonov, Theoretical Issues of Sovereignty in Russia, *Review of Central and East European Law* 37 (2012), 95-113

³⁴ Bernd Wieser, Die Verfassung der Russländischen Föderation im Spiegel der russischen Kommentarliteratur, *Osteuropa-Recht* 1 (2014), 72-77

³⁵ Uta Bindreiter, *A Treatise on the Implications of Kelsen's Doctrine*, Dordrecht, 2002

³⁶ Thomas Finegan, Neither Dualism nor Monism: Holism and the Relationship between Municipal and International Human Rights Law, *Transnational Legal Theory* 4 (2011), 477-503

³⁷ John G. Ikenberry, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order*, Princeton, 2012

³⁸ If we focus on this perspective, it does not mean that we rule out other perspectives. A particular attitude of Russians toward human rights can be explained by the heritage of Orthodoxy, by the specific cultural mindset, by the prevailing ethical convictions or by a specific rationality. E.g., Elena Namli writes about “the traditional reasoning of responsibility” which in Russia confronts and prevails over “liberal rationality of human rights” (Elena Namli, Powerful rationality or rationality of power? Reflections on Russian skepticism towards human rights, in: *Power and legitimacy: challenges from Russia*, hg. von Per Arne Bodin / Stefan Nedlund / Elena Namli, Abingdon, 2013, 133-151).

³⁹ Bill Bowring, *Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power*, Abingdon and New York, 2014

⁴⁰ See Stephen E. Hanson and Jeffrey S. Kopstein, The Weimar/Russia Comparison, *Post Soviet Affairs* 3 (1997), 252-283. We cannot but agree with Ilya Prizel who insists that “the currently fashionable talk of “Weimar Russia” or “fascist Russia” is premature and potentially dangerous, as it could become a self-fulfilling prophecy” (Prizel (Fn. 7), 355).

⁴¹ Richard Pipes, *Russian Conservatism and Its Critics: A Study in Political Culture*, New Haven, 2006

⁴² Peter Truscott, *Russia First. Breaking with the West*, New York, 1997

⁴³ Robert D. English, *Russia and the Idea of the West: Gorbachev, Intellectuals, and the End of the Cold War*, New York, 2000

⁴⁴ Mikhail Antonov, Foreign Court Decisions, Arbitral Awards and Sovereignty in Russia, *Review of Central and East European Law* 38 (2013), 317-340; Antonov Mikhail and Ekaterina Samokhina, *The Reasoning of Russian Courts in Cases Connected with the Protection of Religious Feelings*. Available at SSRN: <http://ssrn.com/abstract=2341512>; Mikhail Antonov, Beyond formalism: sociological argumentation in the “Pussy Riot” case, *Revista Critica de Derecho Canonico Pluriconfesional* 1 (2014), 15-25

⁴⁵ Michel Foucault, The Subject and Power, *Critical Inquiry* 4 (1982), 777-795

⁴⁶ Bill Bowring, *The Resurgence of Radical Conservatism in Russia* (November 23, 2010). Available at SSRN: <http://ssrn.com/abstract=1845424>

⁴⁷ Douglas Blum, *Russia and Globalization: Identity, Security, and Society in an Era of Change*, Washington, 2008

⁴⁸ That is not a surprise as Putin, Medvedev and many other high-ranked officials from their team learnt the command theory of law from their professors at Law Faculty of Saint Petersburg (Leningrad) State University.

⁴⁹ Gustav Radbruch, Statutory lawlessness and supra-statutory law, *Oxford Journal of Legal Studies* 26 (2006), 1-11. First published in 1946

⁵⁰ Stephen White and Valentina Feklyunina, *Identities and Foreign Policies in Russia, Ukraine and Belarus: The Other Europes*, London, 2014

⁵¹ Susanna Rabow-Edling *Slavophile Thought and the Politics of Cultural Nationalism*, New York, 2006

⁵² Peter J.S. Duncan, *Russian Messianism: Third Rome, Revolution, Communism and After*, London, 2005, 133ff.

⁵³ Manfred Hildermeier, Das Privileg der Rückständigkeit: Anmerkungen zum Wandel einer Interpretationsfigur der neueren russischen Geschichte, *Historische Zeitschrift* 244 (1987), 557-603

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